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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. HENRY LEE SMITH, Defendant and Appellant.	B272134 (Los Angeles County Super. Ct. No. VA131686)

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

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell,

Supervising Deputy Attorney General, and Timothy L. O'Hair, Deputy Attorney General, for Plaintiff and Respondent.

After a jury trial—and a mid-trial guilty plea to one of the charges he faced—Henry Lee Smith (Smith) was convicted of second degree murder, two counts of assault with a semiautomatic firearm, possession of a firearm by a felon, shooting from a motor vehicle, and shooting at an occupied motor vehicle. The jury also found that Smith personally and intentionally used and discharged a firearm within the meaning of Penal Code[1] section 12022.53, subdivisions (b)-(c), and caused great bodily injury or death within the meaning of section 12022.53, subdivision (d). The jury acquitted Smith of first degree murder as well as attempted willful, deliberate and premeditated murder. The court sentenced Smith to a total term of 62 years to life.

On appeal, Smith contends he received ineffective assistance of counsel at his preliminary hearing when counsel did not object to the prosecutor's failure to present evidence supporting his felon in possession charge and did not subsequently file a section 995 motion to set aside the information. According to Smith, this allowed the jury to hear testimony at trial regarding his possession of a firearm—a firearm that was unrelated to the charged

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

murder and assault, thus rendering its admission both irrelevant and unduly prejudicial.

We affirm.

BACKGROUND

A. The Shooting

On August 31, 2013, Edward Dodson (Dodson) and his friend Lonnie Warren (Warren) went to Dodson's family picnic at a public park. They arrived at the park in a gray Dodge Durango SUV. While parking the SUV, Dodson told Warren that Dodson's uncle (Smith) was at the picnic and said they did not get along. Warren advised Dodson to keep calm since it was a family event.

At some point during the picnic, Smith approached Dodson. The two became loud and began to fight and, according to Warren, Smith threw the first punch.[2] Neither Smith nor Dodson used a weapon during the fight. Although the family intervened several times, Smith and Dodson quickly began to fight again each time they were separated. Eventually, the two stopped fighting. Dodson and Warren then left the picnic and walked back to the SUV. Warren saw Smith walking toward the parking lot, but did not see what car he was walking toward.

Dodson got in the driver's seat of the SUV while Warren sat in the passenger's seat and the two drove away. As they drove through the Hawaiian Gardens neighborhood,

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[2] According to a defense witness, it was Dodson who threw the first punch.

Smith pulled up to the passenger side of Dodson's SUV in an older model pickup truck. Smith yelled at Dodson, "You want to handle this now?" Dodson replied, "Fuck you, homie." Smith then extended his left arm forward to drive the truck and rested his right hand and arm at a 90 degree angle across his left arm, holding a gun. Using his right hand, Smith fired four to six shots at Dodson's SUV. It appeared that Smith had full control of his right hand while driving with his left. Smith then switched lanes, positioning his pickup truck on the driver's side of Dodson's vehicle, and firing four or five more shots, this time into the driver's side of Dodson's SUV.[3] Dodson was hit in the ribcage area while Warren was struck in the left elbow. After the shooting, Dodson's SUV collided with a telephone pole while traveling at about 40 miles per hour.[4] Smith quickly left the scene. Dodson's SUV contained no weapons of any kind.

Dodson was nonresponsive at the scene and later died. Conscious, Warren told a responding officer that Smith had shot at their car. Two air bags in the SUV had deployed and

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[3] An eyewitness, Ryan Bandel, who was exiting a store, saw two cars driving parallel to each other. The driver of the vehicle closest to Bandel pointed a gun outside the driver's side window at the other car. Bandel heard about four gunshots, then went back into the store. After hearing two more shots, Bandel called 911.

[4] Surveillance cameras captured the shooting and the video was played at the trial. The video showed an SUV followed by an early '70's Chevrolet or GMC long-bed pickup truck until the SUV crashed into the telephone pole.

paramedics had to use the "Jaws of Life" to extricate Warren, who was pinned inside the car. Warren sustained a gunshot wound to his left arm as well as a fractured left femur and left ankle.

Detectives later found five .380-caliber Winchester shell casings and two .380-caliber expended bullets at the shooting scene, one on the street and another inside the SUV. The SUV's interior panel had three bullet holes in the direction of the driver's side door. Two more expended bullets were recovered from Dodson's chest during his autopsy.

Sheriff's deputies arrested Smith at a motel in Gardena the next day, September 1, 2013. During Smith's arrest, police found a loaded nine-millimeter handgun (9mm gun) and an additional magazine with nine-millimeter ammunition in a vehicle associated with Smith. The 9mm gun was not the weapon that fired the casings or bullets recovered at the shooting scene or during Dodson's autopsy.

The prosecution's expert witness, a senior criminalist for the Los Angeles County Sheriff's Department (LASD), tested Dodson's clothes for gunshot residue (GSR). The three elements of GSR (lead, antimony, and barium) were found on Dodson's clothing. Warren's hands were also tested. While lead, antimony, and barium were present, so were white fibers and zirconium, which is "very, very

unusual" in GSR cases.[5] However, air bags deploy zirconium as well as particles that are indistinguishable from the lead, antimony, and barium found in GSR. While the actual airbags in Dodson's SUV were not tested, the airbags on the same make and model were tested and were found to contain zirconium. Thus, the lead, antimony, and barium on Dodson's clothes and Warren's hands could have derived from the SUV's airbags, rather than GSR.

The defense's expert witness, GSR expert Marc Taylor, did not test the evidence in Smith's case; instead he reviewed the work of the prosecution's experts. Taylor noted there were particles consistent with GSR on Dodson and Warren, but agreed that deployed airbags contained particles that resembled the particles in GSR. He further agreed that deployed airbags also contained zirconium. Taylor stated it was impossible to tell if all the particles came from a gun or an airbag, and said testing the actual airbag from Dodson's SUV would have been helpful.

B. Preliminary Hearing and Trial Proceedings

At the preliminary hearing, the prosecution's witnesses testified only as to events that took place on August 31, 2013. The prosecution presented no evidence regarding Smith's arrest on September 1, 2013, and thus failed to address the 9mm gun and ammunition found incident to the arrest. Following the testimony, the prosecutor submitted

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[5] Indeed, Dodson's clothing and Warren's hands contained more zirconium particles than lead, antimony, and barium particles.

Smith's rap sheet to prove he had a prior conviction for assault with a deadly weapon. Defense counsel objected to the classification of the conviction as a felony, contending it was actually a misdemeanor based on the sentence Smith had received in the case, but the court overruled the objection without prejudice. The court held Smith to answer on all charges without further objection from defense counsel.

Although the preliminary hearing only addressed events from August 31, 2013, the prosecutor subsequently filed an information charging Smith with possession of a firearm by a felon "on or about September 2, 2013." All the other charges in the information—murder, attempted murder, assault with a semiautomatic firearm, shooting from a motor vehicle, and shooting at an occupied motor vehicle—were alleged to have been committed "on or about August 31, 2013." Defense counsel did not move to dismiss the felon in possession charge by filing a section 995 motion.[6]

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[6] Section 995 requires a superior court to review the preliminary hearing transcript and determine whether there was any substantial evidence to support the holding order. (*People v. Gephart* (1979) 93 Cal.App.3d 989, 995–996.) The court merely reviews the evidence; it does not substitute its judgment on the weight of the evidence or resolve factual conflicts. (*Ibid.*) " ' " 'An information will not be set aside . . . if there is some rational ground for assuming the *possibility* that an offense has been committed and the accused is guilty of it.' " ' " (*People v. Ramirez* (2016) 244 Cal.App.4th 800, 813.)

At least three different judges presided over portions of Smith's case. Judge John A. Torribio handled the preliminary hearing, Judge Olivia Rosales arraigned Smith on the resulting information, and Judge Raul A. Sahagun presided over the jury trial.

At trial, the prosecutor told the jury they would hear evidence of the 9mm gun Smith had in his possession at the time of his arrest. The jury also learned, however, that neither the murder weapon nor the truck used by Smith during the shooting were ever found. During the prosecution's case in chief, Detective Teri Bernstein testified that a 9mm gun was found in a vehicle associated with Smith at his arrest. However, defense counsel objected before the prosecutor could show the actual gun to the jury. The court indicated that if Smith pleaded to the felon in possession charge, it would bar the prosecution from introducing the 9mm gun into evidence. The court reasoned that a plea to the charge would render the gun irrelevant.

The prosecutor disagreed, however, arguing that the jury should still be able to hear about the 9mm gun "because it shows that [Smith] was in possession of a gun when he wasn't supposed to be in the first place." "What does it matter?," the court asked. "The only . . . significance of that is what if he is guilty or not guilty of [the felon in possession charge]? Unless he . . . pleads out to that then it's no longer an issue. So if he wants to plead, he can plead and then [the prosecutor] doesn't talk about the gun." The prosecutor argued that the jury needed to hear about the 9mm gun to

establish that it was not the murder weapon. The court ultimately agreed with the prosecutor, allowing her to introduce a photo of the gun and elicit testimony that it was not the firearm used to shoot Dodson and Warren in order to lessen any confusion caused by the previous testimony.[7]

Once this issue was resolved, Smith pleaded guilty to the felon in possession charge. A senior criminalist with the LASD subsequently testified that neither the casings nor the bullets found at the scene and during Dodson's autopsy came from the 9mm gun found during Smith's arrest.

DISCUSSION

I. Ineffective Assistance of Counsel Claim

A. *Standard of Review*

To demonstrate his attorney provided ineffective assistance of counsel, Smith must show that his attorney's performance was deficient and that this deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).)

To establish deficient performance, Smith must show that counsel's "performance fell below an objective standard of reasonableness under prevailing professional norms." (*In re Cudjo* (1999) 20 Cal.4th 673, 687.) However, " ' " 'reviewing courts defer to counsel's reasonable tactical decisions' " ' " when examining an ineffective assistance of counsel claim, and there is a " ' " ' "strong presumption that

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[7] The colloquy starting with defense counsel's initial objection through the court's resolution of the issue transpired outside the presence of the jury.

counsel's conduct falls within the wide range of reasonable professional assistance." ' " ' " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 86.)

" ' "[W]e have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' . . . 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' " ' " (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 86.)

"In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) "Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

With respect to prejudice, " '[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.) " 'A reasonable probability is a

probability sufficient to undermine confidence in the outcome.' " (*Id.* at p. 218.)

An appellate court "need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697.) Therefore, if a defendant does not show that he or she was prejudiced by the purported deficient performance of counsel, the claim can be rejected without deciding whether counsel's performance was actually deficient under the *Strickland* standard.

B. *Merits*

Witnesses at Smith's preliminary hearing testified only as to events that took place on August 31, 2013. The prosecution did not address Smith's arrest on September 1, 2013, and thus failed to present any evidence regarding the 9mm gun and ammunition found in Smith's vehicle incident to his arrest. Consequently, Smith contends, his attorney should have objected to the magistrate's holding order on the felon in possession count—a charge not supported by the evidence presented at the hearing—and subsequently should have filed a section 995 motion objecting to Smith's prosecution for a crime not supported by the preliminary hearing evidence.[8]

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[8] Smith was represented by a private attorney at his preliminary hearing. A public defender was appointed at

Smith further contends that counsels' collective ineffective assistance, their failure to object to or move to dismiss the felon in possession charge, resulted in the jury improperly hearing evidence that Smith possessed the 9mm gun. According to Smith, this failure prejudicially affected the jury's consideration of his defense. As discussed below, however, objecting to the holding order and filing a section 995 motion would have been futile and thus cannot constitute ineffective assistance of counsel. Furthermore, Smith cannot show he was prejudiced by the alleged deficient performance of counsel.

C. *Counsels' Performance*

To prevail on a section 995 motion to set aside an information, a defendant must establish that he was "committed without reasonable or probable cause." (§ 995, subd. (a)(2)(B).) To establish probable cause sufficient to withstand a section 995 motion, the prosecution "must make some showing as to the existence of each element of the charged offense." (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 148.)

"Evidence that will justify a prosecution need not be sufficient to support a conviction. [Citations.] ' "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." ' [Citations.]

Smith's arraignment on the information. The public defender later declared a conflict and an alternate public defender was then appointed.

An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.)

Notably, "the showing required at a preliminary hearing is exceedingly low." (*Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846.) An information should be set aside "only when there is a total absence of evidence to support a necessary element of the offense charged." (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226.) The requisite showing may be established by circumstantial evidence. (*Ibid*.)

Here, the prosecution had to make some showing that Smith had been convicted of a prior felony and thereafter had ownership or knowing possession, custody, or control of a firearm. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) The prosecutor submitted Smith's rap sheet to show he had suffered a prior felony conviction. With respect to the second element, there was ample evidence that Smith possessed a gun while chasing Dodson and Warren. Eyewitness Ryan Bandel testified he saw the driver of the vehicle following Dodson fire a gun outside his window. Similarly, Warren testified that Smith fired a gun in his direction as Smith drove alongside Dodson's vehicle. Thus, testimonial evidence established that Smith was in possession of a firearm on or about August 31, 2013.

Nevertheless, the prosecutor subsequently filed an information charging Smith with possession of a firearm by a felon "on or about September 2, 2013." However, "[t]he law is clear that, when it is charged that an offense was committed 'on or about' a named date, the exact date need not be proved unless the time 'is a material ingredient in the offense' (Pen.Code, § 955), and the evidence is not insufficient merely because it shows that the offense was committed on another date." (*People v. Starkey* (1965) 234 Cal.App.2d 822, 827.) "Variation from the allegations of an information within the period of limitations is not fatal except where it appears that commission of the act charged does not constitute a crime unless committed on a specific date." (*People v. Murray* (1949) 91 Cal.App.2d 253, 257.)

Any variation between the prosecution's proof at the preliminary hearing and the allegations of the information was immaterial in this case. The premise for Smith's contention appears to be nothing more than a drafting error.[9] Nevertheless, it is clear that the trial court judge, who neither presided over Smith's preliminary hearing nor arraigned him on the information, believed Smith's

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[9] Because Smith was arrested on September 1, 2013, and thus in custody by September 2, 2013, he could not have possessed a firearm on that date. Thus, as noted by Respondent, the testimony offered at the preliminary hearing, rather than the date on the complaint and information, was more indicative of the prosecution's theory as to the felon in possession charge.

possession of a 9mm gun on September 1, 2013, formed the basis of the felon in possession charge. Indeed, unless the judge believed this to be the case, he would not have determined that a plea to this particular charge would render the 9mm gun irrelevant.[10]

In the end, however, the prosecutor's motives for seeking to introduce the 9mm gun into evidence are irrelevant. The narrow issue on appeal is whether Smith's attorneys were ineffective given their failure to object to the holding order or to file a section 995 motion. Given that the exact date was not a material ingredient in the offense, neither objecting to the order nor filing a motion to set aside the information would have been successful. Thus, these alleged failures cannot be deemed ineffective assistance of

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[10] It is unclear why the prosecutor did not correct the judge at this point. Two full years had passed since the preliminary hearing; perhaps the prosecutor did not notice the drafting error and did not recall that the preliminary hearing testimony had focused exclusively on events from August 31, 2013. Perhaps the prosecutor *did* notice the drafting error but did not flag the issue for fear the judge would dismiss the charge. Perhaps she did not flag the issue because, as defense counsel strenuously argued at trial, the prosecutor simply wanted to paint Smith as a bad man by putting a 9mm gun in his hands. Indeed, the 9mm gun was useful in this respect because the jury could see the actual weapon—a frightening specter and tangible reminder of Smith's crimes. The murder weapon, which was never recovered, could not serve as such a talisman.

counsel.[11] (See *People v. Hinton* (2006) 37 Cal.4th 839, 917 [counsel's failure to file § 995 motion not ineffective because motion would have failed]; *People v. Cudjo* (1993) 6 Cal.4th 585, 616 [counsel's failure to object to admission of evidence not ineffective because no sound legal basis for objection]; *People v. Diaz* (1992) 3 Cal.4th 495, 562.)

D. *Smith Cannot Show Prejudice*

Even if these alleged failures could be deemed ineffective assistance of counsel, Smith cannot show he was prejudiced by the alleged deficient performance. The evidence against Smith was overwhelming. Smith and Dodson fought before the shooting. Smith then followed Dodson after the fight was over and drove alongside the passenger side of Dodson's vehicle just before the shooting. Warren's description of events was substantially

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[11] Even if counsel *had* objected to the holding order or filed a section 995 motion, the prosecutor could have simply amended the information, changing the offense date from September 2, 2013, to August 31, 2013, to conform to the preliminary hearing evidence. (§ 1009.) Of course, while the felon in possession charge would have survived, it is unlikely that the court would have then admitted any evidence regarding the 9mm gun. (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392–1393.) For this admission to be deemed prejudicial, however, it must be reasonably probable that the jury would have otherwise reached a result more favorable to Smith. (See *People v. Alcala* (1992) 4 Cal.4th 742, 797.) There is no such reasonable probability here.

corroborated by Bandel's eyewitness account of the shooting. Furthermore, the shell casings and bullets found at the shooting scene, and during Dodson's autopsy, confirmed that the shots came from a single gun and were fired toward (not from) Dodson's vehicle.[12]

Smith never denied shooting at Dodson's vehicle. Instead, he argued that Dodson or Warren had a gun as well and he fired only in self-defense. But the evidence belied this claim. The search of Dodson's vehicle uncovered no weapons of any kind. Although defense counsel attempted to elicit testimony which could support his argument that a gun had been thrown, or taken, from Dodson's vehicle, Bandel maintained he did not see anyone touch or reach into Dodson's vehicle after it crashed. Warren testified that although he drifted in and out of consciousness, he was able to speak to a bystander after the crash, asking that the man help get him out of the car. However, the man told Warren to wait until the police arrived and did not approach the vehicle.

In addition, surveillance cameras captured the shooting and the resulting video was played at the trial. The jury viewed the video without the assistance of Los Angeles County Sheriff's Deputy Angus Ferguson, who previously described the video content at the preliminary hearing.

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[12] Indeed, two of Dodson's gunshot wounds were in the back of his shoulder and traveled toward the front of his body, indicating that Dodson's back was to Smith when Smith shot him.

However, from Ferguson's prior testimony, we know that no one approached or removed anything from Dodson's vehicle after the crash. Indeed, "[t]he only thing . . . recovered eventually were the victims" themselves.

With respect to the lead, antimony, and barium particles found on or near the victims, Dodson's clothing and Warren's hands actually contained more zirconium particles than lead, antimony, and barium particles, which indicated that the particles came from the vehicle's deployed airbags rather than a gun.

Given the strength of the evidence in this case, as well as the paucity of evidence supporting a self-defense claim, Smith cannot show there is a reasonable probability that, but for counsels' alleged errors, the result of the proceeding would have been different. Thus, Smith cannot satisfy the *Strickland* standard of review and his ineffective assistance of counsel claim must fail.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J. LUI, J.