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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL CERVANTES,

Defendant and Appellant.

B269179

(Los Angeles County  
Super. Ct. No. VA139437)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, John A. Torribio, Judge. Affirmed.

Stanley Dale Radtke, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra and Kamala D. Harris, Attorneys General,  
Gerald A. Engler, Chief Assistant Attorney General, Lance E.  
Winters, Senior Assistant Attorney General, Susan S. Pithey and  
William H. Shin, Deputy Attorneys General, for Plaintiff and  
Respondent.

Raul Cervantes was convicted by a jury of two counts of assault with a deadly weapon. On appeal Cervantes contends the victims' in-court identifications of him were tainted by an unduly suggestive field identification procedure and should have been excluded. He also contends the court erred in failing to rule on his motion for a mistrial following the introduction of that evidence. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Information*

An information filed July 21, 2015 charged Cervantes with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))<sup>1</sup> and specially alleged as to both counts that he had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)). Cervantes pleaded not guilty and denied the special allegations.

### *2. The Trial*

According to the evidence at trial Juana O. and her young aunt, Karla S., both 16 years old, were walking home from high school when they saw Cervantes walking toward them. Cervantes had a funny look on his face, leading the girls to suspect he was under the influence of drugs or alcohol. Cervantes stopped approximately three to five feet from Juana and Karla and swung a knife at them. Both girls jumped back to avoid being stabbed and ran away from Cervantes. As she fled, Karla turned around to look at their assailant and saw he had

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<sup>1</sup> Statutory references are to this code.

not given chase. She also saw he had the initials “L.A.” tattooed on his chest.

When the girls arrived at their shared home, Juana reported the incident to her grandmother and called the 911 emergency operator. While she was speaking with the emergency operator, Juana looked out a window and saw Cervantes at a market across from her house. She reported this sighting to the emergency operator. Juana and Karla remained in the house until Los Angeles County Deputy Sheriff Jason Zabala arrived with his partner. Juana described her assailant as a Hispanic man in his late thirties wearing gray shorts with tattoos covering his upper body. Karla similarly told deputies the man was Hispanic, wore gray shorts and had tattoos.

The deputies left Karla and Juana at their home while they went to look for the man who had assaulted them. The deputies returned a short time later and asked the girls to join them for a field identification a block from their home. Both Juana and Karla identified Cervantes as their assailant. At the time of the identification, Cervantes was handcuffed and shirtless and wearing boxer shorts that were different from the gray shorts the girls had identified. He did not have a weapon.

At the outset of her direct examination Juana identified Cervantes as the man who had assaulted her and Karla. Juana also testified she and Karla had been together in the backseat of the patrol car when Deputy Zabala pointed out Cervantes as the man who may or may not have attacked them. They both told Deputy Zabala, “[T]hat was him.” Juana also testified that “at some point” deputies separated her from Karla and told her they were going to show her someone who might be the assailant. Juana was not asked at trial, and did not indicate, whether she

and Karla had identified Zabala before or after they were separated for identification purposes.

After Juana testified, Cervantes's counsel asked the court to strike evidence of the field identification and any subsequent identifications of Cervantes as the assailant on the ground the field identification, made with both girls present, was impermissibly suggestive and tainted any resulting in-court identifications. Defense counsel also asserted the fact that the two girls were together during the field identification process was not disclosed in the arrest reports the prosecution had turned over in discovery.<sup>2</sup> The court postponed ruling on the defense motion until Deputy Zabala testified, explaining, "[W]e don't know whether the young lady represents it correctly or not." Defense counsel suggested, "Perhaps we need to do a 402 [(Evidence Code section 402 hearing)] with the deputy on the stand." The court replied, "Let's just move forward. I'll take your motion under submission, and let's see what the evidence shows. We are in the middle of trial right now. Absent a motion for mistrial and waiver of jeopardy, I'll just move forward." Cervantes's counsel then moved for mistrial. The court stated it would wait to rule on the motion until it heard Deputy Zabala's testimony.

Karla testified next and identified Cervantes as the man who had swung a knife at her and Juana. She also testified she and Juana had been together in the back seat of the patrol car

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<sup>2</sup> Cervantes's counsel told the court, "[T]o our surprise, during the testimony it just floated out, is that both were together in the car, which is not ever described in the discovery" turned over by the People.

when they each identified Cervantes during the field identification.<sup>3</sup>

Deputy Zabala testified consistently with the arrest report. He stated he drove with both girls to where Cervantes was being detained as part of an identification procedure known as a field show-up. Zabala explained to the jury, “[A] field show-up is when we take the victim of any alleged crime while we are detaining a suspect, show that victim the suspect that we have detained, provide her with an admonition that that suspect or that person that we have detained may or may not be the person that they have described to us that may have committed that crime against them.” In accordance with that standard procedure, Deputy Zabala asked Karla to leave the car. Then, without Karla, Deputy Zabala and his partner drove with Juana a short distance to a spot where Juana could more clearly view Cervantes from the patrol car. Deputy Zabala’s partner read the standard admonition to Juana, advising her not to infer anything from the fact that Cervantes was handcuffed or in custody. Juana

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<sup>3</sup> Like Juana, Karla testified the deputies explained before she identified Cervantes that she may or may not see the person who committed the crime. Karla also testified that, before being driven to the location of the field show-up, she and Juana were told, “I want you guys to see if that was him, the person. And that is when he took us.” Then, immediately before the identification, the deputy said, “That’s him.” Cervantes argues this last statement improperly conveyed the deputies’ opinion the man in custody was the perpetrator. Read in the context of Karla’s full testimony, however, the comment “that’s him” signified this was the person the deputies wanted Karla to see if she could identify, not that he was the person who had committed the crime.

positively identified Cervantes as her assailant. Deputy Zabala and his partner then drove with Juana back to the spot where Karla was waiting. Juana and Karla traded places in the patrol car, and Deputy Zabala conducted the same procedure with Karla. Karla also identified Cervantes. Cervantes was then formally arrested.

3. *Cervantes's Renewed Mistrial Motion and Motion To Exclude Identification Evidence*

After the People rested, Cervantes's counsel renewed his motion to exclude evidence of the field show-up and all subsequent identifications of Cervantes. The court responded by asking whether Cervantes's counsel was making a mistrial motion with a waiver of jeopardy. Without clarifying whether his motion was to exclude identification evidence or to obtain a mistrial, Cervantes's counsel responded his client would not waive jeopardy. The court indicated it would not rule on a mistrial motion without Cervantes's waiver of a double jeopardy objection together with the mistrial motion, and the trial continued without the court ruling on the motion.

Cervantes did not testify, and the defense did not present any evidence. Cervantes's theory of the case was mistaken identity. During closing argument his counsel emphasized Juana and Karla had identified Cervantes together and had been influenced by each other's identification. He argued the field identification was unreliable and tainted all subsequent identifications including the girls' in-court identifications and urged the jury to disregard that evidence.

4. *The Verdict and Sentence*

The jury found Cervantes guilty on both counts. In a bifurcated proceeding Cervantes admitted the special allegations.

The court dismissed the prior qualifying strike conviction in furtherance of justice pursuant to section 1385 and sentenced Cervantes to an aggregate state prison term of eight years, the middle term of three years for the aggravated assault of Juana, plus five years for the prior serious felony conviction (§ 667, subd. (a)). The court imposed a concurrent three-year sentence for the aggravated assault of Karla.

## DISCUSSION

### 1. *The Trial Court Did Not Err in Admitting Evidence of Juana's and Karla's Identifications of Cervantes*

#### a. *Governing law and standard of review*

Due process requires the exclusion of identification testimony if the identification procedures used were unnecessarily suggestive and the resulting identification unreliable. (*People v. Clark* (2016) 63 Cal.4th 522, 556; *People v. Virgil* (2011) 51 Cal.4th 1210, 1256; *People v. Avila* (2009) 46 Cal.4th 680, 698.) An identification procedure is unduly suggestive if it “suggests in advance of identification by the witness the identity of the person suspected by the police.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; accord, *People v. Hunt* (1977) 19 Cal.3d 888, 894.) Only if the identification is unduly suggestive does the court consider whether it was nevertheless reliable under the totality of the circumstances, taking into account such factors as the witness's opportunity to view the offender at the time of the crime, the witness's attentiveness, the accuracy of the witness's prior description, the level of certainty displayed at the identification and the time elapsed between the crime and the identification. (*Clark*, at p. 558; *Ochoa*, at p. 412.)

The defendant bears the burden of demonstrating the identification procedure was unduly suggestive. (*People v. Avila, supra*, 46 Cal.4th at p. 700; *People v. Carter* (2005) 36 Cal.4th 1114, 1164.) “A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard.” (*People v. Clark, supra*, 63 Cal.4th at pp. 556-557; accord, *People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

- b. *The field identification was not unduly suggestive; even if it were, it was not constitutionally unreliable so as to require exclusion*

Cervantes acknowledges that a single person show-up is not inherently suggestive. (*People v. Ochoa, supra*, 19 Cal.4th at p. 413 [field show-up where suspect in handcuffs was not unduly suggestive when the police did not indicate the individual was the perpetrator, despite fact individual was handcuffed and in custody]; *People v. Medina* (1995) 11 Cal.4th 694, 753 [a one-person show-up is not inherently suggestive; rather, “all the circumstances must be considered”]; see also *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 [“single-person show-ups for purposes of in-field identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness’s mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended” (italics omitted)].) However, emphasizing Juana’s and Karla’s testimony that they both had been in the patrol car



when they saw and identified Cervantes, Cervantes argues the identification process was unduly suggestive in that it allowed each girl's identification to influence the other's.

Cervantes's argument disregards Deputy Zabala's testimony that each girl had individually identified Cervantes after they were separated and given proper admonitions. To be sure, Cervantes was free to, and did, argue at trial that Deputy Zabala's recollection was flawed, but the jury was entitled to find Deputy Zabala's testimony credible, a finding to which we must defer since it was supported by substantial evidence. (*People v. Clark, supra*, 63 Cal.4th at p. 557.) Moreover, even if the girls identified Cervantes before Deputy Zabala separated them, nothing Deputy Zabala or his partner said or did suggested the deputies believed Cervantes was the perpetrator; and both girls testified they identified Cervantes because they recognized him, not because of the other's statements.

Finally, even if both girls had been present at the time Deputy Zabala pointed Cervantes out in the show-up and that fact were sufficient to make the identification process unduly suggestive, the identification was nevertheless constitutionally reliable under the totality of the circumstances. Although the aggravated assault was completed in a few seconds, Juana and Karla had ample opportunity to view Cervantes before the crime occurred. Both girls testified they had noticed Cervantes as he walked toward them with a funny look on his face. Juana also saw Cervantes in the market across the street from her house not long after the assault. The girls' descriptions of Cervantes before and after the show-up were fairly consistent, including their observation of tattoos on his chest. Considering the totality of the circumstances, including Juana's and Karla's opportunity to view

Cervantes before the assault, the close proximity between the time of the crime and the time of the girls' identifications, and the consistency in their descriptions before and after the field show-up, there was nothing inherently unreliable that required exclusion of their field identifications or subsequent in-court identifications of Cervantes. (See *People v. Clark*, *supra*, 63 Cal.4th at p. 558; see generally *Simmons v. United States* (1968) 390 U.S. 377, 384 [88 S.Ct. 967, 19 L.Ed.2d 1247] [erroneous admission of pretrial identification does not warrant reversal unless the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"]; *People v. Blair* (1979) 25 Cal.3d 640, 659; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 788.)

2. *Cervantes Was Not Prejudiced by the Trial Court's Refusal To Rule on the Motion for Mistrial*

Cervantes also contends the trial court erred in refusing to rule on his motion for a mistrial absent an affirmative waiver of double jeopardy protections, arguing the court thereby materially interfered with defense counsel's ability to provide effective representation. But the motion for mistrial was predicated on the purportedly improper admission of Juana's and Karla's testimony identifying Cervantes as their assailant. As discussed, that testimony was properly admitted and thus did not provide grounds for a mistrial. Accordingly, any error in failing to rule on the motion could not have prejudiced Cervantes whether viewed, as Cervantes suggests, as a denial of his federal constitutional right to a fair trial (see *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [reversal not required if the People establish "beyond a reasonable doubt that the error . . .

did not contribute to the verdict obtained”]) or as state law error (see *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal not required for state law error unless “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error”])).

**DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

MENETREZ, J.\*

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\* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution