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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. CARLOS GARCIA, Defendant and Appellant.	B275591 (Los Angeles County Super. Ct. No. BA428369)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

H. Russell Halpern for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Carlos Garcia was convicted by a jury of attempted murder with related firearm use and criminal street gang enhancements as well as unlawful firearm possession and aggravated assault. On appeal, Garcia argues his convictions should be reversed because of prosecutorial misconduct, the improper admission of evidence and ineffective assistance of counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Charges

Garcia was charged with attempted willful, deliberate and premeditated murder (Pen. Code,[1] §§ 187, subd. (a), 664, count 1), possession of a firearm by a felon (§ 29800, subd. (a)(1), count 2) and assault with a firearm (§ 245, subd. (a)(2), count 3). The information specially alleged each of the crimes had been committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)) and, as to counts 1 and 3 specially alleged firearm-use enhancements under sections 12022.53, 12022.5 and a great bodily injury enhancement under 12022.7, subdivision (a). The information also specially alleged Garcia was subject to sentencing under section 667, subdivision (a)(1) and the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12) for having suffered one prior conviction for robbery and under section 667.5, subdivision (b) for having served two separate prison terms for felonies.

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[1] Undesignated statutory references are to the Penal Code, unless otherwise indicated.

II. The Prosecution Evidence

A. The Shooting

At approximately 1:00 a.m. on August 3, 2014, Craig McMullen was riding his bicycle near the intersection of Leeward and Westmoreland Avenues in Los Angeles, when he was shot twice from behind, the bullets striking his left leg. McMullen turned and saw two men. One of the men was holding what appeared to be a pistol, who looked at McMullen as he handed the pistol to his taller companion. The taller man put the pistol into his backpack, and both men ran off. McMullen limped down the sidewalk and collapsed. He was later transported to the hospital, where he was comatose for a number of days.

B. The Identification of the Shooter

1. McMullen's identification of Garcia

McMullen first identified Garcia as the shooter in a photographic lineup while he was still hospitalized and then later at the preliminary hearing and at trial.

During his trial testimony McMullen said that upon viewing the photographic lineup "the face of [Garcia] jumped out at me;" and "I can't get [Garcia's] face out of my head." McMullen also stated he recognized his two assailants from having seen them in the area, but he did not know them and had no idea why he had been shot. McMullen explained, although it was dark outside, he was able to see the men clearly because "the place [was] lit up . . . lit up like Disneyland" by the streetlights and the adjacent apartment building lights. McMullen testified both assailants were Hispanic, although the taller man appeared to be

partly African American, and they were between 18 and 30 years of age. McMullen testified Garcia had acne scars and the other man had short curly hair that was dyed red.

2. McMullen's description of his assailants' clothing

Shortly after the shooting and during the legal proceedings, McMullen described the clothing worn by his assailants. McMullen told a responding police officer that the man, whom McMullen later identified as Garcia, was wearing a blue hat, white shirt and blue pants. At the preliminary hearing, McMullen testified the taller man was wearing a red hat, but he could "not say they both weren't wearing hats." At trial, McMullen testified he recalled the taller man's hat was red, but it could have been blue and possibly both men were wearing hats.

C. The Identification of the Second Suspect

1. McMullen's identification of the second suspect

While testifying at trial, McMullen revealed he had previously identified the second suspect, the taller man with Garcia, in a photographic lineup. The six-pack photographic lineup had been conducted shortly after the preliminary hearing by Los Angeles Police Officer Jorge Cruz, the lead investigator.

2. The belated disclosure of the identification of the second suspect

Following McMullen's testimony, the defense counsel informed the trial court that she had no prior knowledge of McMullen's identification of the second suspect. Counsel demanded the prosecution produce all relevant reports and

recordings and reserved her right to object. The court ordered the material produced and gave counsel time to consider how to proceed.

The next day, the defense counsel told the trial court that, upon reviewing the material produced by the prosecution, she believed it was potentially exculpatory. Counsel noted the second suspect identified by McMullen had not been charged and the prosecution's material included police reports stating the suspect had an alibi for the time of the shooting. Counsel requested jury instructions on the prosecution's untimely disclosure of evidence and the inability of an eyewitness to identify a perpetrator.

The prosecutor explained charges had not been filed against the second suspect because the police had not yet completed their investigation of the second suspect's alibi, so the accuracy of McMullen's identification had not been determined. Additionally, the man identified as the second suspect had told officers it was possible the shooting was in retaliation for a severe beating Garcia had suffered by someone who resembled McMullen. The prosecutor stated he would seek to admit evidence of Garcia's motive in committing the shooting if the defense introduced evidence of the prosecution's filing decision and the basis for it.

The defense counsel ultimately advised the trial court that she was electing to proceed with the trial "as a strategic decision," contingent upon the jury being instructed with CALCRIM No. 306. The trial court agreed to give the instruction.[2] The parties agreed no evidence would be introduced

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[2] As the jury was instructed: "Both the People and the Defense must disclose their evidence to the other side before trial within the time limit set by law. Failure to follow this rule may

concerning the prosecution's filing decision or the second suspect's purported alibi. The parties stipulated, and the jury was later told, that prior to making the identification, McMullen had only told the police that the second suspect was a male Hispanic.

D. Police Interrogation of Garcia and Search of his Cellphones

In an interview on August 14, 2014, Garcia told Officer Cruz he had heard about the shooting, which had occurred near his own apartment, but he denied having been involved in the crime. Garcia stated he had been with his girlfriend Edna Valdez at the time. The two of them were at Dodgers Stadium and then in East Los Angeles before returning to his apartment. Garcia and Valdez stayed together in the apartment until Valdez left at 5:30 a.m.

Garcia acknowledged to Officer Cruz that he was part of a tagging crew known as SEK and his moniker was "Grams," but he denied belonging to MS-13, a criminal street gang that claimed the area of the shooting.[3]

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deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose reports regarding the identification of the other suspect within the legal time period. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of the late disclosure." (CALCRIM No. 306)

[3] Called as a prosecution witness, Edna Valdez's testimony corroborated Garcia's account to Officer Cruz as did an earlier police interview.

Officers executed a search warrant of Garcia's apartment and found two working cellphones, both of which had been used by Garcia. They recovered no firearms.

Analysis of the cellphone data showed Garcia had been close to the intersection of Leeward and Westmoreland Avenues near the time of the shooting. Garcia's call history for one of his cellphones indicated he had placed or received 31 phone calls and text messages from 12:02 a.m. to 3:59 a.m. on August 3, 2014, of which 17 were exchanged between Garcia and Valdez between 12:02 a.m. and 3:36 a.m. Following a two-minute forty-second phone call from Valdez at 12:41 a.m., Garcia did not place or receive any phone calls or text messages until 1:10 a.m., when he called Valdez.

E. Gang Evidence

Los Angeles Police Officer Gabriel Mejia, a gang expert, testified, in part, the Leeward Grandes clique of MS-13 claimed the territory that included the intersection where McMullen had been shot. Based on Mejia's investigation of Garcia, he concluded Garcia was a member of the Leeward Grandes clique of MS-13.

Prior to the shooting, Garcia had admitted to Officer Mejia that he belonged to the SEK tagging crew and used the moniker "Grams." Mejia explained, unlike other gangs, the Leeward Grandes clique allowed SEK to operate in its territory so long as SEK members participated in MS-13 criminal activities. According to Mejia, it was possible for SEK members to become MS-13 members, and Mejia knew of five individuals who had joined MS-13 after being part of SEK. Mejia testified MS-13's primary criminal activities included murder, robbery, and unlawful possession of a firearm.

Officer Mejia further testified gang members were expected "to put in work" or to commit crimes of escalating seriousness for the gang to demonstrate their dedication and loyalty. Putting in work elevated the status of gang members within the gang and enabled them to earn certain tattoos reflecting their enhanced stature. Without objection, Mejia testified Garcia had two of these gang-related tattoos, which Garcia told officers he had earned while incarcerated. Mejia testified those tattoos were generally permitted only for MS-13 gang members who put in work to prove their allegiance to the Mexican Mafia prison gang. Mejia opined that, while Garcia was a SEK member at one point, he was now a member of the Leeward Grandes clique of MS-13 and used the moniker "Vago."

III. Defense Evidence

Dr. Kathy Pezdek, a clinical psychologist, testified about factors undermining the accuracy of eyewitness identifications. Pezdek indicated that stress, a poor opportunity to observe in the first instance, and loss of memory due to passage of time can all contribute to mistaken identification. Accuracy of an identification can also be compromised, Pezdek explained, by the presence of something, such as multiple perpetrators or a weapon, that distracts the eyewitness's attention. Pezdek explained the presence of a gun, in particular, leads to a higher rate of misidentification.

Presented with a hypothetical based on McMullen's differing accounts over time concerning the headwear worn by the two men involved in the shooting, Dr. Pezdek concluded the shooting victim did not see clearly what had happened and the victim's memory as to the identity of the shooter would have

gradually faded. When asked about an identification made from a six-pack photographic lineup five days after the shooting, Pezdek opined it "would be more likely correct than anything that happened after that."

Defense investigator George Vidal testified McMullen told him on October 30, 2014 that both men he saw on August 3, 2014 wore baseball hats. McMullen did not mention the color of the hats, or describe the men in detail as he had during his trial testimony.

IV. Verdict and Sentencing

The jury found Garcia guilty of attempted murder, possession of a firearm by a felon and assault with a firearm. The jury found the attempted murder to be willful, deliberate and premediated. It also found true the firearm, great bodily injury and gang enhancements. In a bifurcated proceeding, Garcia admitted the prior conviction allegations.

The trial court sentenced Garcia to an aggregate state prison term of 60 years to life: 15 years to life on count 1 for attempted murder (count 1) doubled to 30 years to life under the Three Strikes law; 25 years to life for the firearm-use enhancement under section 12022.53, subdivision (d), and five years for the section 667, subdivision (a)(1) enhancement. The sentences on counts 2 and 3 for possession of a firearm by a felon and assault with a firearm, respectively, and on the prior prison term enhancements were imposed and stayed pursuant to section 654.

CONTENTIONS

Garcia contends the prosecution committed misconduct by withholding evidence of McMullen's identification of the second suspect contrary to *Brady v. Maryland* (1963) 373 U.S. 83, 87 [10 L.Ed.2d 215, 83 S.Ct. 1194] (*Brady*), which requires the disclosure of favorable and material evidence to the defense. Garcia also contends Officer Mejia's testimony that Garcia had earned certain tattoos for having committed crimes was admitted in violation of Evidence Code section 1101, subdivision (a), which generally prohibits the use of character evidence to prove conduct on a specific occasion. Defense counsel did not object and/or seek a mistrial on these grounds; Garcia has thus forfeited his claims of error (*People v. Morrison* (2004) 34 Cal.4th 698, 714 [*Brady* violation]; *People v. Williams* (2008) 43 Cal.4th 584, 620 [admission of evidence]). He argues, however, that his counsel provided ineffective assistance by failing to object.

DISCUSSION

I. The Defense Counsel's Decision Not To Seek a Mistrial for Prosecutorial Misconduct Was Not Ineffective Assistance

"When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have

been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1009; see *Strickland v. Washington* (1984) 466 U.S. 668.)

1. The defense counsel's decision not to seek a mistrial was based on rational tactical reasons

The record affirmatively shows the defense counsel had rational tactical reasons for not seeking a mistrial for prosecutorial misconduct. Counsel announced to the trial court that, notwithstanding the belated disclosure of the identification evidence, she was "making the strategic decision" to proceed with the trial. Counsel made this decision after learning: (1) the police were under no time constraints to complete their investigation of the second suspect's alibi, because he was currently in custody on another unrelated case; and (2) the second suspect could possibly attribute a motive to Garcia for the shooting. In earlier discussions with the trial court on this issue, counsel had expressed concerns that any delay in the trial

proceedings to await the results of the police investigation would adversely affect Garcia's speedy trial rights.

Counsel also explained her purpose in having the jury charged with CALCRIM 306. Counsel told the trial court that she anticipated her cross-examination of Officer Cruz would reveal the late disclosure of the identification evidence was due to police bias against Garcia. Counsel stated she also wanted to impeach McMullen's credibility by having Cruz recount the differing descriptions of the two assailants given by McMullen in police interviews and court appearances.

After the court granted her request for the CALCRIM No. 306 instruction, the defense counsel cross-examined Officer Cruz, highlighting the inconsistencies in McMullen's multiple descriptions of both suspects, which suggested McMullen's identifications of his assailants were unreliable. Counsel thus took full advantage of the limited impeachment value of the second suspect identification evidence, while avoiding the possibility of having Garcia implicated in the shooting by additional prosecution evidence. Furthermore, counsel made the jury aware that Cruz had not followed proper police procedures in this case, calling the officer's credibility into question. Cruz acknowledged on cross-examination that neither the prosecution nor the defense had been informed of the identification evidence before McMullen testified at trial.

2. Garcia suffered no prejudice even if his counsel's decision was unreasonable, because there was no *Brady* violation

Even if counsel's decision not to move for a mistrial had been unreasonable, there was no prejudice to Garcia, as there was no *Brady* violation in this case.

"'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt and innocence.' [Citation.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [Citation.] A defendant instead 'must show a "reasonable probability of a different result."'" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.)

Even if the identification of the second suspect had actually been withheld from the defense, as Garcia claims, rather than disclosed belatedly at trial, Garcia has failed to show this evidence was "material" within the meaning of *Brady*.

Garcia does not address how or why it is reasonably probable that earlier disclosure of the identification evidence would have produced a different verdict. (See *Wood v. Bartholomew* (1995) 516 U.S. 1, 6 [116 S.Ct. 7, 133 L.Ed.2d 1]; *People v. Salazar, supra,* 35 Cal.4th at p. 1052, fn. 9 [mere speculation as to materiality will not support relief under *Brady*].) Instead, without support, Garcia asserts in his opening brief, "Mr. McMullen's ability to accurately identify his attackers was critical to [Garcia's] conviction;" and "[t]he reliability of Mr. McMullen to make an accurate identification of the persons who attacked him was crucial[,] . . . [g]iven the statement of the

[prosecutor] [that] identified two people, one being [Garcia] and the other being one that could have been conclusively proved [sic] to have been in error." This speculation is inadequate to establish prejudice. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 281-282.)

II. The Ineffective Assistance of Counsel Claim for Failing To Object to Inadmissible Evidence Cannot Be Resolved on Direct Appeal

Officer Mejia, the gang expert, testified without objection about the significance of Garcia's gang tattoos and that Garcia stated he had earned them by putting in work while in prison. Garcia argues this testimony, which indicated he had committed prior crimes, was inadmissible propensity evidence under Evidence Code section 1101, subdivision (a).

The record does not reveal the reason counsel failed to object to this evidence, nor can we determine whether there may have been a tactical reason for not interposing an objection. Garcia's ineffective assistance claim on this basis is therefore more appropriate for resolution in a habeas proceeding.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

BENSINGER, J.*

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