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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re D.W., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.W.,

Defendant and Appellant.

A133123

(Alameda County  
Super. Ct. No. SJ11017210-01)

**INTRODUCTION**

A man driving a rental car, looking to buy marijuana in the middle of the night in East Oakland, had his car and belongings stolen at gun point by the minor, a would-be drug peddler. About an hour later, the robbery victim identified minor D.W. as the robber at an in-field show up held within view of the stolen car. At the jurisdictional hearing, the court found the petition true, even though the robbery victim recanted his identification. On appeal, the minor asserts (1) his attorney rendered ineffective assistance of counsel by failing to bring a motion to suppress the in-field identification, and (2) the evidence was insufficient to support the court's finding. We will affirm because counsel was not ineffective for failing to bring a nonmeritorious motion, and the jurisdictional finding is amply supported by substantial evidence.

## **PROCEDURAL HISTORY**

In June of 2011, a juvenile wardship petition under Welfare and Institutions Code section 602 was filed in the Alameda County Superior Court alleging that the minor, D.W., had robbed Victor P. (P.), of a Dodge Charger, an iPhone, a wallet and keys and had personally used a firearm to do so. (Pen. Code, §§ 211, 12022.53, subd. (b).) Following a contested jurisdictional hearing, the court sustained the petition in its entirety. At the disposition hearing in August of 2011, the court adjudged the minor a ward of the court and granted him probation with placement at Camp Wilmont Sweeney. The minor timely appeals.

## **STATEMENT OF FACTS**

On June 21, 2011, at 3:00 a.m., P. was robbed at gun point by a person he identified as the minor D.W. after an in-field show up later that morning. At the jurisdictional hearing, however, he insisted D.W. was not the person who robbed him. He had described the robber to police as about 25 years old, 5'11" tall, 185 pounds, and wearing a "low-box fade" or "Afro-fade" hairdo. At trial, D.W. did not appear as old or as dark skinned as the robber, the robber's hair was longer and rounder than D.W.'s, and D.W. appeared "a little bigger" than the robber. Although P. believed at the time of the show up that D.W. was the robber, he testified he was actually more focused at the time on getting the rental car back and recovering his other property. P. did not want to press charges, but he could not give a reason why not.

### **The Events Leading Up To The In-Field Identification**

At approximately 2:55 a.m. on June 21, 2011, P. drove from his home in East Oakland to 73rd Avenue in East Oakland in a rented Dodge Charger, "looking for some marijuana." At 73rd Avenue and Orral Street, P. stopped and asked a man standing in the street, through the open passenger window, if he had any "grapes," meaning marijuana. The person said he had none on him, but he had some at a house on 64th Avenue and Foothill, about one-half to three-quarters of a mile away. P. gave the person a ride to that location "to get the grapes."

Near the intersection of 64th Avenue and Foothill, P. turned towards the passenger to ask, "What building?" P.'s passenger was pointing a gun at P.'s torso. The robber demanded, "Give me everything," adding: "Don't do anything or I will shoot you in the leg." P. turned over his iPhone, his wallet, and his possession of the car.

P. memorized the license plate number of the car and called 911 from a pay phone on 67th Avenue and Foothill. The police responded in seven to 10 minutes, and P. described the car and recited the license plate number. He told police he could track his phone's whereabouts via G.P.S. through a computer. The police would not let him access their computer. P. walked to his house after signing a statement. P. refused the officer's offer of a ride home, and did not tell the officer where he lived because he "did not want it to become public information."

At home, P. logged onto his computer to track the location of his phone and discovered it in at least five different places. He phoned the police to tell them of the locations, and met with them in person on 67th Avenue about 20 minutes later. Approximately an hour after the robbery, the police officers transported P. in a police car to a location on Dashwood Street. Before taking him anywhere, the police told P. they were going to take him to the location of his vehicle for a "field I.D."

At the Dashwood location, P. saw the Dodge Charger parked on the street, about four car lengths in front of the police car he was in. Police officers brought D.W. out of one of the police cars parked nearby and stood him in the street, handcuffed. P. was asked if he could make an identification. From his position in the rear seat of the police car, looking through a cage or screen at the suspect, who was standing 18 feet away, P. identified D.W. as the robber. After he made the identification, the police showed him the keys and iPhone taken in the robbery.

Oakland Police Officer Brian Kline responded to P.'s initial call at approximately 3:00 a.m. and met him in the 6600 block of Foothill Avenue. Kline confirmed that he did not allow P. to use the police computer to track his phone. About half an hour to an hour later, dispatch advised Kline that P. had called, and Kline called him back. Kline drove to the locations P. had given him. As he was driving north on Dashwood, he saw that the

Dodge Charger “was pulled over to the left curb, . . . and I saw a gentleman get out of the car.”

Kline detained the gentleman at gun point until assisting Officer Keating arrived on the scene, handcuffed and searched D.W., then placed D.W. in Officer Kline’s patrol car. Keating found a car key in D.W.’s right front pocket and an iPhone. Meanwhile, Officer Kline found a wallet and a set of keys in the Dodge Charger. At approximately 4:00 a.m., Keating and another officer drove to the 6700 block of Avenal, picked up P., and returned with him to Dashwood for an in-field show up.

After the officers arrived with P., Kline removed D.W. from his patrol car and placed him about 20 feet in front of Keating’s patrol car, in which P. was seated. D.W. was illuminated by the overhead lights and the spotlights of Officer Keating’s patrol car. As soon as Officer Kline pulled D.W. out of the police car and brought him up, P. said, “Yes, that’s him.” P. was “positive” that it was the minor who robbed him. After P. identified D.W., Officer Keating returned P.’s belongings to him.

### *The Defense*

L.W. (L.) testified that he and D.W. were playing video games at L.’s house into the early morning hours of June 21, 2011. They had been playing video games for “a couple of hours.” At some point, D.W. and L.’s brother went outside to get L.’s phone from his car. About five minutes later, L.’s brother returned and said the police were “surrounding” D.W. with their guns drawn.

## **DISCUSSION**

### **I. The Record Does Not Demonstrate That Trial Counsel’s Failure To File A Motion To Suppress P.’s Pretrial Identification Was The Result Of Ineffective Assistance Of Counsel.**

Minor D.W. argues that his attorney’s failure to seek exclusion of P.’s in-field identification of him as the robber constituted ineffective assistance of counsel. We disagree because, as we explain below, such a motion would have been properly denied. Counsel’s decision to forego making a meritless motion was well within the range of reasonable representation expected of a competent criminal defense attorney.

### **A. Principles Governing Ineffective Assistance Of Counsel Claims**

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92–93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 693–694 (*Strickland*).) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Hart* (1999) 20 Cal.4th 546, 624 (*Hart*).)

“Judicial scrutiny of counsel’s performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. . . .” (*Strickland, supra*, 466 U.S. at p. 689.) For that reason, “ ‘[t]actical errors are generally not deemed reversible; and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” ’ ” (*Hart, supra*, 20 Cal.4th at pp. 623–624.) To demonstrate that counsel’s failure to make a suppression motion was the product of incompetence, the defendant must show that the motion would have been meritorious and that there is a reasonable probability that the verdict would have been different absent the excluded evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 576.)

### **B. Principles Governing Pretrial Identification Procedures**

We apply the following principles governing the admissibility of eyewitness identifications to the question whether a motion to suppress P.’s in-field identification of the minor as the robber would have been meritorious. The minor bore the burden below

of showing an unreliable identification procedure. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412 (*Ochoa*)). “ ‘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 . . . . 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.] In other words, ‘[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.’ [Citation.]” (*Id.* at p. 412; see also *People v. Kennedy* (2005) 36 Cal.4th 595, 608 (*Kennedy*), overruled on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

### **C. Standards Of Review**

A claim of ineffective assistance of counsel presents a mixed question of law and fact, which we review de novo. (*In re Alcox* (2006) 137 Cal.App.4th 657, 664.)

It remains unsettled whether the suggestiveness of a pretrial identification procedure is a question of fact subject to deferential review or a mixed question of law and fact subject to de novo review. (*Kennedy, supra*, 36 Cal.4th at p. 608.) We will independently review the issue of suggestiveness. However, in resolving any factual conflicts regarding the identification procedures actually used in this case, we defer to the trial court’s findings, express or implied, as long as they are supported by substantial evidence. (See *People v. Waidla* (2000) 22 Cal.4th 690, 730.) In determining whether a given identification procedure was unduly suggestive, we look to the totality of the circumstances. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 788.)

### **D. The In-Field Identification Was Not Unduly Suggestive Or Unnecessary**

The minor argues P.’s identification of him an hour or so after the offense, at a spot where the Dodge Charger was also clearly visible to P., was unduly suggestive and unnecessary. He emphasizes that because a single-person show up is inherently suggestive (*People v. Odom* (1980) 108 Cal.App.3d 100, 110), “care must be taken to avoid undue suggestivity [sic].” This duty of care, he argues, required the police officers

to remove the minor “some slight distance so the car was not visible at the same time.” We disagree.

A single-person show up is not inherently unfair. (*Ochoa, supra*, 19 Cal.4th at p. 413.) Prompt identification of a suspect close to the time and place of the offense serves a legitimate purpose in quickly ruling out innocent suspects and apprehending the guilty. (*People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219.) Such identifications are likely to be more accurate than a more belated identification. (*Ibid.*) Here, an immediate show up would have allowed officers to pursue other suspects in the event that P. exonerated the minor. The show up made sense and was a necessary component of the police investigation.

“ ‘A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.’ [Citation.]” (*Ochoa, supra*, 19 Cal.4th at p. 413.) Whether an identification procedure is suggestive depends upon the procedure used, as well as the circumstances in which the identification takes place. In this case, there is no evidence that Officer Keating at any time suggested to P. that he was about to view the robber. On the contrary, Officer Keating testified he told P. that the “person detained . . . may or may not be the person who stole his vehicle.” P., himself, admitted the police told him that the person he would see might or might not be the robber.

The location of the Dodge Charger did not make the show up unduly suggestive in this case. The success of the investigation hinged on finding the iPhone. The fact that P. was able to track the phone in a short period of time to no fewer than five locations made it highly likely—even before he saw the Dodge Charger parked on Dashwood—that the phone was still in the car. Furthermore, the officers told P. they were going to take him to the location of his car for a “field I.D.,” but warned him that the person they detained might or might not be the same person who stole the car.

Other details of the show up that the minor argues were unduly suggestive—the handcuffing and the illumination with spotlights—seem inherent in any night time show up. Viewing the totality of the circumstances, the in-field identification procedure used

here was not unduly suggestive. (Cf. *People v. Gomez* (1976) 63 Cal.App.3d 328, 335–337, [one person show up was permissible notwithstanding that victim was told there was a suspect the police wanted her to look at, that the defendant was standing outside a patrol car, handcuffed, with two officers, and that victim volunteered her identification before being admonished].)

The minor further argues P.’s identification was unreliable because P. had a poor opportunity to view the perpetrator, his attention during the show up was more focused on recovering his belongings than making an identification, and his description of the perpetrator was less than accurate. However, in light of our conclusion the in-field show up was not impermissibly suggestive, we need not decide whether P.’s identification of the minor during the show up was “ ‘nevertheless reliable under the totality of the circumstances.’ ” (*Ochoa, supra*, 19 Cal.4th at p. 412.) As we stated earlier, “ ‘[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.’ [Citation.]” (*Ibid.*) Thus, even if defense counsel had brought a suppression motion, the trial court would have been correct to deny it. Trial counsel cannot be found ineffective for failing to file an unmeritorious motion.

## **II. Substantial Evidence Supports The Trial Court’s Finding**

The minor contends that the evidence of a repudiated pretrial identification together with possession of recently stolen property is insufficient to support a finding of guilt beyond a reasonable doubt in the absence of corroboration. We disagree.

In considering a sufficiency of the evidence claim in juvenile delinquency proceedings, this court applies the same standard of review that is applicable in criminal cases. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808–809.) Thus, this “court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

As the minor acknowledges in his reply brief, an out-of-court identification does not require any special corroboration to support a criminal conviction (or juvenile adjudication). (*People v. Cuevas* (1995) 12 Cal.4th 252, 257, overruling *People v. Gould* (1960) 54 Cal.2d 621.) He argues, however, the circumstances surrounding the identification were unduly suggestive, and the identification was unreliable. He also argues that the evidence “fully supports the inference that [the minor] may well have been walking past the curb when he saw the telephone and car key, and entered the car solely to remove the items.” Even if that were so, it would not empower us to overturn the juvenile court’s finding.

The trier of fact heard the evidence about P.’s description of the robber, the circumstances surrounding the identification, and the minor’s proximity to the stolen car prior to his detention. The evidence of the minor’s involvement was strong. The court also observed P.’s demeanor under cross-examination about the reasons he did not want to press charges and could not identify the minor in court. The juvenile court made credibility determinations and drew rational inferences from the evidence that amply support its finding that the minor robbed P. of his car, iPhone, wallet and keys.

### **CONCLUSION**

Trial counsel did not render ineffective assistance of counsel by failing to move to suppress P.’s pretrial identification of the minor as unduly suggestive and unnecessary. Substantial evidence supports the juvenile court’s jurisdictional finding.

**DISPOSITION**

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Dondero, J.