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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TERRELL COOKS, Defendant and Appellant.	B231757 (Los Angeles County Super. Ct. No. TA112124)
In re TERRELL COOKS On Habeas Corpus.	B237938 (Los Angeles County Super. Ct. No. TA112124)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotelo, Judge. Judgment affirmed; writ denied.

Brian A. Wright, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted defendant Terrell Cooks of second degree robbery (Pen. Code, § 211).[1, 2] He admitted a prior strike conviction (§§ 667, subds. (b) – (i), 1170.12, subds. (a) – (d)) and a prior prison term (§ 667.5, subd. (b)). The trial court sentenced him to 10 years in state prison (double the high term of five years) and struck the prior prison term. Defendant appeals from the judgment, and we affirm.

BACKGROUND

Around 4:00 p.m. on October 8, 2009, as Maria Gonzalez was walking with her two young children on Arlington Avenue in Compton, she stopped because a dog frightened her. An African American man, whom she identified at trial as defendant, approached, asked her a question in English which she did not understand, and then grabbed a gold chain on her neck. He pulled, but the chain did not break. He pulled again, and this time it broke. In the pulling, defendant's fingernails cut her chest.

Defendant ran off with the chain. As he did so, an EBT card fell out of his sweat shirt pocket. Gonzalez recovered it and gave it to the police. Defendant's name was on the card, and using that name Los Angeles County Sheriff's Detective Gualberto Castro found a photograph of defendant which he placed in a six-pack photographic lineup shown to Gonzalez on November 4, 2009. Gonzalez identified defendant's photograph and wrote in Spanish that "he was the one that robbed my chain."

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[1] All undesignated section references are to the Penal Code.

[2] The jury acquitted defendant of an unrelated count of residential robbery with use of a handgun. In our summary of the evidence, we discuss only the evidence relating to the count of which defendant was convicted.

On May 5, 2010, Detective Castro showed Gonzalez another photographic six-pack, which contained a different photograph of defendant. Gonzalez again identified defendant as the man who took her chain.

Before the preliminary hearing, two Hispanic men came to Gonzalez's new address. They said that they were friends of defendant and told her that defendant's brother wanted to speak to her. She spoke to the brother, who said he did not know why defendant had done it and the brother had come to apologize. One of the Hispanic men asked Gonzalez if she could help out by not identifying defendant. When she later testified at the preliminary hearing, she did not identify defendant, because this incident made her afraid.

DISCUSSION

Defendant's court appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and informed defendant that he had the right to submit a supplemental brief within 30 days. Defendant filed a supplemental brief and a petition for writ of habeas corpus. We discuss the contentions raised in each as best we can discern them.

I. *Supplemental Brief*

False Testimony

In his supplemental brief, defendant contends that the prosecutor knowingly elicited false testimony that Gonzalez's May 5, 2010 photographic identification of defendant occurred after the preliminary hearing at which Gonzalez failed to identify defendant in court when, in reality, that identification occurred before the preliminary hearing. According to defendant, the prosecutor introduced this evidence in order to bolster the identification testimony.

The record shows that Gonzalez made her photographic identifications of defendant on November 4, 2009 and May 5, 2010. Defendant was held to answer at a preliminary hearing held on May 21, 2010.[3] At that hearing, Gonzales failed to identify defendant in court, but testified to her November 2009 and May 2010 photographic identifications of defendant. Detective Castro also testified to the November 2009 identification.

At trial, the prosecutor confused the chronology of Gonzalez's May 2010 identification and the preliminary hearing. In his opening statement, he stated that Gonzalez' made a second photographic identification of defendant in May, after the preliminary hearing at which she failed to identify defendant in court. In questioning Gonzalez, he asked, "After all this happened [referring to the incident in which she spoke to defendant's brother, and her later failure to identify defendant at the preliminary hearing], Detective Castro did another photographic lineup with you . . . , correct?" Gonzalez answered yes and testified concerning the May 5, 2010 identification. Similarly, the prosecutor later asked Detective Castro, "Now, after the preliminary hearing where she did not identify the defendant, did you do another six pack photo lineup?" Detective Castro answered that he "did another six pack," and went on to describe Gonzalez's May 5, 2010 identification of defendant's photograph. Finally, despite having earlier confused the chronology, the prosecutor got it right in his closing argument: "you heard about

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[3] In his supplemental brief, defendant states that this was actually the second scheduled preliminary hearing. At the first, Gonzalez failed to appear. Following issuance of a body attachment and at least two continuances, the case was dismissed and later refiled. The record on appeal is silent as to these events; however attached to defendant's petition for writ of habeas corpus are copies of minute orders confirming this scenario.

the prelim. She didn't identify. *But even before that* Deputy Castro did a second six-pack photo I.D. A second one May 5th, 2010." (Italics added.)

Defendant finds intentional misconduct in the prosecutor's mixing up the chronology of Gonzalez's May 2010 photographic identification. We disagree. The same attorney represented defendant at the preliminary hearing and at trial. He obviously knew that the May 2010 photographic identification occurred before the preliminary hearing. Given that defense counsel knew the correct chronology, the prosecutor obviously was not to trying to mislead. Indeed, in portraying the May 2010 photographic identification as having occurred after the preliminary hearing, the prosecutor actually undercut its probative value. Under the prosecutor's version, Gonzalez saw defendant at the preliminary hearing before the May 2010 photographic identification. Thus, it could be suggested that identification was based not on Gonzalez's memory of defendant's face from the crime of October 8, 2009, but based on her memory of having seen defendant in court a short time earlier. It would make little sense for the prosecutor to intentionally undercut his own evidence by falsely portraying it. Further, in his closing argument, the prosecutor stated the correct chronology. Thus, there is no evidence the prosecutor intentionally sought to mislead the jury.

Besides the absence of evidence showing intentional misconduct, it is difficult to conclude that the prosecutor's minor error in confusing the dates of the preliminary hearing and the May 2010 photographic identification rises to the level of invoking the prosecutor's due process duty to correct false testimony. (See *People v. Morrison* (2004) 34 Cal.4th 698, 716-717 ["the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading"].) But even if it does (a finding we do not make), defendant suffered no prejudice. (*In re Jackson* (1992) 3 Cal.4th 578, 597 [prosecutor's

failure to correct false testimony subject to harmless error standard of *Chapman v. California* (1967) 386 U.S. 18].) As the trial evidence showed, Gonzalez identified defendant at trial, and selected his photograph in six-packs on November 4, 2009 and May 5, 2010. As we have explained, the probative value of the May 5, 2010 identification was actually lessened by any misperception that it occurred after the preliminary hearing. Moreover, when fleeing after taking Gonzalez's chain, defendant dropped an EBT card containing his name. Under these circumstances, beyond a reasonable doubt the prosecutor's inadvertent confusing of when the May 2010 identification occurred vis-à-vis the preliminary hearing did not affect the verdict. (*In re Jackson, supra,* 3 Cal.4th at p. 597.)

Sufficiency of the Evidence and Jury Instructions

Defendant contends that the evidence failed to prove that he used force or fear in taking Gonzalez's chain, and that therefore there was insufficient evidence of robbery. He is incorrect. Defendant pulled on the chain around Gonzalez's neck twice, the second time breaking it. This evidence is alone sufficient to support the force element of robbery. (See *People v. Roberts* (1976) 57 Cal.App.3d 782, 787, overruled on another ground in *People v. Rollo* (1977) 20 Cal.3d 109, 120, fn. 4 [grabbing purse with sufficient force to break handle satisfies force element of robbery].) Moreover, Gonzalez testified that defendant's fingernails cut her as he grabbed the chain. Without doubt the evidence was sufficient to prove robbery.

In a related contention, defendant contends that the jury instructions did not accurately distinguish between robbery and the lesser included crime of grand theft on which the jury was also instructed. The court instructed on these crimes pursuant to CALCRIM Nos. 1600 (robbery) and 1800 (grand theft). We have

examined the instructions. They correctly define the crimes and are not at all misleading.

Sentencing

Defendant contends that the circumstances of his crime do not justify the trial court's selection of the upper term of five years for robbery. In selecting the upper term, the trial court reasoned that the crime involved a threat of great bodily injury, because Gonzalez's two children, ages one and two, were present with her. She was holding the one-year-old in her arms. We see no abuse of discretion in that reasoning. Defendant's conduct in forcibly taking Gonzalez's necklace while she held her infant and had her two-year-old nearby clearly created a risk that one or both children might be hurt in the incident.

We have independently reviewed the record on appeal and are satisfied that no arguable issue exists. Defendant has, by virtue of counsel's compliance with the *Wende* procedure, received effective appellate review. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-279; *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.) We turn to the habeas corpus petition.

II. *Habeas Corpus Petition*

Preliminary Hearing Evidence

Defendant contends that the identification testimony at the preliminary hearing was insufficient to bind him over for trial. He is incorrect – Gonzalez's confirmation of her two photographic identifications of him established probable cause to believe he was the robber. In any event, even if he were correct, he cannot raise this issue now because, having been convicted by a jury, he cannot

demonstrate prejudice by the supposed error at the preliminary hearing. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 140.)

Explanation of Gonzalez's Failure to Identify at the Preliminary Hearing

Defendant contends that the trial court erred in overruling his objection to evidence of the incident in which Gonzalez was visited at home by two Hispanic men and spoke to defendant's brother. This claim, which could be raised on appeal, cannot be raised on habeas corpus. (*In re Clark* (1993) 5 Cal.4th 750, 765.) In any event, we disagree on the merits. Defense counsel explained before trial that he intended to examine Gonzalez about her failure to identify defendant at the preliminary hearing. The evidence of Gonzalez's encounter with the two Hispanic men and defendant's brother at her new address was admissible to explain that her failure to identify defendant was caused by fear generated by that encounter.

Discovery

Defendant complains that he was not provided with discovery of various items of evidence and asserts that Detective Castro orchestrated the case in ways that violated his due process rights. Defendant produces no valid evidence to support the claim.

Ineffective Assistance of Counsel

Defendant must establish that no reasonably competent attorney would have done what defense counsel did and that he was prejudiced by defense counsel's conduct, i.e., that it is reasonably probable a more favorable determination would

have resulted in the absence of counsel's failings. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

Defendant contends that his attorney was ineffective for failing to investigate and present an alibi defense. In a declaration filed with the petition, defendant states that he was with his girlfriend Sherdena Ewell when the robbery occurred. He also contends that his counsel was ineffective for failing to investigate whether someone else possessed his EBT card, which the perpetrator dropped. Defendant states that he had given the card to his brother-in-law, Charles Martin.

However, defendant has failed to submit declarations from Ewell or Martin, and hence cannot demonstrate that counsel was ineffective in failing to investigate or call them witnesses, or that it is reasonably probable a different result would have been reached if he had.[4]

Defendant also contends that his counsel was ineffective for failing to investigate when Gonzalez moved to her new address. The contention is based on speculation that this investigation might have revealed evidence disproving Gonzalez's encounter with the two Hispanic men and defendant's brother who came to the new address. Because the claim is purely speculative, it fails.

Defendant contends that his attorney should have introduced evidence that Gonzalez failed to attend the first scheduled preliminary hearing. He asserts that such evidence would have made her failure to identify him at the second scheduled preliminary hearing more probative to the jury, because it would have shown that she "wasn't interested in seeking justice and identify[ing] [defendant] from the beginning despite pressure from the court." However, Gonzalez's failure to appear

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[4] In his petition, he states that he has spoken to Ewell, who told him that her declaration is in the mail. Similarly, he states that he has spoken to Martin and that a declaration from him is on the way.

at the first scheduled preliminary hearing had no tendency in reason to undercut her in-court identification of defendant at trial, or undercut her photographic identifications of defendant in November 2009 and May 2010.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.