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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY ISAIAH CROWNOVER,

Defendant and Appellant.

B276245

(Los Angeles County
Super. Ct. No. VA 137055)

APPEAL from the judgment of the Superior Court of
Los Angeles County, Raul Anthony Sahagun, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant Attorney
General, Shawn McGahey Webb and David W. Williams, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gary Crownover challenges his conviction for robbery, in violation of Penal Code section 211.¹ Crownover contends that the trial court violated his right to due process by allowing evidence of an out-of-court identification that he alleges was unduly suggestive and unreliable. He also contends that the trial court erred by allowing the prosecutor to recall him as a witness, and that the prosecutor committed misconduct by making improper arguments during closing argument. We affirm.

FACTS AND PROCEEDINGS BELOW

Chino Intal was walking on Norwalk Blvd. in Hawaiian Gardens at around 11:00 p.m. on September 26, 2014, when he saw a man wearing a black hoodie and gray cargo shorts coming toward him on a skateboard. Seconds after the man passed by, Intal sensed the man's presence at Intal's side. Intal kept walking until the man pulled a handgun out of the pocket of his hoodie and pointed it at Intal's chest. Intal was listening to music on his black Beats headphones and could not hear what the man was saying, but he instinctively took the headphones off and gave them to the man. The man demanded Intal's cellular phone, but Intal asked to be allowed to keep it, saying that he needed it in case the "Air Force ROTC" tried to contact him. The man allowed Intal to keep the cellular phone, but told him not to call the police. The man then fled, and Intal walked back to his home a short distance away.

When Intal arrived home, he told his parents about the robbery and spoke with a friend about it by telephone. Intal then called 911 and told the operator that he had been robbed by a Hispanic man, 17-23 years old, wearing a black hoodie, gray shorts, and long socks.

¹ Unless otherwise specified, subsequent statutory references are to the Penal Code.

About one hour after the robbery, Los Angeles County Deputy Sheriff Clarissa Prentice saw Crownover riding a bicycle without a light, in violation of the Vehicle Code, approximately 12 blocks south of where the robbery took place. Crownover was wearing a black hoodie and tan cargo shorts. Prentice ordered him to stop and searched him, finding a loaded .25 caliber semiautomatic handgun in the left pocket of his cargo shorts. Crownover was also wearing a set of black Beats headphones around his neck.

When Prentice and her partner learned that Intal had reported a robbery earlier that night, and that the suspect in the robbery matched Crownover's general description, they called Deputy Antoinette Bowen to ask for Intal to come to the location where they had detained Crownover to identify whether he was the man who had robbed Intal. Bowen picked up Intal at his home and read him the sheriff's department's standard admonition for identifications of this kind, known as "field show-ups." The admonition states as follows: "You are under no obligation to identify this person as a suspect. We want to have guilty persons identified but we also want to make sure that innocent persons are cleared of suspicion in this matter. You should not draw any conclusions about a person just because he is in our custody or handcuffed."

When Bowen arrived on the scene with Intal, she read the same admonition to him a second time. Prentice positioned Crownover between herself and her partner. Bowen stopped her patrol car approximately 30 feet away and shined her headlights, spotlights, and overhead light in Crownover's direction. Streetlights provided additional illumination. Intal remained in the backseat of Bowen's patrol car and viewed Crownover through the plexiglass divider that separated the front seats from the back.

The deputies placed Crownover facing forward, then had him turn from side to side. At Intal's request, the deputies then put the hood of Crownover's sweatshirt up and placed him in the same positions. Bowen asked Intal if Crownover was the man who had robbed him, and Intal answered "that's the guy." Intal said he was 100% sure about the identification.

After the identification, Prentice interviewed Intal. She showed him the Beats headphones she had discovered in Crownover's possession, and Intal identified them as his stolen headphones. He stated that he could identify them by their smell of sweat and Lysol—he often wore the headphones while exercising, and cleaned them with Lysol.

An information charged Crownover with one count of robbery, in violation of section 211, and one count of carrying a loaded handgun, in violation of section 25850, subdivision (a). The information alleged further, with respect to the robbery charge, that Crownover personally used a firearm, pursuant to section 12022.53, subdivision (b), and that a principal in the robbery was armed with a firearm, pursuant to section 12022, subdivision (a).

At trial, Crownover testified in his own defense. He claimed that he spent a few hours on the evening of the robbery at the nearby Bingo Club, then went toward a friend's house. Just after leaving the Bingo Club, a man approached with a gun and asked Crownover if he had any money. Crownover testified that he bought the gun from the man for \$50 but did not examine the gun or see if it was loaded. He then continued on his bicycle to his friend's house and left after a few minutes, at which point the police stopped him.

A psychologist testified on behalf of Crownover as an expert on memory and perception. He explained that identifications may be unreliable because people have difficulty in identifying strangers

even under the best of circumstances. These problems may be compounded when a suspect is wearing a hood and when a witness is in a stressful situation. The expert stated that harsh white lights may alter a person's appearance, and that identifications are less reliable when made from inside the back seat of a police car at a distance of more than 25 feet. Finally, the expert opined that the procedure of an identification may affect the accuracy of the results. If the police present a witness with a single suspect instead of a line-up, the witness may infer that the police have already found the perpetrator, and need only confirmation.

The jury found Crownover guilty of both robbery and carrying a loaded handgun. The jury also found true the allegations that Crownover personally used a firearm in the robbery, and that he was not listed with the Department of Justice as the registered owner of the gun.

DISCUSSION

Crownover makes three claims on appeal.² First, he contends that the use of a single-person field show-up process to identify him violated his constitutional right to due process. Next, Crownover contends that the trial court violated his Fifth Amendment privilege against self-incrimination by allowing the prosecutor to recall him for further cross-examination after he had been excused. Finally, he contends that the prosecutor committed misconduct by implying that he personally believed in Crownover's guilt and by impugning

² Crownover also contends that the trial court erred by denying his motion for a new trial. In that motion, Crownover made the same arguments regarding the identification procedure and prosecutorial misconduct that he does in his appellate briefs. Because we conclude that the trial court did not commit prejudicial error with respect to these issues, we also hold that the court acted within its discretion in denying Crownover's motion for a new trial.

the character of Crownover's trial counsel and his expert witness during closing argument. We agree with Crownover that the prosecutor committed misconduct, but we conclude that the error was not prejudicial. Otherwise, we reject Crownover's arguments.

I. Identification Procedure

Crownover argues that the procedure the sheriff's department followed when Intal identified him was unduly suggestive, and that the identification was unreliable. He contends that Intal's in-court identification of him was tainted by the out-of-court procedure, and that the introduction of evidence of that identification violated his right to due process. We are not persuaded.

Before trial began, Crownover filed a motion to suppress any in-court identification of him on the ground that Intal's initial identification was flawed. After hearing testimony from the sheriff's deputies who participated in the field show-up identification and reviewing Intal's preliminary hearing testimony, the trial court denied the motion, finding that the initial identification procedure was not unduly suggestive.

“ ‘In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.’ ” (*People v. Virgil* (2011) 51 Cal.4th 1210, 1256 (*Virgil*).)

The admission of evidence based on a one-person show-up identification like the one used in this case does not necessarily violate a defendant's right to due process. "[A]lthough a one-person showup may pose a danger of suggestiveness, such showups 'are not necessarily or inherently unfair. [Citations.] Rather, all the circumstances must be considered.' [Citation.]" (*People v. Medina* (1995) 11 Cal.4th 694, 753) For an identification procedure to violate a defendant's due process rights, 'the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure.' (*People v. Ochoa* (1998) 19 Cal.4th 353, 413) However, '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. [Citation.] The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.' " (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359 (*Garcia*).)

Crownover contends that the identification procedure was suggestive because the deputies did not interview Intal or ask him for a description of the perpetrator prior to the field show-up, and because Intal saw Crownover while he was handcuffed and wearing the same clothing that the perpetrator had worn. We are not persuaded. Crownover cites no case law holding that the factors he has cited render an identification procedure unduly suggestive. Indeed, courts have held that "the mere presence of handcuffs on

a detained suspect is not so unduly suggestive as to taint the identification” (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386; accord, *In re Richard W.* (1979) 91 Cal.App.3d 960, 970), and it is not clear from the record that Intal was even aware that Crownover was handcuffed at the time of the identification. Furthermore, Intal stated that he identified Crownover not only by his clothing, but also by his face and facial hair.

In addition, the deputies took steps to avoid biasing Intal. Prior to the show-up, they told him only that they *might* have found the perpetrator. At least one court has upheld a field identification even when “police called his home and told him that ‘they had caught the guys.’” (*Garcia, supra*, 244 Cal.App.4th at p. 1359.) Deputy Bowen attempted to avoid the suggestive potential of the procedure by twice reading Intal an admonition stating that it was as important to exculpate the innocent as to identify the guilty. According to Intal, he approached the show-up with an open mind, and did not assume that the person the police had apprehended was the man who robbed him.

Because we conclude that the identification procedure was not unduly suggestive, we need not proceed to the second step of determining whether the identification was nevertheless reliable. (See *Virgil, supra*, 51 Cal.4th at p. 1256.) In any case, the preponderance of the relevant factors indicate that the identification of Crownover was reliable. We judge the reliability of an identification by factors including the witness’s opportunity to view the suspect at the time of the offense, the degree of attention he paid to the suspect, the accuracy of his prior description, the level of certainty in his identification, and the amount of time between the initial encounter with the defendant and the subsequent identification. (*Ibid.*) Although Intal had a relatively short period of time in which to view Crownover, and

Crownover's face was partially obscured by the hoodie he was wearing, Intal was able to give the 911 operator an accurate description of Crownover's appearance. Furthermore, Intal identified Crownover with a high degree of confidence, and he did so only an hour or so after the robbery took place.

II. Additional Cross-Examination of the Defendant After the Defense Had Rested Its Case

Crownover contends that the trial court violated his Fifth Amendment privilege against self-incrimination by allowing the prosecutor to recall him as a witness. We are not persuaded. The prosecutor's additional questions were merely a continuation of the cross-examination that had concluded a few minutes earlier.

Crownover testified on his own behalf and was the final defense witness. When the prosecutor finished cross-examining him, the defense moved to introduce its exhibits into evidence and rested its case. After a 10-minute recess, the prosecutor asked to recall Crownover to testify as a rebuttal witness. The court told the prosecutor that he could not call a criminal defendant as a rebuttal witness. The prosecutor then requested to reopen cross-examination. The trial court granted the request over the defense's objection.

The prosecutor then asked Crownover four questions about a photograph of Crownover's leg taken on the night of his arrest. These questions related to a dispute regarding Crownover's appearance at the time of the robbery. In his 911 call, Intal told the operator that his assailant had been wearing long socks. During direct examination, Crownover testified that the night before his arrest, he had obtained a tattoo on his lower leg reading "[f]uck cancer," in support of a cousin who was battling cancer. According to Crownover, he was wearing low-cut socks on the night of his

arrest because the tattoo was still fresh, and he was afraid that if his socks were high enough to touch the tattoo, they might damage it. When cross-examination resumed, the prosecutor showed Crownover a picture of himself taken after his arrest in which he was wearing long socks that had been pulled down to reveal the tattoo. Crownover explained that the photograph was taken after he had been booked at the sheriff's station and given long socks to wear.

A defendant who testifies on his own behalf waives "his privilege against compelled self-incrimination with respect to cross-examination on matters within the scope of the narrative testimony he provided on direct examination, as well as on matters that impeached his credibility as a witness." (*People v. Barnum* (2003) 29 Cal.4th 1210, 1227, fn. 3; accord, *People v. James* (1976) 56 Cal.App.3d 876, 888 [noting that a defendant waives the Fifth Amendment privilege *only* as to subjects of proper cross-examination].) Because the prosecutor limited his questions to matters Crownover had testified about during cross-examination, Crownover's Fifth Amendment rights were not violated.

In addition to the Fifth Amendment, the Evidence Code also regulates testimony by a defendant in a criminal trial. Under section 772, subdivision (d) of that code, a criminal defendant "may not, without his consent, be examined under direct examination by another party." Thus, the court in *People v. Mack* (1977) 66 Cal.App.3d 839, 861 held that although the defendant had waived his privilege against self-incrimination by testifying in his defense, it remained "improper" for the prosecution to call the defendant as a rebuttal witness. The court stated that "whether [the defendant] takes the stand or, having completed his testimony, resumes the stand to do so, must be solely at his election." (*Ibid.*) In this case, however, the court merely allowed the prosecutor to

reopen cross-examination of Crownover shortly after it concluded. The court did not abuse its discretion by doing so. (See *People v. Tafoya* (2007) 42 Cal.4th 147, 175-176; *People v. Barnum*, *supra*, 29 Cal.4th at p. 1227, fn. 3.)

III. Prosecutorial Misconduct

Crownover contends that the prosecutor committed misconduct by indicating that he personally believed in Crownover's guilt, and by suggesting that Crownover's trial attorney and expert witness were motivated by money to lie on his behalf. This argument fails because Crownover failed to preserve it by raising a timely objection at trial. In addition, Crownover is not entitled to relief on the basis of ineffective assistance of counsel. Although we agree with Crownover that the prosecutor's comments regarding his trial attorney's motivation were improper, they did not prejudice him.

In his rebuttal argument, the prosecutor drew a contrast between his own motivation and that of Crownover's trial attorney and expert witness. The prosecutor said, "We're here to seek justice. And that's what a district attorney does. Persons committed the crime, we prosecute. If the person didn't commit the crime, you don't prosecute. That's not the standard that the defense has. 52,000 reasons why the defense doesn't have that standard: \$50,000 [that Crownover paid to his attorney] to seek justice, \$2,000 to [the expert witness] not to seek justice. Their job is to get the defendant off of this charge. So when [Crownover's attorney] says we're trying to seek justice, that's not what they're seeking."

The prosecutor went on to describe how Crownover's attorney would have responded in the face of hypothetical evidence against his client. According to the prosecutor, if Crownover had confessed,

his attorney would have said, “ ‘Well, it wasn’t taped. How can we believe it?’ ” If the hypothetical confession had been taped, Crownover’s attorney would have said, “ ‘Well, my client was coerced.’ ” The prosecutor went on to describe to the jury similar responses to hypothetical evidence of fingerprints and DNA on the headphones police recovered from Crownover. Later, the prosecutor returned to the subject of Crownover’s payment to his attorney. “Defendant has 16 months to come up with this fairytale. He paid \$50,000 to be coached as to what to say.”

Crownover’s attorney did not object to any of these statements immediately. After the jury retired to deliberate, Crownover’s attorney made an objection and a motion for a mistrial, arguing that the prosecutor’s statements that he was paid \$50,000 to coach Crownover “border[ed] on prosecutorial misconduct.” The court replied that Crownover’s attorney “should have made the objection at that time. You’ve waived that. The jury is now deliberating. I would consider the objection [if] you made [it] at the time it was uttered, but you didn’t, and I took that as a defense strategy.”

“The standards governing review of [prosecutorial] misconduct claims are settled. ‘A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such “ ‘unfairness as to make the resulting conviction a denial of due process.’ ” (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . . ; see *People v. Cash* (2002) 28 Cal.4th 703, 733 . . .) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.’ (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328 . . .) ‘In order to preserve a claim of misconduct, a defendant must make a timely objection and

request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.’ (*Ibid.*) When a claim of misconduct is based on the prosecutor’s comments before the jury, ‘“the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” ’” (*People v. Friend* (2009) 47 Cal.4th 1, 29.) To establish a claim of misconduct, “bad faith on the prosecutor’s part is not required. ([*People v. Hill*] (1998) 17 Cal.4th 800,] 822-823 [*Hill*]). ‘[T]he term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’” (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.) A prosecutor may commit misconduct by stating his own personal belief in the defendant’s guilt (*People v. Lopez* (2008) 42 Cal.4th 960, 971), or by attacking the integrity of defense counsel. (*Hill, supra*, 17 Cal.4th at p. 832.)

The People contend, and we agree, that Crownover forfeited his claim of prosecutorial misconduct by failing to make a timely objection. “‘[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.’” (*People v. Stanley* (2006) 39 Cal.4th 913, 952.) A failure to object or to request an admonition may be excused if either would have been futile or would not have cured the harm caused by the misconduct. (*Hill, supra*, 17 Cal.4th at p. 820.) Crownover contends that no objection was required in this case because an objection would have been futile and because an admonition to the jury would have been ineffective. The record shows that an objection would not necessarily have been futile.

When Crownover objected and moved for a mistrial after the jury had begun deliberations, the court stated explicitly that it would have considered the objection, had it been timely. We also disagree that an admonition would not have cured the harm. “A jury will generally be presumed to have followed an admonition to disregard improper evidence or comments, as ‘[i]t is only in the exceptional case that “the improper subject matter is of such a character that its effect . . . cannot be removed by the court’s admonitions.” ’ ” (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692, superseded by statute on other grounds as stated in *People v. Levesque* (1995) 35 Cal.App.4th 530, 537.)

Crownover contends that, if his argument regarding prosecutorial misconduct is not preserved, then his attorney rendered ineffective assistance by failing to object. In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish, first, that his attorney’s performance was deficient, and second, that those errors prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) To demonstrate prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.)

We need not decide whether Crownover’s counsel fell below the standard of reasonably effective assistance because there is no reasonable probability of a different outcome in the case even if the attorney had made a timely objection. The evidence against Crownover was overwhelming. Sheriff’s deputies arrested Crownover a short distance away from the scene of the robbery wearing the same clothing that Intal had described to the 911 operator. At the time of the arrest, Crownover was carrying a

loaded handgun and headphones identical to those Intal reported stolen. Intal positively identified Crownover as his assailant both on the night of the robbery and in court. In comparison with this mass of evidence, the prosecutor's comments regarding the motives of Crownover's attorney were unlikely to have had a significant influence on the jury. Furthermore, Crownover's attorney made similar, albeit less inflammatory, comments during his own closing argument. Crownover's attorney told the jury that the prosecutor had been "coaching" Intal before he testified, and that Intal "followed the district attorney's instructions" in testifying. "Although the remarks of a defense counsel do not justify retaliation by the prosecution, such remarks must be considered in assessing the prejudicial effect of the prosecutorial misconduct." (*People v. Perry* (1972) 7 Cal.3d 756, 789, overruled on other grounds by *People v. Green* (1980) 27 Cal.3d 1, 28-34.) By insinuating that the prosecutor behaved improperly in preparing Intal for testifying, Crownover's attorney lessened the prejudicial effect of the prosecutor's attacks on himself.

Despite our conclusion that the prosecutor's remarks did not prejudice Crownover, we nevertheless note our disapproval of the prosecutor's conduct in the rebuttal argument. "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*Hill, supra*, 17 Cal.4th at p. 820.) The prosecutor's suggestion that Crownover's trial attorney could not be trusted solely because Crownover was paying him for his representation fell below that standard and was unbecoming of a prosecutor.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.