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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re D.D., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.D., Defendant and Appellant.	A131372 (San Mateo County Super. Ct. No. 77396)

The juvenile court adjudged appellant D.D. a ward of the court after it found that he had committed robbery. On appeal, the minor claims that he received ineffective assistance of counsel below, because his attorney did not adequately challenge the victim's identification of the minor, did not offer the testimony of an expert in eyewitness identification, and did not properly impeach the victim with his prior inconsistent statements. We affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

On the night of January 15, 2011, three males surrounded the victim after he got out of his car, which he had just parked on a street in Daly City. One of the males, who was around six feet tall and wearing a black hooded sweater, pointed a gun at the victim

and told him to "[g]ive him the money. The wallet, the money." The victim gave the person his wallet, which contained about $30. The man with the gun also demanded the victim's cellular phone and keys, but the victim refused. The three males then hit the victim, striking his left eye, his nose, and his right ear.

Two Daly City police officers responded to Cypress Lane, about two blocks from the crime scene, after receiving a report of the robbery. One of the officers noticed an open gate near an apartment on the north side of the lane, and saw three males matching the general description of the robbery suspects (males wearing black hooded sweatshirts and baggy clothing) standing around a small fire. The officer testified that two of the males were of similar height, and the third was about six inches shorter. The officer did not get a good look at their faces, because they wore hoods pulled up over their heads.

As the officer approached the three males and made contact with them, two of the males (including the one who was noticeably shorter than the other two) ran away. The officer lost sight of them, and was not able to make visual contact with them again. The third male, later identified as N.A.,[1] remained near the fire. The officers extinguished the fire and saw that the object that had been burning was a wallet, later identified to be the one taken from the victim. The minor lived 50 to 75 yards, or less than a minute's walk, from the fire.

Four days after the robbery, the victim was shown a photographic lineup containing a picture of the minor and five other males. Before the victim was shown the pictures, he read and signed a Daly City Police Department form with photographic lineup instructions, which stated that (1) the fact that a police officer was showing a group of photographs should not influence the victim's judgment in any way, (2) the person who committed the crime may or may not be in the group of photographs, (3) the victim was in no way obligated to identify anyone, and (4) the victim should study each photograph carefully before making any comments. The instructions further stated, "Consider that the photographs could be old or new, that hair styles change and that

[1] An officer testified that the victim was unable to identify N.A. as having been involved in the robbery.

persons can alter their appearance growing or shaving facial hair." A police detective testified at the jurisdictional hearing that the victim appeared to understand the instructions, and he did not ask questions about them.

The six photographs shown to the victim all feature African-American males, of roughly the same weight, ranging in age from age 16 (the minor's age) to 30. The minor's skin appears to be lighter than the skin of the other five males, possibly because a flash was used when the picture was taken. His picture has a black background, whereas the backgrounds of the other photographs are either white or gray.

When the victim looked at the photographic lineup, he selected the photograph of the minor after about 20 seconds, and identified him as the person who had pointed a gun at him. After the identification, police searched the minor's home, and found in the family room a black hooded sweatshirt belonging to the minor. Police also found two cellular phones in his possession, one of which belonged to the minor; the other belonged to the minor's friend, Richard M. After informing the minor of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, police interviewed the minor, who gave police permission to download information from his cellular phone.

The minor told police that, at the time of the crime, he had been at Richard M.'s house, the back gate of which can be seen from the front door of the minor's house. The minor explained that he had arrived at the residence at " '7:00, 8:00, no later than 9:00 p.m.,' " and that he stayed there all night. Police concluded that the minor's cellular phone records were inconsistent with his alibi, because they revealed incoming and outgoing phone calls to Richard M.'s home telephone number about two hours after the robbery was reported, whereas the minor reported that he had been inside the house at that time. When asked about the cellular phone records, the minor reported to police, "[a]fter some hesitation," that he had given his phone that evening to someone named Marcus. The minor had not mentioned Marcus before being confronted with his cellular phone records, and he was not able to provide a last name for Marcus or any other information about him. The minor's cellular phone records also reveal that the minor's

cellular phone placed a call at 11:14 p.m. (about an hour and a half after the robbery was reported) to N.A., the other person suspected of burning the victim's wallet.

A juvenile wardship petition was filed alleging that the minor came within the provisions of Welfare and Institutions Code section 602, in that he committed felony second degree robbery (Pen. Code, § 212.5, subd. (c)—count 1) and felony arson (Pen. Code, § 451, subd. (d)—count 2).

At a contested jurisdictional hearing, the victim testified through a Cantonese interpreter. He was asked on direct examination whether he saw "any of the three people that had taken your wallet, in the courtroom today," and the victim identified the minor. On cross-examination, the minor's counsel asked the victim several questions about the photographic lineup he had been shown. The victim acknowledged that the minor was the only light-skinned African-American depicted in the photographs, that it took the victim about one minute to select the photograph of the minor, and that the minor had facial hair, whereas the victim told police that the gunman was clean shaven.[2] As discussed in more detail below, the minor's counsel also asked the victim about his prior statements to police.

Three witnesses testified on behalf of the minor. Richard M.'s mother testified that the minor was at her house on the night of the robbery. The minor had dinner at the house with Richard M.'s mother and other family members, as well as Marcus. Marcus was a neighbor who had been to Richard M.'s house "multiple times," but who Richard M.'s mother did not know "very well." The minor did not leave after dinner, and he stayed at the home to play video games. He did not leave at any time between 7:00 p.m. and midnight. At some point, the minor called Richard M.'s mother on her

[2] A review of the photographic lineup reveals that the minor had a small amount of facial hair on his upper lip. The victim confirmed on redirect that the minor had "[j]ust a little bit" of hair in the photograph, and he testified that the photograph of the minor depicted an amount of hair consistent with the description that he provided to police. Two of the other males depicted in the photographs also had slight facial hair on their upper lips, one appeared to have to have no facial hair, and two of the males in the photographs had goatees.

phone, and she also called him at some point to tell him to turn down his music. She explained that she calls the minor and other kids, even when they are in her home, "instead of screaming" at them.

Richard M.'s cousin (the niece of Richard M.'s mother) also testified that she saw the minor at her aunt's house on the night in question, that the minor had dinner at the house around 7:00 p.m., and that the minor stayed at the house until midnight (the entire time she was there). The cousin further testified that she played a video game with the minor that evening, and that she saw the minor give his cellular phone to Marcus at some point. (The cousin acknowledged on cross-examination that, although she had seen Marcus before the night of the robbery, she did not know his last name.) The cousin also testified that she saw the minor call her aunt at some point, and that she saw or heard her aunt call the minor during the time he was in the house, in order to tell the minor to turn down his loud music. The minor's mother testified that it was common for the minor to call his mother when they were both in the home, and that the minor had had this practice ever since he received a cellular phone two years earlier.

During her closing argument, the minor's counsel highlighted the shortcomings in the photographic lineup, noting (without objection) that the victim was not shown photographs until four days after the incident occurred, and the photograph of the minor is the only one showing a light-skinned African-American.

The juvenile court sustained the allegation that the minor committed robbery (count 1), but found that the arson allegation (count 2) had not been proven beyond a reasonable doubt.

At a dispositional hearing on March 2, 2011, the juvenile court adjudged the minor a ward of the court, and committed him to a county juvenile rehabilitation facility. The maximum time of confinement was set at five years. The minor timely appealed.

II.
DISCUSSION

The minor argues that he received ineffective assistance of counsel, because his attorney failed to present crucial evidence that would have raised a reasonable doubt about his involvement in the robbery.[3]

A. General Legal Principles.

The legal standard to show ineffective assistance of counsel is well established: the minor must show both that counsel's performance was deficient and that the performance prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *In re Julius B.* (1977) 68 Cal.App.3d 395, 401 [minor has right to effective assistance of counsel in delinquency proceedings].) "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.' [Citation.] A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. [Citation.] The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' [Citation.]" (*Harrington v. Richter* (2011) __ U.S. __, 131 S.Ct. 770, 787.)

"With respect to prejudice, a challenger must demonstrate '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.' [Citation.] It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [Citation.] Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.]" (*Harrington v. Richter*, *supra*, 131 S.Ct. at pp. 787-788.) " 'Surmounting *Strickland*'s high bar is never an easy task.' [Citation.] An

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[3] In a related petition for a writ of habeas corpus (No. A134307), the minor likewise argues that he received ineffective assistance of counsel, and provides supporting declarations. We deny the petition today by separate order.

ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' [Citations.] The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. [Citation.]" (*Harrington v. Richter*, *supra*, 131 S.Ct. at p. 788.) "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.)

B. Photographic Lineup.

The minor first claims that his appointed attorney's performance fell below an objective standard of reasonableness, because she failed to challenge the admission of the victim's identification of the minor using an unduly suggestive photographic lineup, and failed to object to the victim's in-court identification of the minor.

"[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384.) An accused bears the burden of showing that a challenged identification procedure was "unduly suggestive and unfair 'as a demonstrable reality, not just speculation.' [Citation.]" (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) " 'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; 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 criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) "[A]n identification procedure is considered suggestive if it 'caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*Cook* at p. 1355.) The validity of a photographic lineup is not considered unconstitutional "simply where one suspect's photograph is much more distinguishable from the others in the lineup." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) An in-court identification of an accused is error because of the taint of the pretrial identification only if the pretrial identification procedure was unduly suggestive, unnecessary, and unreliable under the totality of the circumstances. (*People v. Kennedy* (2005) 36 Cal.4th 595, 610, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

The minor argues that his picture in the photographic lineup "stood out" because his skin appeared to be noticeably lighter than the other five subjects,[4] he was the only one with what appeared to be a spotlight on his face, his photograph was the only one with a black background, and he appeared to be the only one who was wearing a hooded sweatshirt. Although the minor overstates the extent to which his photograph stands out among the six that were shown to the victim, we agree that there are arguable differences between his photograph and the other five. Had counsel never raised the issue below, or had counsel failed to make a motion to suppress the identification evidence or to

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[4] The minor claims that the victim described the gunman "as having light skin." He directs us to a portion of the reporter's transcript where the victim testified on cross-examination that he looked at the gunman for five minutes, and during that time he was "remembering [the gunman's] face, his eyes," as well as the gunman's "skin and that it was whiter." The minor does not direct this court to any evidence that the victim told police before the photographic lineup that the suspect had light skin.

challenge victim's in-court identification at a *jury trial*, the minor might have a stronger argument that his attorney rendered ineffective assistance of counsel. In *that* situation, such potentially meritorious objections would have been adjudicated outside the presence of the trier of fact, and counsel would have had "no satisfactory tactical reason for not" making such a formal motion. (*People v. Nation* (1980) 26 Cal.3d 169, 179.) Here, of course, there was no jury trial, so any motion to suppress would have been heard by the same judge who then served as trier of fact.

The minor's counsel repeatedly questioned the reliability of the photographic lineup. She elicited testimony from the victim that he was not shown the lineup until four days after the robbery, that the photograph of the minor shows that he was the only light-skinned African-American, that it took the victim about one minute to select the minor's photograph, and that the minor had facial hair in the photograph, whereas the victim described the suspect to police as clean shaven. Counsel also elicited an admission that the victim's in-court identification of the minor was based on the photographic lineup, and not on his observation on the date of the incident.[5] During closing argument, she again stressed that the photographic lineup was unreliable, because it did not take place

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[5] The admission came during cross-examination:

"Q Now, in identifying [the minor] today, that identification is based upon that photograph you looked at. Correct?

"A Yes, when I looked at the photographs, yes.

"Q And your identification of [the minor] today is not based upon your recollection of the date of the incident. Right?

"A Can you ask again?

"Q When you identified [the minor] in court today, that identification was based upon the photograph No. 3 [from the photographic lineup] and not your observation on the date of the incident. Correct?

"A Correct."

It may be true that, because the victim was testifying through an interpreter and apparently had trouble understanding the original question, he possibly "was simply confirming that he identified appellant during the line-up," as respondent contends. However, the prosecutor did not ask for clarification on redirect, so it is unclear whether the victim meant something other than what he testified.

until four days after the crime, the minor's photograph stood out because he was the only light-skinned African-American, and it was questionable whether the victim could correctly identify the minor, because it was dark on the night of the crime, the perpetrators were wearing hooded sweatshirts, and the victim was scared at the time of the attack. Indeed, the minor notes that "a major part of the defense strategy was attacking the reliability of [the victim's] identification." The minor faults counsel for not *additionally* making a formal motion to suppress, or moving to strike the victim's in-court identification; however, she essentially made all the arguments that would have accompanied a formal motion, and she was able to elicit an admission from the victim that his in-court identification was based on the photographic lineup. This case is therefore distinguishable from *In re Hall* (1981) 30 Cal.3d 408, upon which the minor relies, where counsel made no effort whatsoever to challenge an identification procedure used by police. (*Id.* at pp. 430-431.)

When the juvenile court sustained the robbery count against the minor, the court observed: "I believe that the evidence is such that the victim made a positive identification of the defendant. And it was corroborated by the location of the defendant. It was corroborated by the cell phone calls." The juvenile court thus considered, but rejected, counsel's arguments that the photographic lineup was unreliable and did not support a finding that the minor committed robbery. There is therefore no reason to conclude that, had the minor brought a formal motion to suppress, it would have been granted.

Reviewing de novo the lower court's implied ruling that the pretrial identification procedure was reliable (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 609), we agree with respondent that, even assuming arguendo that the lineup was unduly suggestive (notwithstanding the fact that the victim received cautionary instructions before viewing the lineup, the fact that slight differences in the background and appearance of lineup subjects do not make a lineup suggestive, *People v. Johnson* (1992) 3 Cal.4th 1183, 1217, and the fact that there is no requirement that a defendant in a lineup be surrounded by others nearly identical in appearance, *People v. Brandon*, *supra*, 32 Cal.App.4th at

p. 1052), it was nevertheless reliable under the totality of the circumstances. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.) Taking into account the relevant factors (*ibid.*), the victim testified that although he was not able to view the three males who robbed him while he was being hit, at that point, he "had already seen them entirely." Before the three males started hitting him, he was able to view the person who pointed the gun at him for "at least four minutes, five minutes." Although the minor was depicted in the photograph with a small amount of facial hair, the victim testified that this amount was consistent with how he described the suspect to police before the lineup. Considering the totality of the circumstances, we conclude that the photographic lineup was reliable. The minor's claim of ineffective assistance of counsel based on the failure to make a formal motion thus fails. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1082 [ineffective assistance of counsel claim rejected where attorney had no basis to object to evidence of photographic lineup].)

As for the in-court identification of the minor, the minor stresses that, had the evidence of the pretrial identification procedure been suppressed, the prosecution would have had the burden to show that the victim's in-court identification had a source independent of, and untainted by, the pretrial identification procedure. (*People v. Caruso* (1968) 68 Cal.2d 183, 189-190; *People v. Citrino* (1970) 11 Cal.App.3d 778, 783.) The minor's counsel in fact obtained an admission from the victim that his in-court identification of the minor was based on the photographic lineup. (*Ante*, fn. 5.) The trier of fact thus had information to sufficiently weigh whether the in-court identification was corrupted by the effect of the photographic lineup. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.) The juvenile court nonetheless found that the victim's identification was sufficiently reliable. We reject the minor's argument that his trial counsel was ineffective for not taking additional steps to challenge eyewitness identification evidence.

C. Expert Testimony.

In a related argument, the minor contends that he received ineffective assistance of counsel because his attorney did not offer expert testimony regarding eyewitness identification. During her closing argument, the minor's counsel stated, without

objection, "As the court may know, cross-racial identifications are even more suspect than the same-race identifications. And then the longer period of time we have in making those identifications, the less reliable they are. [¶] The fact that it was dark, that [the victim] was very scared, that he only was able to observe these individuals for a few moments, that he ducked down and looked away indicates that he did not have a good opportunity to look at them. They were wearing hoods over their heads. [¶] I just don't believe that the evidence shows that [the victim's] identification is reliable." The minor contends that a "reasonably competent attorney would have presented" expert testimony to support these contentions, as well as the contention (unraised below) that the same detective who prepared the photographic lineup also administered it, which means that the detective may have inadvertently telegraphed to the victim who the suspect was.

Expert testimony is appropriate where it is "[r]elated to a subject that is sufficiently beyond common experience," and it "would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "It is doubtless true that from personal experience and intuition all jurors know that an eyewitness identification can be mistaken, and also know the *more obvious factors* that can affect its accuracy, such as lighting, distance, and duration." (*People v. McDonald* (1984) 37 Cal.3d 351, 367, italics added, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Especially in light of the fact that the trier of fact here was the juvenile court, as opposed to a jury, we disagree with the minor that expert testimony was necessary on such "obvious factors" potentially affecting reliability as the delay in showing the victim the lineup, and the fact that the victim was scared at the time of the incident.

As for the failure to present expert testimony regarding potential problems with cross-racial identification, again, the minor might have a stronger argument that this amounted to ineffective assistance of counsel had a jury, as opposed to the juvenile court, served as trier of fact. In *People v. McDonald*, *supra*, 37 Cal.3d 351, upon which the minor relies, the court noted that "[t]o be sure, *many jurors* are likely to have *some awareness* of the fact that an eyewitness is more accurate in identifying a person of his own race than one of another race." (*Id.* at p. 368, italics added.) Although the court in

McDonald went on to hold that it was reversible error to exclude expert testimony regarding eyewitness identification, based in part on the fact that information bearing on eyewitness identification is sufficiently beyond common experience so as to be helpful to the average juror (*id.* at pp. 369, 376), we agree with respondent that such information was not so beyond the experience of a juvenile court, such that the failure to introduce expert testimony on the topic amounted to ineffective assistance of counsel. Indeed, the fact that the deputy district attorney did not object when the minor's counsel argued that the court "may know" that "cross-racial identifications are even more suspect than the same-race identifications," despite the fact that no evidence had been presented on this point, is an indication that the court likely was familiar with such issues.[6] Counsel did not raise the issue that the detective who prepared the lineup also was the person who administered it; however, there is nothing in the record to indicate that this factor affected the lineup in any way. Because lack of expert testimony on eyewitness identification was not an "error" that was " 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' " (*Harrington v. Richter*, *supra*, 131 S.Ct. at p. 787), we reject the minor's ineffective assistance of counsel claim on this issue.

D. Cross-Examination of Victim.

Finally, the minor faults his attorney for cross-examining the victim about prior statements to police, but then failing to call the police officer to whom the statements were made, to testify that they were in fact made. The failure to impeach a witness is a matter which usually involves a tactical decision on counsel's part and "seldom establish[es] a counsel's incompetence." (*People v. Frierson* (1979) 25 Cal.3d 142, 158.) To properly evaluate the minor's argument, we summarize in detail the various portions of the hearing transcript that the minor highlights on appeal.

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6 This case is distinguishable from *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1254-1256, upon which the minor relies, both because *Caro* involved a jury trial, and because counsel in that case failed to investigate the effects of defendant's brain damage due to pesticide exposure, an issue that is less widely understood than the ones at issue here.

Location of robbers: On direct examination, the victim testified that when he got out of his car and three males surrounded him, they were as close to him as the interpreter was when he testified, which the victim clarified meant that they were all within arm's reach of him. On cross-examination, the victim was asked whether he told police that the three males were three feet away (at some unspecified point), and he testified that he did not remember telling that to a police officer. The record does not include a description of the victim; however, it is conceivable that his arm measured close to three feet, meaning that there was only a slight difference between his in-court testimony and what he told police.

Height of gunman: On direct examination, the victim testified that the gunman was about "5'10", 5'11", 6 [feet]." (The minor is six feet tall.) On cross-examination, the victim was asked whether two of the individuals were to his left, and he answered, "Two among them were shorter." The minor's counsel thereafter asked the victim to confirm that he had told police that all three males were approximately five feet, 10 inches tall. The victim testified that "[a]ll three were different. I'm aware that one was tall. The other two were shorter." He specifically testified that he did not tell police that all three males were the same height.

Gunman's lack of facial hair: The victim was asked on cross-examination whether he recalled telling a police officer that the gunman was "clean shaven." The victim responded, "I did not say—that is—," at which point the interpreter requested permission "to ascertain with the court as to hairs on the face. Here would be mustache. Here would be a goatee. What about here?" The juvenile court then called a brief recess, and asked counsel to pose a new question at that time. The victim later acknowledged that he described the gunman to police as being clean shaven, but explained on redirect that the "little bit" of hair the minor had in the photograph depicted an amount of hair consistent with the description that he provided to police. (*Ante*, fn. 2.)

Distance of gun from victim: The victim testified on cross-examination that the gunman held the weapon "[c]lose to 12 inches" away from him (the victim). Counsel asked him whether he recalled telling a police officer that the gun was held 20 inches

from the victim—a difference of less than one foot—and the victim testified, "I did not say."

Where the victim was hit: The minor claims that the victim testified on direct examination that the three males who attacked him struck him under his left eye, on his nose, and on his right ear, and that his trial counsel questioned the victim about his inconsistent statement to police that he was "punched one time in the face." The cited testimony does not indicate such a clear inconsistency. On direct examination, the victim testified that the three males who attacked him hit him "[h]ere, here, and here," indicating under his left eye, on his nose, and on his right ear. The attack injured the bridge of the victim's nose, and caused his nose to bleed. The victim was asked to show where the attack left a mark on his nose, and the juvenile court stated that the witness indicated "an area of his nose where there appears to be a mark. It looks like a scar on the left side of the whole lower portion of his nose." On cross-examination, the following exchange took place:

"Q Now, do you recall telling the police that you were struck in the head two times? Is that correct?

"A Which head? Which part of it?

"Q Is it correct that you were struck one time in the face?

"A Incorrect.

"Q Do you recall telling the police that you were punched one time in the face?

"A Should be—no.

"Q Do you recall telling the police that you were punched one time in the back of the head directly behind your ear?

"A Is it the part here?

"The Court: The witness is indicating the area near his right ear.

"Q My question is . . . , do you remember telling the police that you were punched one time in the back of your head directly behind your ear?

"A Here. Right.

"The Court: Indicating the area of his right ear."

The minor's counsel later asked the victim to confirm that he was not looking at the person in front of him when he was "punched in the head," and the victim testified, "I was hit *on the face*, not on the head." (Italics added.) In short, it appears that the minor's counsel was asking about the victim's statement that he was hit in *two* places, and the victim's testimony that he was hit "on the face" (and the display of a scar on his nose) does not directly contradict any statement to police that he was hit at least once in the face.

The victim's actions: The minor also claims that the victim testified that he "lowered his head a little" during the attack and that the minor's trial counsel questioned the victim about his inconsistent statement to police that he actually "crouched down into a defensive posture when he saw the three men surround him." The victim testified on direct examination that the three males surrounded him when he first got out of his car, and he was told to hand over his wallet. After the victim's wallet was taken, and the victim thereafter refused to comply with the additional demand that he turn over his keys and cellular phone, the three males began hitting him. On cross-examination, the following exchange took place:

"Q [W]hen you got out of the car and saw these three individuals, you were scared. Correct?

"A Yes.

"Q And do you remember telling the police officer that you crouched down in a defensive posture?

"A To one side? Or defensive to which side?

"Q My question is, Do you remember telling the police officer that you crouched down?

"A That is, my head was lower like this. A little.

"Q And when you lowered your head, you weren't looking at the person in front of you. Correct?

"A That is to say, I had already seen them entirely.

"Q My question . . . was when you crouched down, you were not looking at the man directly in front of you. Correct?

"A When my head was lowered I did not look at him."

The victim further acknowledged that he was not looking at the man in front of him when he was punched in the face or hit on the ear, and that he had "only a brief moment to look at the individual in front" of him during the attack.

Closing Argument: During her closing argument, the minor's counsel argued that the victim's "testimony today was very different than his statement to the police officer. He told the police officers that the individuals were approximately 3 feet away from him." The prosecutor objected, stating that "[n]o rebuttal evidence that established he said anything different to the police than what he testified to." The juvenile court stated, "I'll filter it out." Defense counsel proceeded to highlight other ways in which the victim's testimony differed from what he told police. The court then asked, "Is the police report other than what you got him to admit?" The minor's counsel responded: "He admitted that he told the police that the individual—he told the police that the individuals were between 20 and 30 years old. And they were all about 5'10" and that the individual holding the gun was clean shaven. The photo I.D. that he identified as [the minor] shows a young man with a mustache. [¶] [The victim] indicated that he was scared. That he crouched down, that he put his head down. [¶] On cross-examination he indicated that he only saw the males for a few moments. On redirect he then stated that he stared at the individual in front of him for five minutes."

The minor claims that it is inexplicable that counsel failed to call the police officer to whom the victim spoke when he made his prior statements. He contends that the victim's unreliable story "was a substantial component" of his defense, and that prior inconsistent statements would have added "substantial strength" to that defense. However, the record on appeal does not reveal that trial counsel could have proven the prior statements that the victim supposedly made to police. Appellate counsel "assumes" that counsel could have proven the prior statements, because it would have been misconduct for her to cross-examine the victim regarding statements that she knew to be

untrue. However, absent a copy of the relevant police report, we cannot say that the failure to call the officer who prepared it was crucial to the minor's defense. It is possible that a review of the report might reveal that although there may have been some minor inconsistencies, it generally *supported* the victim's version of events, much the same way as the scar on his nose confirmed that he was injured during the attack. Because incompetence of trial counsel is not demonstrated on the face of the appellate record (*People v. Frierson*, *supra*, 25 Cal.3d at p. 158), we reject the minor's argument.

In any event, as the minor's counsel stated in response to the juvenile court's question during closing argument, the victim in fact admitted some inconsistencies on cross-examination, so it would have been unnecessary to call a rebuttal witness as to those points. Moreover, the minor overstates the significance of some of the supposed inconsistencies. It is not surprising that, as often happens, the victim of a violent crime gave somewhat differing accounts of a traumatic event at different times. The fact that the victim at one point said that the three males were three feet away is not so different from testifying that they were within arm's reach of him, considering the fact that a man's arm could measure close to three feet long. Likewise, the fact that the victim testified that the gunman held his weapon a foot from him is not so different from telling police that the gun was held 20 inches from him. Such minor inconsistencies certainly did not amount to a "substantial component" of the defense. The minor therefore cannot show that he was prejudiced by the absence of impeachment evidence.

III.
DISPOSITION

The juvenile court's orders are affirmed.

_____
Sepulveda, J.*

We concur:

_____
Reardon, Acting P.J.

_____
Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.