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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.

DANIEL LEONARD,

Defendant and Appellant.

A133510

(Alameda County  
Super. Ct. No. CH50412)

Daniel Leonard appeals his conviction for first degree residential burglary, contending that the trial court gave an erroneous jury instruction with respect to the evaluation of eyewitness identification and that his counsel rendered ineffective assistance in failing to request a clarifying instruction. We shall affirm.

**Factual and Procedural History**

There was trial testimony of the following. On December 17, 2010, at approximately 6:00 p.m., Jorge Villalvazo heard the sound of broken glass outside his home on Blanco Street in San Leandro. Looking out the window, he observed two people near his neighbor's house, one of whom was climbing through a window. Both persons wore hoodies; he could not ascertain their gender. One of the hoodies was gray or black. Villalvazo promptly called 911.

Alameda County Deputy Sheriff Matthew Skidgel received a dispatch concerning an in-progress burglary. He drove to the house and parked approximately 100 feet south of the address. Skidgel observed two suspects emerge from the residence and he walked toward the suspects quickly. Both suspects appeared to be carrying items.

As Skidgel approached, the suspects appeared startled and dropped the items they had been carrying. Skidgel drew his weapon, activating the flashlight attached to the weapon, illuminating the suspects. As one suspect turned and ran, Skidgel focused on the suspect who remained. The flashlight illuminated the suspect from his upper thighs to his head. The deputy was about 30 feet from the suspect. Skidgel viewed his face for “less than five seconds,” but determined that his expression was “[v]ery shocked, mouth open, eyes wide open. Surprised.” Skidgel described the suspect as 5 feet 10 inches, possibly 210 pounds and wearing a black hooded sweatshirt with the hood pulled over his head. The suspect retreated and ran from Skidgel. Skidgel broadcast a description of the suspect: a Black male with a light complexion, about six feet tall, medium build, wearing dark clothing, and possibly a black-colored sweatshirt.

Deputy Patrick Kerns also responded to the 911 call. Kerns saw two Black males in dark clothing carrying items and walking from the front of the house. He did not see either of their faces before losing sight of them.

After hearing Skidgel’s description of the suspects, two other police officers spotted defendant approximately a quarter-mile from the crime scene. Defendant matched the description provided over the dispatch system. The two officers approached defendant, who gave the officers a glancing look and did not attempt to flee or resist. The deputies arrested defendant and placed him in handcuffs. Although the evening was cold and rainy, defendant was drenched in sweat and steam was emitting from him. Defendant had an elevated pulse. One of the arresting officers announced over the radio that they had detained a suspect and requested the presence of Skidgel. The officer also announced that the suspect had been running and was not wearing the black sweatshirt, having possibly discarded it. Skidgel arrived at the scene about seven minutes later and identified defendant as the suspect. Skidgel said he was 100 percent sure that defendant was the burglar.

Defendant was charged by information with first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a))<sup>1</sup> and a prior prison term pursuant to section 667.5, subdivision (b). The defense relied exclusively on expert testimony from experimental psychologist Dr. Robert Shomer. Dr. Shomer testified concerning the factors that affect eyewitness testimony and the unreliability of eyewitness certainty as a predictor of accurate identification.

The jury found defendant guilty as charged. The court found the prior prison enhancement to be true but stayed the enhancement when sentencing defendant to four years in prison for the burglary. Defendant filed a timely notice of appeal.

### **Discussion**

#### **I. *Jury Instruction***

Utilizing CALCRIM No. 315, the court instructed the jury on evaluating eyewitness testimony as follows: “You’ve heard eyewitness testimony identifying the defendant. As with other witness, you must decide whether an eyewitness gave truthful and accurate testimony. In evaluating identification testimony, consider the following questions: Did the witness know or have contact with the defendant before the event? How well could the witness see the perpetrator? What were the circumstances affecting the witness’s ability to observe, such as lighting, weather conditions, obstructions, distance and length of time to make the observation? How closely was the witness paying attention? Was the witness under stress when he or she made the observation? Did the witness give a description, and how does that description compare to the defendant? How much time passed between the event and the time when the witness identified the defendant? Was the witness asked to pick the perpetrator out of the group? Did the witness ever fail to identify the defendant? Did the witness ever change his or her mind about the identification? *How certain was the witness when he made an identification?* Are the witness and the defendant of different races? Were there any other circumstances affecting the witness’s ability to make an accurate identification?” (Italics added.)

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

Defendant contends the trial court erred in instructing that witness certainty is indicative of accurate eyewitness identification. Defendant argues that this part of the instruction violated his right to due process because it was “predicated on a proposition which has been established to be empirically false, and recognized as such by numerous courts and judges.” In evaluating a claim of instructional error, the reviewing court must consider whether there is a reasonable likelihood of misapplication by evaluating the whole record, including the instructions in their entirety and the arguments that counsel presented to the jury. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4; *People v. Kelly* (1992) 1 Cal.4th 495, 526-527.) “The only question for us is ‘whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.’ ” (*Estelle, supra*, at p. 72.) “It is well established that the instruction ‘may not be judged in artificial isolation,’ but must be considered in the context of the instructions as a whole and the trial record.” (*Ibid.*)

The jury instruction here set forth a multitude of factors that the jury might consider in evaluating the accuracy of the eyewitness testimony. Dr. Shomer’s testimony emphasized the need to consider factors other than the witness’s certainty, most of which were included in the non-exclusive list of factors included in the jury instruction. The instruction did not require the jury to find that an eyewitness who is certain is necessarily correct. The jury was instructed to weigh the different factors as it deemed appropriate.

Defendant contends the instruction fundamentally discredited his case, which relied exclusively on Dr. Shomer’s testimony that witness certainty is not indicative of the reliability of an identification. The prosecutor used the jury instruction to discredit Dr. Shomer’s testimony.<sup>2</sup> However, the prosecutor did not argue that the jury should

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<sup>2</sup> The prosecutor argued: “The eleventh question that is asked is: How certain was the witness when he or she made an identification? Deputy Skidgel again was very, very, very certain about his identification. He testified that he immediately recognized the defendant based upon the defendant’s face when he initially saw him in Lieutenant Hesselein’s custody. . . . When asked in court whether he had any doubt the defendant was the same man, he said no. There’s no doubt in his mind that the defendant was the individual that he saw and confronted in the front of [the victim’s] home.” “Dr. Shomer’s

completely disregard Shomer's testimony, but that certainty is a relevant factor despite the testimony of Dr. Shomer. Dr. Shomer did not testify that the certainty of a witness has no bearing on the reliability of an identification, but that a witness's certainty is not a reliable indicator of accuracy under less than ideal conditions. The jury was not bound by the instruction to either accept or reject Dr. Shomer's testimony. In view of Dr. Shomer's testimony, the jury was free to give that factor little or no weight. The court instructed jurors to "consider the expert's testimony and give it whatever weight you believe it is due. The meaning and importance of such testimony is for you to decide." The inclusion of certainty as one factor to consider did not instruct the jury to disregard or to minimize the significance of Dr. Shomer's testimony. There was no error in giving the instruction.

## II. *Inadequate Representation*

"A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) "Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to effective assistance." ' ' ( *People v. Ledesma* (1987) 43 Cal.3d 171, 215, italics deleted.) The defendant has the burden of demonstrating ineffective assistance of counsel. ( *People v. Maury* (2003) 30 Cal. 4th 342, 389.) " "[A] defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness ... under prevailing professional norms." ' ' ( *In re Harris* (1993) 5 Cal.4th 813, 832-833, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-88 and *People v. Pope* (1979) 23 Cal.3d 412, 425.) Secondly, a defendant must establish "prejudice flowing from counsel's performance or lack thereof."

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response was that certainty correlates with accuracy only when the identification procedure is done, quote, under ideal conditions. He specifically stated that certainty cannot apply to show-ups because show-ups are inherently suggestive. [¶] Well, ladies and gentlemen, that conflicts with the instruction that you were just given by Judge Gaffey. And this is one of the 13 factors for witness identification and I will quote it directly, and the question is, quote, how certain was the witness when he or she made an identification, unquote. That's all it is. When you get the instructions when you go back to deliberate, you can look at it. That's all it says."

(*In re Harris, supra*, at p. 832.) A defendant is prejudiced when there is a “ ‘ “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” ’ ’ ” (*In re Harris, supra*, at p. 833.)

Defendant contends trial counsel was ineffective for failing to request an instruction specifically advising the jury that witness confidence may not be an indicator of the accuracy of an identification. Although there is increasing recognition of the potential unreliability of an eyewitness’s identification, the law in California is that an additional instruction to view eyewitness testimony with caution would improperly single out testimony as suspect. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1296.) “The requested cautionary instruction would . . . improperly usurp the jury’s role as the exclusive trier of fact by binding it to the view that eyewitness identifications are often mistaken.” (*People v. Wright* (1988) 45 Cal.3d 1126, 1153.) Rather than objecting to the instruction, defendant’s counsel attacked Deputy Skidgel’s certainty by presenting expert testimony that eyewitness certainty is not indicative of accurate identification and by emphasizing other factors that tended to cast doubt on his ability to make an accurate identification—such as his distance from the suspect and the darkness of the evening. Under the circumstances we cannot conclude that counsel’s performance fell below the standard to be expected of trial counsel. Moreover, even if the attorney’s failure to request such an instruction was deficient, defendant fails to show prejudice. Under the current state of the law, it is unlikely that the instruction would or should have been given even if requested. And if it had, it is not likely to have produced a different outcome. Defense counsel pointed out to the jury all of the reasons to reject Skidgel’s identification. The jury instructions directed jurors to consider numerous factors other than the witness’s certainty which bore upon the reliability of the identification. Significantly, the identification was made minutes after Skidgel observed the suspect. Moreover, defendant was apprehended while apparently fleeing the scene and there is no indication of other persons being present, which might have led to apprehension of the

wrong person. Thus, defendant has failed to demonstrate either element necessary to establish ineffective assistance of counsel.

**Disposition**

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Siggins, J.