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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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

THE PEOPLE,

Plaintiff and Respondent,

v.

C.W.,

Defendant and Appellant.

A143710

(Alameda County  
Super. Ct. No. SJ13021595)

This is an appeal from the dispositional order entered in juvenile delinquency proceedings involving minor C.W. after the juvenile court found that he committed a robbery. Minor's primary challenge relates to the admission of evidence from a field identification procedure during which the victim named him as the perpetrator of the crime. According to minor, the identification procedure employed by the police was overly suggestive and unreliable based upon a totality of the circumstances, requiring suppression of the evidence produced by it. Alternatively, minor contends his defense counsel rendered ineffective assistance by failing to properly move to suppress this evidence, and that the evidence, in any event, was insufficient to support his commission of the charged offense. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On August 6, 2014, a juvenile wardship petition was filed pursuant to Welfare and Institutions Code section 602, alleging that minor, age 13, committed the offense of robbery (hereinafter, petition).<sup>1</sup> A contested jurisdictional hearing began on August 27, 2014, at which the following evidence was disclosed.

On August 4, 2014, at around 6:20 p.m., the victim, V.T., age 17, was walking on Buena Vista Avenue in Alameda, when he noticed four African-American boys riding behind him on bicycles. The boys asked the victim whether he intended to pass them, and the victim, suspicious of their intentions, let them pass. Three of the boys then dismounted from their bicycles, while one of them, later identified as co-responsible, J.J., proceeded to grab the victim and throw him to the ground. While the victim was pinned down on the ground, another boy, later identified as minor, searched the victim's pockets, removing and taking his iPod.

Within about ten seconds, the boys allowed the victim to stand up. The victim, who was about five feet away from the boys, saw that J.J. was now holding his iPod. The victim pleaded with the boys to return his iPod, offering to instead give them the money in his wallet, which totaled about \$45. Once the victim removed this money from his wallet, J.J. took it and returned the iPod. The four boys then rode off on their bicycles. The entire event took only about one minute.

An unidentified person called 911, and Officer Cameron Miele was dispatched to the corner of Buena Vista and Everett Street at around 6:20 p.m. The victim described the perpetrators as young African-American males with short afro haircuts wearing black hooded sweatshirts over red and blue t-shirts, respectively. He estimated the boys' ages as between 16 and 18, and minor's height as about five feet six inches.

Just minutes later, Officer Miele drove to the Valero gas station, about one block away, after hearing from another officer that four young males similar in appearance to

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<sup>1</sup> Unless otherwise stated, all statutory citations herein are to the Welfare and Institutions Code.

the victim's descriptions had been seen there. After Officer Miele left his police vehicle, he noticed J.J. hiding in the parking lot behind a dumpster, appearing "out of breath" and "very scared." After directing another officer to monitor J.J. so that he could return to the victim to arrange an identification, Officer Miele noticed a second young male matching the suspects' description — to wit, minor, wearing a blue T-shirt (but no hooded sweatshirt) and appearing sweaty, out of breath and "surprised." Neither boy was found in possession of money or a bicycle.

Leaving minor and J.J. with his colleague, Officer Miele left to retrieve the victim, returning with him just minutes later (to wit, within five to ten minutes of the robbery). Officer Miele asked the victim whether he would participate in an in-field identification procedure and, after the victim agreed, admonished him to, among other things, "keep an open mind," as the individuals may or may not be the boys who robbed him.<sup>2</sup> The victim, seated in the police car, viewed J.J. and minor, one at a time, from about 50 feet away. During this procedure both minor and J.J. were handcuffed, with one standing next to the gas pumps and the other standing next to the store. According to Officer Miele, the victim "immediate[ly]" identified both boys as the perpetrators of the robbery based on their clothing, facial characteristics and hair.

The victim testified at the jurisdictional hearing, and again identified minor as one of the perpetrators of the robbery. In doing so, the victim acknowledged minor's hair was cut shorter than it had been on the day of the robbery. In addition, the evidence admitted at trial established minor was five feet ten inches and 13 years-old, rather than five feet six inches and between 16 and 18 years-old, as the victim had surmised when interviewed by police.

Following the contested jurisdictional hearing, the juvenile court found true the allegation that minor committed robbery. A dispositional hearing was then held on October 7, 2014, after which the juvenile court continued minor as a ward of the court,

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<sup>2</sup> The victim testified that he did not recall receiving an admonishment from the officer prior to the identification procedure.

and ordered his out-of-home placement subject to various terms and conditions. Minor timely appealed.

## **DISCUSSION**

Minor raises the following issues on appeal. First, minor contends the evidence produced from the victim's in-field identification should have been suppressed because the procedure utilized by police was unduly suggestive and otherwise unreliable under a totality of the circumstances. Second, minor argues in the alternative that, should this court determine defense counsel forfeited his right to challenge the admissibility of this evidence for failing to file a timely motion to suppress below, we should deem his attorney's failure ineffective assistance within the meaning of the Sixth Amendment of the U.S. Constitution and article I, section 15 of the California Constitution. Finally, minor contends that, in any event, there was insufficient evidence to support the juvenile court's ultimate finding that he committed robbery. We address each issue below as appropriate.

### **I. Failure to Suppress Evidence from the Victim's In-Field Identification.**

The legal standards governing minor's first challenge are well-established. Minor contends the evidence from the victim's in-field identification should have been suppressed by the juvenile court because the procedure employed by police was unduly suggestive and otherwise unreliable under the totality of the circumstances. On appeal, we independently review a lower court's decision to admit such evidence to determine whether the procedure was unduly suggestive. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942; *People v. Kennedy* (2005) 36 Cal.4th 595, 608-609, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) The appellant then has the burden to show on appeal that the identification procedure was unreliable under a totality of the circumstances. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) Thus, "[t]he 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.' (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242 [270 Cal.Rptr. 451, 792 P.2d 251].) In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' (*United States v. Bagley* (9th Cir. 1985) 772 F.2d 482, 492.)" (*People v. Ochoa, supra*, 19 Cal.4th at p. 412.)

We thus turn first to the issue of whether the identification procedure was unduly suggestive. " 'A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.' [Citation.]" (*People v. Ochoa, supra*, 19 Cal.4th at p. 413.) "Moreover, there must be a 'substantial likelihood of irreparable misidentification' under the ' ' "totality of the circumstances" ' ' ' to warrant reversal of a conviction on this ground. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 990.)

Here, minor's claim of undue suggestiveness is based upon the fact that minor and his co-responsible, J.J., were jointly presented to the victim during the identification procedure and that, at the time, both boys were handcuffed. According to minor, this procedure was unduly suggestive because it amounted to a "one-person showup," which is, by its nature, suggestive in that only the suspects (and no third parties) were presented, and because the suspects were presented together. In making this claim, minor acknowledges California Supreme Court authority holding that one-person show-ups may in fact be appropriate if, under the totality of circumstances, there is no unfairness demonstrated. (*People v. Clark* (1992) 3 Cal.4th 41, 136 ["a one- person showup or corporeal lineup, may pose a danger of suggestiveness, but such lineups or showups are not necessarily or inherently unfair. [Citations.] Rather, all the circumstances must be considered"].) Minor likewise acknowledges case law approving identification procedures where the defendant appeared for identification while in handcuffs. (E.g.,

*Stovall v. Denno* (1967) 388 U.S. 293, 296.) Thus, as this authority instructs, we must look more closely at the relevant facts to determine whether, based upon the totality of circumstances, the procedure employed against minor was fair. The following record is relevant.

Within ten minutes of the robbery, Officer Miele asked the victim to participate in an in-field lineup involving possible suspects. After the victim agreed, Officer Miele delivered an admonishment instructing the victim that a person's detention and participation in a lineup did not necessarily mean that person committed the crime and, in particular, to "keep an open mind." Officer Miele then drove the victim to a nearby gas station on Park Street, just blocks from the robbery, to view two detained suspects. Upon their arrival, the victim, seated in the police car about 50 feet from the suspects, "immediate[ly]" told the officer that minor and J.J., standing in handcuffs, one near the gas pumps and the other near the store, were the individuals who had robbed him. In particular, the victim told Officer Miele that he recognized minor's clothing, face, and hair, explaining at trial that he had a "good look" at minor during the robbery while he was being pinned on the ground and that during the identification procedure he "could see their face clearly."

Having considered these undisputed facts, we conclude reversal of the juvenile court's judgment on the basis of the chosen show-up procedure is unwarranted because the requisite "substantial likelihood of irreparable misidentification under the totality of the circumstances" does not exist. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 990 [internal quotation marks omitted].) Not only did the victim "immediate[ly]" identify minor, he later confirmed minor's identification at the hearing. Moreover, the victim specifically explained – to police on the day in question and to the court at the subsequent hearing – that he recognized minor's clothing and "facial features." Although minor was no longer wearing the black hooded sweatshirt that he had on during the robbery, he was still wearing the distinctive blue T-shirt that the victim had seen underneath the sweatshirt. Finally, the victim testified that he got a "good look" at minor

during the robbery, which occurred in broad daylight, when he was immobilized on the ground just five feet away from him.

In light of the victim's near certainty that minor was the perpetrator, the absence of any indication that the victim had trouble seeing minor during the robbery or the subsequent identification, and his recognition of minor's clothing and physical appearance, we conclude the identification procedure in this case was fair based upon the totality of circumstances. While minor correctly notes certain discrepancies or inaccuracies with respect to the victim's descriptions – to wit, those relating to minor's age (16 to 18 years-old rather than 13, as the victim surmised), his height (five feet six inches rather than five feet ten inches, as the victim surmised) and his hairstyle (shorter at the hearing than during the robbery) – these differences do not render the procedure constitutionally infirm. Rather, they go to the weight of the victim's testimony, a matter left to the sound discretion of the trier of fact. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1414.) Moreover, while the victim testified that he did not recall receiving an admonishment prior to the identification, Officer Miele testified that he did in fact provide the admonishment. The juvenile court was entitled to accept the officer's testimony, and to conclude the proper admonishment was delivered. (*People v. Panah* (2005) 35 Cal.4th 395, 489 [“uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable”].)

Accordingly, we conclude the challenged evidence was properly admitted. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222 [appellant must prove “unfairness as a demonstrable reality, not just speculation”]; see also *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [the mere fact that the defendant was handcuffed during a field identification does not establish the identification procedure was unduly suggestive].)

## **II. Effectiveness of Counsel.**

Our conclusion from above likewise defeats minor's alternative argument that his defense attorney rendered ineffective assistance by failing to properly move to suppress

the challenged evidence.<sup>3</sup> To prevail on a claim of ineffective assistance of counsel, the defendant must prove more than a failure by counsel to undertake a particular strategy or investigation. Rather, “defendant must show counsel’s performance fell below a standard of reasonable competence, and that prejudice resulted.” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) In meeting this standard, the defendant must overcome a strong presumption that counsel’s conduct was sound trial strategy or otherwise within the wide range of reasonable professional assistance. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 180; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1215.) Moreover, “prejudice” in this context occurs only where defense counsel’s deficient performance “ ‘so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” (*People v. Kipp* (1998) 18 Cal.4th 349, 366, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) If “a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel’s performance was deficient.” (*People v. Kipp, supra*, 18 Cal.4th at p. 366.)

Applying these principles to the facts at hand, we conclude minor’s argument necessarily fails. As mentioned above, regardless of whether defense counsel provided deficient legal assistance to a particular client, if “[the] defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel’s performance was deficient.” (*People v. Kipp, supra*, 18 Cal.4th at p. 366.) Thus, because, for the reasons identified above, we conclude there was no substantial likelihood in this case of irreparable misidentification under the totality of the circumstances, there is no basis for minor’s claim to have been prejudiced by his counsel’s failure to move to suppress. (*Strickland v. Washington, supra*, 466 U.S. at p. 694 [reversal is warranted only if appellant proves a reasonable probability that, but for counsel’s deficient performance, he would have achieved a different result].) Simply put, the identification procedure employed in this

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<sup>3</sup> We need not address for purposes of appeal the People’s argument that minor failed to properly preserve this issue for review.

case provides no basis for reversing the jurisdictional order, whether viewed for admissibility or effectiveness of assistance of counsel.

### **III. Substantial Evidence Identifying Minor as the Robbery’s Perpetrator.**

Finally, minor contends that, even if the identification evidence was properly admitted (we have concluded it was), the evidence in the record, considered as a whole, was insufficient to establish that he was the perpetrator of the robbery. The following legal principles apply.

“On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] ‘Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. “ ‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.’ ” [Citations.]’ [Citation.] “ ‘Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.’ ” ( *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

Here, the record, described at length above, provides substantial evidence in support of the juvenile court’s finding that minor was the person who committed the robbery in question. To briefly summarize, the victim twice identified minor as the perpetrator of the robbery — to wit, at the constitutionally-valid in-field showup, and again at the hearing. Specifically, the victim testified that, after co-responsible, J.J., pushed him to the ground and immobilized him, minor, dressed in a black hooded sweatshirt with a blue T-shirt underneath demanded and removed the victim’s iPod. Just minutes after this crime, Officer Miele located minor and J.J., mere blocks from the crime

scene, sweaty, out of breath and “look[ing] surprised.” At that time, although minor was no longer wearing a black hooded sweatshirt, carrying the cash, or riding a bicycle, his appearance reasonably matched the description of the suspect that the victim had given to police – to wit, a young, reasonably tall African-American male with a short afro haircut wearing a bright blue T-shirt. No further evidentiary showing was required. (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [“ ‘The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation omitted.] The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt’ ”]. See also *People v. Panah, supra*, 35 Cal.4th at p. 489 [“uncorroborated testimony of a single witness is sufficient to sustain a conviction”].) The juvenile court’s finding stands.

**DISPOSITION**

The juvenile court’s October 7, 2014 dispositional order is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.

*In re C.W.*, A143710