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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

THE PEOPLE

Plaintiff and Respondent,

v.

JAHMAL FRAZIER

Defendant and Appellant.

B236057

(Los Angeles County
Super. Ct. No. VA117303)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Peter Espinoza, Judge. Affirmed.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and
Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jahmal Frazier was convicted of robbery with the use of a handgun. He appeals the judgment on the ground he was given ineffective assistance of counsel. We reject defendant's arguments and affirm the judgment.

BACKGROUND

1. The Robbery

On October 23, 2010, at about 3:00 p.m., a man carrying a black duffle bag and wearing a mask, a black "hoodie" sweatshirt, a black baseball batter glove, and gray shorts (or sweatpants) entered a 7-Eleven store on Artesia Boulevard in Bellflower. He was later identified as defendant.

Roshan Bhandari was working at the 7-Eleven. When defendant entered the store, there were no customers. Bhandari was cleaning a coffee table in an area open to the public. Another employee of the store was fixing or cleaning the cooler in a separate room.

Defendant showed Bhandari a small black gun and demanded money. Bhandari gave him about \$50 from the cash register and \$40 from the safe. The cash consisted of one dollar and five dollar bills. After defendant received the money, he fled. The robbery was captured by a surveillance videotape.

While the robbery was in progress, someone at the 7-Eleven triggered a silent alarm. Deputy Sheriffs Michael Espinosa and Jose Arciga were notified of the silent alarm and started driving toward the 7-Eleven.

After defendant left the 7-Eleven, Bhandari's co-worker at the store called the police and handed the telephone to Bhandari, who reported the crime. As Espinosa and Arciga were driving toward the 7-Eleven, they were informed an actual robbery had occurred. When they arrived at the scene, they interviewed Bhandari.

Deputy Sheriffs Karen Taylor and Gary Osburn were also dispatched. Taylor was advised that the suspect was a black male wearing a black jacket and gray pants and was last seen on foot. When she arrived in the area, she saw a person matching the suspect's description near a parked blue Ford Mustang. As she approached, the suspect ran.

Taylor then requested assistance to set up a “containment” to prevent the suspect’s escape.

Osburn drove to the abandoned blue Ford Mustang. Osburn found in the car a wallet which contained defendant’s driver’s license, 56 one-dollar bills and 6 five-dollar bills. He also found a black duffle bag containing a sweatshirt, gloves, shorts, and mask matching the clothes worn by the suspect who robbed the 7-Eleven, as well as a black gun that appeared to be similar in size and shape to the one used in the robbery.¹

Defendant was eventually tracked down and detained by a police canine unit. Espinosa and Arciga arrested him.

2. Preliminary Hearing

On January 20, 2011, the trial court held a preliminary hearing on the charges against defendant. Bhandari testified at the hearing as a witness for the People. He was also cross-examined by defendant’s counsel.²

3. Information

On February 3, 2011, the People filed an information charging defendant with second degree robbery in violation of Penal Code section 211. The information also alleged that defendant committed the robbery by personally using a firearm, a handgun, within the meaning of Penal Code section 12022.53, subdivision (b).

4. Trial

The trial began on April 4, 2011. Bhandari was the People’s first witness. Before his direct examination was completed, the trial adjourned for the day.

¹ This gun was later identified by Bhandari as the gun used in the robbery.

² At the preliminary hearing, Bhandari’s description of the robber’s clothes was somewhat different than what was shown on the surveillance videotape at the 7-Eleven. Bhandari testified that the color of the robber’s “hoodie” was “like a creamy color; like not exact[ly] white, but creamy.” He also stated that the robber was wearing “trousers” which were “gray or something like this (indicating)”

On the next day, outside the presence of the jury, Deputy District Attorney Ann Park advised the court that Bhandari had been shot and killed at about 7:30 a.m. on his way to the courthouse.³ Defendant moved for a mistrial on the ground that he did not have an opportunity to cross-examine Bhandari. The court denied the motion.

Shortly thereafter, the court advised the jury that it was striking Bhandari's testimony on April 4, 2011. It also instructed the members of the jury that they "are not to consider it [Bhandari's testimony] for any purpose."

The People played for the jury the 7-Eleven surveillance videotape and the audiotape of Bhandari's 911 call. Defendant's counsel did not object to the admission of this evidence. The People also read from the transcript of Bhandari's testimony at the preliminary hearing. Again, defendant's counsel did not object.

The People called Gary Osburn, Karen Taylor, Michael Espinosa and Jose Arciga as witnesses. The officers testified about their investigation of the robbery and defendant's arrest. Additionally, Osburn testified about photographs that were created from the video surveillance tape at the 7-Eleven where the robbery occurred. Defendant's counsel did not object to this testimony.

On several occasions, outside the presence of the jury, counsel for both parties and the trial court discussed television coverage of defendant's trial and Bhandari's apparent murder. At the end of the trial, the court advised the jury "there may be some media reports associated with this case[.]" The court admonished the jury to avoid television, radio, and print news during deliberations.

5. *Verdict*

On April 6, 2011, the jury returned a guilty verdict on the second degree robbery charge. It also found true the allegation that defendant personally used a handgun within the meaning of Penal Code section 12022.53, subdivision (b).

³ Park stated that Bhandari's death was being investigated as a homicide case. There is no evidence in the record indicating Bhandari's apparent murder was connected with defendant's case.

6. *Judgment*

On September 15, 2011, the trial court sentenced defendant to 15 years in state prison, less credit for time in custody and good behavior. The court also ordered defendant to pay court security and criminal conviction assessments, as well as restitution and parole restitution fines. On September 19, 2011, the court entered judgment. Defendant filed a timely notice of appeal.

CONTENTIONS

Defendant contends he was denied his federal and state rights to effective assistance of counsel. He argues his trial lawyer, Deputy Public Defender Debra D. Sims, made two principal errors requiring reversal of the judgment. First, Sims did not object to the admission of the surveillance videotape, still photographs taken from the videotape, and the audiotape of the 911 call on the ground that such evidence was not authenticated. Second, Sims did not object to the admission of Bhandari's preliminary hearing testimony even though there was no evidence Bhandari was an unavailable witness.

DISCUSSION

1. *The Right to Effective Assistance of Counsel*

Under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result." (*Ibid.*)

A criminal conviction can be reversed on the ground that defendant did not receive effective assistance of counsel if the defendant shows two things. First, counsel's assistance fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*); *Williams v. Taylor* (2000) 529 U.S. 362, 390-391 (*Taylor*).) Second, the deficient performance prejudiced the defense, that is, the errors were so egregious as to

deprive the defendant of a fair trial, a trial whose result is reliable. (*Strickland*, at p. 687; *Taylor*, at p. 390.)

With respect to the first prong—objectively reasonable assistance—“ ‘every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’ ” (*Bell v. Cone* (2002) 535 U.S. 685, 698, quoting *Strickland*, *supra*, 466 U.S. at p. 689.) Further, judicial scrutiny of counsel’s performance must be “highly deferential.” (*Strickland*, at p. 689.)

There is a strong presumption counsel’s conduct was within a wide range of reasonable professional assistance and that such conduct was part of counsel’s sound trial strategy. (*Strickland*, *supra*, 466 U.S. at p. 689; *Harrington v. Richter* (2011) __ U.S. __ 131 S. Ct. 770, 790.) Thus, on appeal, “ ‘ “[i]f the record sheds no light on why counsel acted or failed to act in the manner challenged, ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ [citation], the contention [that counsel provided ineffective assistance] must be rejected.” ’ ” (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

2. *Defense Counsel’s Decision to Not Raise Authentication Objections*

Defendant contends that his counsel provided ineffective assistance because she failed to object to certain evidence on authentication grounds.⁴ There is nothing in the record, however, indicating why counsel did not raise authentication objections. We thus presume counsel declined to object for tactical reasons, unless there is no possible tactical reason for doing so.

⁴ “Authentication of a writing is required before it may be received in evidence.” (Evid. Code, § 1401, subd. (a).) The surveillance videotape, still photographs taken from the videotape and the audiotape of the 911 call are each a “writing” (Evid. Code, § 250) which must be authenticated. “Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.” (Evid. Code, § 1400.)

Counsel could have reasonably concluded that raising authentication objections was futile because the subject evidence could have been authenticated without Bhandari's testimony. The surveillance videotape and the still photographs could have been authenticated by the second employee who was working at the 7-Eleven when the robbery occurred, or by Arciga and Espinosa, who arrived at the store shortly after the robbery. All three witnesses could have testified that the videotape and still photographs were an accurate portrayal of what they purported to be, namely a depiction of Bhandari and the suspect inside of the 7-Eleven at about 3:00 p.m. on October 23, 2010.⁵ (*Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440, fn. 4 [a videotape can be authenticated "if the proponent makes a showing the videotape is an accurate portrayal of what it purports to be"].) Likewise, the audiotape of the 911 call could have been authenticated by Bhandari's co-worker who initiated the call or other witnesses who were familiar with Bhandari's voice, including perhaps deputies Arciga and Espinosa, who talked to Bhandari shortly after the 911 call. (*People v. Patton* (1976) 63 Cal.App.3d 211, 220 ["That the voice on the tape was defendant's was also established by the testimony of the officer who arrested defendant in the phone booth while the conversation was in progress"].)

At a minimum, nothing in the record precludes the possibility that the videotape, photographs and audiotape could have been authenticated without Bhandari's testimony. We therefore presume defendant's counsel did not raise authentication objections to this evidence for tactical reasons and, accordingly, acted in an objectively reasonable manner.

⁵ Although the videotape appears to show the robbery and Bhandari and his co-worker calling 911, it has a time stamp of about 5:00 p.m, which is about two hours after the People contend the robbery took place. The jury, however, could have reasonably concluded that the time stamp on the videotape was wrong, as there was no evidence of an identical robbery two hours after the one at issue.

3. *Defense Counsel's Decision to Not Object to the Reading of Bhandari's Preliminary Hearing Testimony*

Defendant argues his counsel provided ineffective assistance because she failed to object to Bhandari's preliminary hearing testimony. According to defendant, his counsel should have objected on the ground that this evidence was precluded by the hearsay rule because there was no showing Bhandari was an unavailable witness. (Evid. Code, §§ 1200 [hearsay rule], 1350 [hearsay exception for unavailable witness].)

We reject this argument. Defendant's counsel could have reasonably concluded that it was not a wise tactic to challenge the truthfulness of the deputy district attorney's representation to the court regarding Bhandari's death, especially when there was no apparent reason to do so. Further, defendant's counsel tried to take advantage of Bhandari's apparent unavailability by moving for a mistrial. We thus presume defendant's counsel declined to object to the reading of Bhandari's preliminary hearing testimony for sound tactical reasons. Accordingly, defendant did not meet his burden of showing that his counsel failed to act in an objectively reasonable manner.

4. *Prejudice*

Because we conclude defendant did not show his counsel failed to act in an objectively reasonable manner, we do not reach the issue of whether counsel's alleged ineffective assistance prejudiced defendant.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.