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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY BRANDON WELLS,

Defendant and Appellant.

A131502

(Solano County
Super. Ct. No. FCR273698)

Defendant Anthony Brandon Wells appeals the judgment and sentence imposed following his jury-trial conviction for being a felon in possession of ammunition, in violation of Penal Code, section 12316, subdivision (b)(1).¹ Defendant asserts the trial court erred by denying his motion for a new trial based on ineffective assistance of trial counsel. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 28, 2010, the Solano County District Attorney filed a single-count, amended information alleging that on or about February 2, 2010, defendant committed felony possession of ammunition, in violation of section 12316, subdivision (b)(1). The information also alleged that defendant served prison terms on three prior felony convictions, within the meaning of section 667.5, subdivision (b). Prior to trial, the court granted defendant's motion in limine and precluded any reference to defendant's parole

¹ Further statutory references are to the Penal Code unless otherwise noted.

status during the trial. The court also granted defendant's motion to bifurcate trial on the prior conviction allegations.

The evidentiary phase of trial began on June 3, 2010. The only witness for the prosecution was Fairfield Police Officer Jose Villanueva. Officer Villanueva testified that on February 2, 2010, at around 11:20 p.m., he was on patrol driving a marked police vehicle. The vehicle immediately ahead of his car was a blue Honda Accord. Villanueva observed the Honda cross a solid white line in a turning lane and then continue to swerve in its lane of travel. Villanueva activated his overhead lights to initiate a traffic stop. The Honda failed to respond and continued in its direction of travel, made a left turn and came to a stop shortly thereafter. Based on the Honda's failure to yield initially, Villanueva called for backup.

Villanueva parked the police car behind the Honda, exited his vehicle, approached the driver's side and identified defendant as the driver of the Honda. A person identified as William McGee was in the front passenger seat. Defendant appeared extremely nervous and told Villanueva his driver's license was suspended. By this time, several backup officers were at the scene and defendant and McGee were detained after it was confirmed defendant was driving on a suspended license. Villanueva arranged to have the Honda towed and conducted an inventory search prior to towing. In the rear seat of the vehicle, Villanueva found a yellow backpack. Inside the backpack was a Winchester .40 caliber, hollow point bullet. The backpack was completely empty except for the bullet.

Villanueva read defendant his Miranda rights and then questioned him. Defendant stated he purchased the Honda but was still in the process of having the vehicle registered in his name. The backpack belonged to him but the bullet did not. Defendant did not know who owned the bullet but offered to "take responsibility for it." Villanueva also questioned McGee about the backpack and bullet. Thereafter, Villanueva arrested defendant for possession of ammunition, released McGee and booked the bullet into evidence. Villanueva left the backpack in the Honda, which was later towed.

The sole witness called in the defense case was John Ebling.² John testified he has known defendant for about a year and they socialize “every once in a while.” Around midday on the day in question, defendant arrived at John’s home in a small car. Defendant asked John to test-drive the car because defendant was thinking about buying it. John decided to drive the car to a location in Collingsville about 20 miles away where he rides and shoots. He went alone, taking with him a plastic container holding a few handguns, a toolbox converted to an “ammo can” and a backpack containing some items. He spent about an hour at the location in Collingsville firing the handguns before driving back home. Once home, he removed the items in backpack and transferred them to the lockable toolbox because “there was room in the toolbox and that’s where everything goes.” Then he carried his gun case and toolbox into the house but inadvertently left the backpack in the car. The backpack was one he “had [] around” the house; and it was yellow with black straps. Defendant returned to John’s around 4 p.m., picked up his car and then left.

John subsequently learned that defendant “got in trouble with my stuff.” In an attempt to rectify the situation, John submitted two sworn affidavits to defense counsel within a week, the first dated February 18 and the second dated February 23, 2010. In each affidavit, he swore under penalty of perjury that the ammunition and backpack were his personal property. In the first affidavit, John identified the bullet in the backpack as a .45 caliber bullet. In the second affidavit, he identified the bullet in the backpack as a .40 caliber bullet.³ John prepared the second affidavit after he reread the first one and

² We shall refer to John Ebling as “John” to avoid any confusion with his brother, Gary Ebling.

³ The affidavit of February 18, 2010, is as follows: “I, John Ebling, hereby swear under penalty of perjury that the foregoing is a true and correct statement. The purpose of this statement is to properly inform the court that the yellow backpack and its contents consisting of .45 caliber ammunition, is my sole personal property. [¶] It is my understanding that Anthony Wells is facing criminal charges for the possession of the .45 caliber ammunition. The .45 caliber ammunition and the backpack are not and where (*sic*) never the personal property of Anthony Wells. I feel it is unjust for the court to charge Anthony Wells for unknowingly having my personal property in his possession.

realized he misidentified the bullet as .45 caliber. He testified he submitted the second affidavit to ensure the accuracy of his description of the bullet. He testified “those shells are mine. I was using the car. That’s all my stuff[,] [¶] . . . my weapons, my shells.”

On cross-examination, John stated he owns nine handguns, all of them inherited from his father. On the day in question, he fired two handguns belonging to him, a .32 caliber and a .38 caliber. He also fired a .40 handgun that he borrowed from his brother, Gary Ebling. Gary inherited the .40 caliber handgun from their father. John did not recall precisely when he inherited the handguns, stating, “the executor, my aunt, released them to the Sheriff’s Department, and I collected them from the Sheriff’s Department, so it’s documented.” John also testified he did not own a .45 handgun, “just ammo.” John also inherited some ammunition from his father and also buys ammunition but has never bought hollow points. The prosecutor asked, “Can you buy hollow points?” and John replied, “I don’t know, I have never bought pistol shells ever. They just came with my dad’s stuff.” John stated his father was never in law enforcement.

Regarding his use of the blue Honda, John testified that defendant loaned him the car about 11:00 a.m., then “went out the side door and out through the gate.” He did not know if defendant “left walking” or if he called someone for a ride. When defendant returned later in the day to pick up the vehicle, John did not see if he arrived with anyone. John testified that the backpack he owned was yellow with black straps. He did not buy it and did not know the make—it was a backpack one of his kids had used at school. Inside the backpack were some shells, a few bandanas and a holster. John thought he had emptied all the contents of the backpack into the toolbox when he returned from the shoot. When asked what type of .40 caliber ammunition he has, John replied, “My brother had some different kinds of ammo. There was some regular shells, and there was a few hollow points, but I don’t think I shot any of the hollow points.” John did not

[¶] I am writing this statement in an attempt to dismiss all accusations against Anthony Wells for the possession of my personal property. I will be present in court in March on Anthony Wells’ appearance date should you have any questions. In addition, please contact me at (707) 419-xxxx if you require further information or have any questions.” The statement of February 23, 2010, is identical, except .40 is substituted for .45.

know what kind of bullet it was that he left in the backpack; nor did he know what type of hollow point bullets he had, or whether “they were my bother’s or my dad’s.” He is not familiar with handguns and had used “shotguns all my life, deer guns, rifles.”

In response to questions from the trial judge, John testified he did not know the model of .40 handgun he fired on the day in question, except that it was a revolver, not an automatic. There was some ammunition for that gun in the metal toolbox and he also “got some from my brother [Gary] and put it in the backpack.” Gary “lives here in town” and still has the .40 ammunition “unless he went and shot it” out at Collinsville. Following up on the court’s questions, the prosecutor asked, “The brother you are talking about, is your younger brother, Gary?” and further enquired, “Is there a reason he can’t come and tell us about this .40 caliber gun?”

The prosecution recalled Officer Villanueva as a rebuttal witness. Officer Villanueva testified that while on duty he carries a .40 caliber Glock and carries .40 caliber Winchester hollow point bullets as ammunition for the gun. Villanueva testified Winchester hollow point bullets are not sold to the public and come in boxes stamped “for law enforcement only.”

On June 3, 2010, the jury returned a guilty verdict on the charge of felony possession of ammunition. After the jury was discharged, the court held a bench trial and found true allegations that defendant had suffered three prior felony commitments within the meaning of section 667.5, subdivision (b). On July 16, 2010, the date set for judgment and sentencing, defense counsel requested a hearing and briefing schedule for a new trial motion. On March 7, 2011, the trial court held an evidentiary hearing on defendant’s motion for a new trial.⁴ After presentation of evidence and argument of counsel, the trial court denied the motion. The next day the trial court sentenced defendant to the midterm of two years in state prison, with an additional year for each of his three prior section 667.5 convictions, for a total term of five years in state prison. Defendant filed a timely notice of appeal on March 9, 2011.

⁴ Evidence presented in connection with defendant’s new trial motion is adduced as necessary in the Discussion section, *post*.

DISCUSSION

A. *Applicable Legal Standards*

A claim of ineffective assistance of counsel (IAC) is not one of the statutory grounds enumerated in section 1181 upon which a trial court may grant a new trial after a verdict has been rendered against a defendant. (See § 1181.) However, in *People v. Fosselman* (1983) 33 Cal.3d 572, our Supreme Court held that section 1181 should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law. The *Fosselman* court stated that “trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them,” and concluded that “in appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel’s effectiveness to the trial court as the basis of a motion for new trial.” (*Id.* at pp. 582 -583; see also *People v. Callahan* (2004) 124 Cal.App.4th 198, 209 [“[a]lthough ineffective assistance of counsel is not among the grounds enumerated for ordering a new trial under Penal Code section 1181, motions alleging ineffective assistance are permitted pursuant to ‘the constitutional duty of trial courts to ensure that defendants be accorded due process of law’ ”].) We review the denial of a motion for a new trial de novo when claimed errors of constitutional magnitude such as IAC are at stake (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225 & fn. 7; see also *People v. Ault* (2004) 33 Cal.4th 1250, 1260-1262), although we must defer to the trial court’s express or implied findings if supported by substantial evidence. (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 224-225; see also *People v. Taylor* (1984) 162 Cal.App.3d 720, 724.)

A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show not only that his or her counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms but also that it is reasonably probable, but for counsel’s failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *In re Jones* (1996) 13 Cal.4th 552, 561.) “ ‘The burden of sustaining a charge

of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.’ ” (*People v. Karis* (1988) 46 Cal.3d 612, 656.) There is a presumption the challenged action “ ‘might be considered sound trial strategy’ ” under the circumstances. (*Strickland v. Washington, supra*, 466 U.S. at p. 689; accord *People v. Dennis* (1998) 17 Cal.4th 468, 541.) On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel’s challenged act or omission. (See, e.g., *People v. Lucas* (1995) 12 Cal.4th 415, 442; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058.)

B. Analysis

Defendant’s IAC claim is premised upon trial counsel’s failure to conduct an adequate investigation of the defense presented at trial. Specifically, defendant asserts trial counsel was ineffective because (1) her investigation failed to discover evidence that would have corroborated defense witness John Ebling’s trial testimony regarding his identification of the yellow backpack and his inheritance of the handguns he fired on the day in question; (2) she failed to locate and call several witnesses who would have corroborated John’s testimony, in particular, “Steven,” the registered owner of the blue Honda for sale, defendant’s “female friend” who purportedly drove him back to John’s house to pick up the car, and Gary (John’s brother), the owner of the .40 revolver that John fired at Collingsville on the day in question. Defendant’s claims are unavailing.

With respect to counsel’s efforts to locate the backpack, trial counsel testified that based on her assumption that the backpack had been booked into evidence, she instructed her investigator to go to the police station to examine and take photographs of the backpack. When the investigator went to the police station, he learned that the backpack had not been booked into evidence and must have been left inside the towed vehicle. Her investigator then went to the yard to locate the towed vehicle but the vehicle was “already gone.” On these facts, we conclude that trial counsel’s efforts to locate the

backpack prior to trial did not fall below an objective standard of reasonableness.⁵ Because defendant cannot show trial counsel's efforts to locate the backpack were objectively unreasonable, his IAC claim fails. (*Strickland, supra*, 466 U.S. at p. 697 [there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one].)

Similarly, no IAC lies on account of counsel's failure to call the Honda owner and defendant's "female friend." At the new trial hearing, trial counsel testified she knew the person defendant referred to as "Steven" was the registered owner of the vehicle driven by defendant but she did not contact him. Counsel was not asked and did not volunteer why she opted not to contact Stephen. Counsel may have decided not to contact Steven on tactical grounds, because she considered the issue of the registered owner of the car was not relevant to the issues to be decided at trial, or because she did not want to call further attention to the fact that defendant was driving on a suspended license in a vehicle not registered to him. In any event, the presence of rational tactical explanations for counsel's conduct supports our rejection of defendant's IAC claim on this ground. (Cf. *People v. Lucas, supra*, 12 Cal.4th at p. 442 [to prevail on IAC claim on direct appeal, record must demonstrate there could have been no rational tactical purpose for counsel's challenged act or omission].)

We also conclude that counsel cannot be faulted for failing to identify defendant's "female friend" who allegedly drove him back to John's residence to pick up the vehicle when John returned from Collingsville. On this point, counsel testified at the new trial hearing that she "must have" asked defendant whether someone dropped him off that day because she "was looking for more witnesses" and she always asks questions designed to jog the memory and test recollection. Counsel also testified that when she asked

⁵ Indeed, the reasonableness of trial counsel's efforts on this point are confirmed by the fact defendant's investigator on his post-trial motion, William Zerby, fared no better in his efforts to locate the backpack. In his declaration, Zerby states that when he "attempted to either locate or find out what happened to the backpack," he learned that the towing company in question does not inventory personal property left in towed vehicles and such property is left inside vehicles when they are sold for salvage.

defendant about how he got to John's residence to collect the car, defendant did not mention another person. Counsel stated she was "firm on that."⁶ The record clearly establishes that defendant's response to counsel's question impeded trial counsel's ability to identify the "female friend" who allegedly drove defendant back to John's house on the day in question. As importantly, defendant points to no evidence in support of his assertion that counsel's effort to identify the "female friend" was unreasonable. Accordingly, it cannot be said counsel's investigation on this point was objectively unreasonable. (Cf. *People v. Karis*, *supra*, 46 Cal.3d at p. 656 [defendant has the burden of sustaining a charge of inadequate or ineffective representation and the proof "must be a demonstrable reality and not a speculative matter"].)

Last, we consider defendant's claim of IAC based on trial counsel's failure to present Gary Ebling as a witness at trial. At the new trial hearing, trial counsel testified she saw no need to investigate in more detail John's claim that he and his brothers had recently inherited firearms from their father, including a .40 caliber handgun inherited by his brother Gary, and that she never contacted Gary because she was "content with John's responses when I asked him questions about the day [in question]." Defendant argues that counsel's failure to call Gary undermined the credibility of John's trial testimony that he fired a .40 caliber gun "borrowed" from his brother Gary. Defendant asserts that the significance of Gary's corroborative testimony is illustrated by the question the court asked of John whether Gary "lives here in town" and the prosecutor's follow up question, "[Why can't Gary] come and tell us about this .40 caliber gun?"

However, even assuming counsel's decision to rely solely on John's testimony on this point was objectively unreasonable, defendant cannot demonstrate prejudice. Patently, John's credibility was seriously undermined because he provided two signed

⁶ Indeed, the only basis in the record for the existence of defendant's "female friend" is a statement in the declaration of William Zerby (defendant's investigator on the new trial motion) that, "[Trial counsel] told me that she never interviewed the defendant's female friend who drove the defendant to pick up the blue Honda on February 2, 2010." Tellingly, in his declaration in support of a new trial, defendant does not identify the "female friend" or allege counsel failed to interview her.

and sworn affidavits, presenting conflicting evidence regarding the caliber of the bullet in the backpack—the first stating it was a .45 caliber bullet, and a second stating it was a .40 caliber bullet in the backpack. Moreover, subsequent investigation into the ownership of the handgun by defense investigator Zerby revealed the handgun owned by Gary was not in fact a .40 caliber handgun and was incapable of firing the .40 bullet found in the backpack.⁷ Thus, the fruits of the defendant’s post-trial investigation would only have served to further discredit John’s credibility in light of his trial testimony that one of the handguns he fired on the day in question was a .40 caliber capable of firing the type of bullet subsequently recovered in the yellow backpack. Nor does investigator Zerby’s discovery, post trial, that John had three .40 caliber bullets at his home establish prejudice. In his declaration, Zerby states that John “showed me three other .40 caliber bullets” but he does not identify John’s bullets as Winchester .40 caliber, hollow point bullets of the type found in the backpack. Furthermore, the inventory of firearms included as an exhibit in defendant’s new trial motion shows that the only ammunition inherited by John was a single clip of .22 caliber ammunition. Accordingly, the inventory would not serve to corroborate John’s testimony regarding his ownership of the .40 caliber bullet at issue.⁸ Thus, even if counsel’s efforts to corroborate John’s testimony were inadequate on the points discussed, it is not reasonably probable that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington*, 466 U.S. at p. 694.) In sum, we conclude defendant has failed to establish that counsel’s trial preparations amounted to

⁷ In his declaration, William Zerby, defense investigator on the new trial motion, states the handgun in question is a Forehand & Wadsworth British Bulldog, that this company never produced a .40 caliber handgun, and that the Forehand & Wadsworth pistol was incapable of firing the round found in the backpack.

⁸ The inventory is set forth in a letter from estate attorneys to the Solano County Sheriff’s Department listing the firearms for distribution to John and Gary. The only ammunition listed for distribution to John is “1 clip for Inv # 18,” where “Inv # 18” is identified as “Jennings Firearms J-22 .22 caliber SN 339560.” No ammunition is listed for distribution to Gary.

constitutional ineffective assistance of counsel. Thus, the trial court did not err by denying his motion for a new trial.

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.