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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYANT KEITH BRIGGS,

Defendant and Appellant.

C064743

(Super. Ct. No. SF106351A)

A jury convicted defendant Bryant Keith Briggs of residential robbery (Pen. Code, § 211)<sup>1</sup>, residential burglary (§ 459), attempted murder (§§ 664/187), false imprisonment (§ 236), and possession of cocaine base for sale (Health & Saf. Code, § 11351.5). The jury further found true allegations that defendant personally inflicted great bodily injury on the victim and personally used a firearm in the commission of the offense. (§§ 12022.7, subd. (a), 12022.5, subd. (a).)

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<sup>1</sup> Statutory references are to the Penal Code, unless otherwise indicated.

After the trial court denied defendant's motion for new trial, it sentenced him to a term of 33 years and 8 months to life in prison.

Defendant argues: (1) the prosecutor's use of peremptory challenges to remove two prospective jurors was based on group bias, (2) there was insufficient evidence that he possessed crack cocaine, (3) the trial court erred in instructing the jury it could consider the witness's level of certainty in evaluating an eyewitness's identification, and (4) he received ineffective assistance of counsel.

We shall affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

At the time of the offenses, the victim, David Campbell, regularly got high, his drug of choice being crack cocaine. He went to the Jamestown Apartments because it was a gathering place for people to go to get and use drugs. On the date in question, he went to apartment 232 with Shonda Batson to get high and have sex. Campbell brought crack cocaine with him, which the two of them smoked.

After they smoked all of the crack he brought with him, they decided they wanted more. Campbell had no more money. Batson told Campbell she had some money and knew someone from whom she could buy drugs. She agreed to go get more drugs.

When Batson returned to the apartment, she had defendant with her. Campbell saw Batson give money to defendant and saw defendant give crack cocaine to Batson. Campbell was hazy on the specifics, but he remembered defendant saying something about money being owed and pointing to him (Campbell). Campbell told defendant he just wanted the dope.

Batson proceeded to smoke the dope she purchased, and did not give any to Campbell. Campbell decided to leave, and went out to the walkway outside the apartment. Defendant was on the walkway. He told Campbell that Campbell owed him money for the dope. Campbell said he hadn't smoked any of the dope, and owed him no money. Defendant told Campbell that they needed to go back into the apartment and talk

about it. About that time another man came up behind them, identified as Harvest Thomas, and Campbell felt surrounded. Campbell went back into apartment 232 with defendant and Thomas, because he felt there would be violence if he refused.

After the trio was inside the apartment and the door was closed, defendant and Thomas pulled guns on Campbell and demanded money. Thomas hit Campbell on the side of the head with his gun. Campbell opened his wallet to show that he had no money.

Defendant then demanded that Campbell take off his clothes. When Campbell had undressed, defendant told him to go outside. Campbell refused. Campbell, deciding to fight back, grabbed Thomas, threw him across the stair rail, and grabbed his gun. Campbell and Thomas struggled. Defendant dived on top of them and the three fell onto the couch. Defendant pointed his gun at Campbell and shot him in the head.

Campbell survived the gunshot wound. He was treated in the emergency room for a gunshot wound to the left temple. The bullet lodged in Campbell's neck. Blood tests indicated Campbell's blood alcohol level was 0.097, and his urine tested positive for cocaine.

Campbell picked defendant and Thomas out of separate photo lineups. When Campbell was shown defendant's photograph he stated "He's . . . the guy that shot me."

Law enforcement first searched Thomas's residence. One of the items seized was a cell phone. There were pictures in the cell phone of clear plastic baggies containing a substance, of clear plastic baggies containing money, and of an individual fanning money. Also, the address book of the cell phone contained the name Brian and a phone number that was previously defendant's phone number.

The next day, officers searched apartment 222 at the Jamestown Apartments, which belonged to defendant's mother. The search uncovered a repair receipt, in defendant's name for an automobile, and a mini scale.

Defendant was arrested in apartment 231 of the Jamestown Apartments, the apartment directly next door to the apartment where the shooting occurred. In a search

incident to the arrest, the officers found \$886 in cash, three grams of marijuana packaged for sale, a small gram scale, a notebook which had buy-owe notations, and some .38-caliber bullets.

## DISCUSSION

### I

#### Wheeler/Batson Motion

During jury voir dire, defense counsel made a motion under *Batson v. Kentucky* (1986) 476 U.S. 79, 97 [90 L.Ed.2d 69] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*), arguing that the prosecutor had systematically excluded African-Americans from the jury. The trial court ruled that defendant had not established a prima facie case of racial bias. Defendant raises the issue again on appeal.

In reviewing the trial court's ruling, the "dispositive question . . . is whether defendant made a prima facie case of group bias." (*People v. Howard* (2008) 42 Cal.4th 1000, 1016.) Where, as here, it is unclear what standard the trial court used to make its determination, we review the record independently to determine whether defendant made a " " "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.]' [Citations.]" (*Id.* at pp. 1016-1017.) Having reviewed the record, we find no inference of discrimination was established.

Defense counsel cited two potential jurors excused by the prosecutor. The first was T.A. Defense counsel made the following comments about T.A.: "She was another African American female in my opinion. [¶] . . . [T.A.] was employed, eligibility worker, Alameda County. Said she could be fair. She answered all the questions properly. She did have a brother who was convicted of possession for sales. She said she could put that behind her. We kept her on the panel quite sometime [*sic*], and then for no apparent reason, as far as I can understand, she was excused."

Defense counsel made the following comments about L.D.: "I believe that [L.D.] . . . she had [a] Hispanic surname but to me she was clearly black, African American.

That was my take on it, Your Honor. [¶] . . . [¶] . . . She was a supervisor at Home Depot, supervised three hundred people, had three girls, answered all questions properly. Was left on the jury quite some time. And for no apparent reason as far as I can tell, she was excused.”

Defense counsel also stated that defendant and the victim in the case were African-American. The prosecutor referred to the fact that two other African-American prospective jurors had been excused for cause. One was excused for cause because she was breast-feeding. One was excused for cause because defense counsel had previously represented the man’s son. Defense counsel stated that as of the time of the motion there were no other African-Americans on the jury. Following the motion, one more juror and three alternate jurors were seated. The record does not indicate their race.

The trial court first asked the prosecutor if he agreed that L.D. was African-American, stating that it did not appear to the court that she was. The prosecutor, who was African-American, stated that L.D. “did not in any way appear African American. Her complexion is [a] little bit darker than some individuals who happen to be Hispanic. She certainly seems to [fall] within the [ambit] of that social, racial group, however you classify that.”

The prosecutor then proceeded to justify his challenges to the two potential jurors. He stated that the primary reason he excused T.A. was that her brother had been convicted for the sale of drugs, and he was dissatisfied with her answers when she was questioned about it. When asked, she stated: “He did it. He got caught.” T.A. was one of the first potential jurors questioned, and as voir dire went along, the prosecutor stated he thought other jurors would be better, strategically, for the prosecution.

As to L.D., the prosecutor stated that her work was a positive factor in her favor, but that she had three young children and appeared to be under the age of 30. The prosecutor stated: “I didn’t feel she had enough life experience based on what she outlined to be able to be on this particular jury. [¶] My preference in regards to jurors

are individuals who are above the age of 35. If they're above the age of 35, I generally feel they have enough life experience to be able to, number one, understand and pick up on credibility issues which come up on the stand. So based on that, I felt there was a superior juror. [¶] . . . [¶] Each of the individuals [who were put in L.D.'s chair] were all older than [L.D.] That's the primary reason I moved her down. It was a question of strategy. There was no other rationale for doing so."

In this case defendant failed to make a sufficient showing that L.D. was a member of the racial group he asserted the prosecution was attempting to keep off the jury. Although defense counsel asserted that L.D. was Black, she had a Hispanic surname, and both the court and the prosecutor disagreed that L.D. was African-American.

*Batson* set forth a three step process to be utilized by the trial court in reviewing the constitutionality of peremptory strikes, and those steps "should by now be familiar." (*Johnson v. California* (2005) 545 U.S. 162, 168 [162 L.Ed.2d 129, 138] (*Johnson*).) "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Id.* at p. 168, fn. omitted.)

Defendant asserts that because the trial court required the prosecutor to state the reasons for his peremptory challenges, the question of whether defendant established a prima facie case is moot. We reject this contention.

"[A] trial court's request that the prosecutor provide reasons for his or her exercise of a peremptory challenge is not an implicit finding the defendant has established a prima facie case, and does not moot the issue, in every instance. 'In determining whether to infer a trial court's finding of a prima facie case under *Wheeler*, we look to the whole

record, examining the court's remarks in context.' [Citation.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 612-613.)

Viewing the record as a whole and examining the remarks of the trial court and the prosecutor in context, it is clear the trial court did not require the prosecutor to state his reasons for challenging either juror. With respect to T.A., the prosecutor volunteered his reasons without any prompting by the trial court. After finding that the defense had not established a prima facie case as to L.D. for the reason that the defense failed to establish that L.D. is a member of a cognizable group, the court asked the prosecutor, "would you be willing to give us your reasons with regard to [L.D.] even though [defense counsel] has not established . . . [¶] . . . [¶] . . . that person was African American?" After acknowledging that a pattern of discrimination is not required, the trial court repeated the request, asking, "If you don't mind, I'd like you to share your reasoning with [L.D.]" The prosecutor responded, "Not at all. I appreciate the opportunity."

The words, "would you be willing" and "[i]f you don't mind" connote a request, not a directive to provide justification for the challenge. The request apparently was made for the sole purpose of creating a record on appeal. (See *People v. Taylor, supra*, 48 Cal.4th at p. 613.) Indeed, there would be no reason to require a justification after the trial court ruled that defendant had not established L.D. was a member of a cognizable group. Moreover, the trial court did not expressly accept the prosecutor's reasons for excusing either juror. (See *People v. Mills* (2010) 48 Cal.4th 158, 174, fn. 3 [distinguishing between cases where the court does not expressly accept the prosecutor's reasons and cases where the court expressly accepts the prosecutor's reasons -- in the latter situation, the prima facie issue is moot; in the former, it is not].) Thus, nothing the court did converted the *Batson* step-one analysis into a step-three analysis.

Defendant contends that comparative juror analysis establishes a prima facie case of discrimination and ultimately proves discrimination. He cites *Miller-El v. Dretke* (2005) 545 U.S. 231 [162 L.Ed.2d 196] and *Snyder v. Louisiana* (2008) 552 U.S. 472

[170 L.Ed.2d 175] for the proposition that appellate courts should engage in comparative analysis in reviewing a trial court's prima facie case determination.

The California Supreme Court has repeatedly stated that comparative analysis is a *Batson* step-three tool and appellate courts need not employ it in a *Batson* step-one review. (*People v. Taylor, supra*, 48 Cal.4th at pp. 616-617 [“ ‘[w]hatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales . . . .’ (*People v. Bonilla*, [(2007)] 41 Cal.4th [313,] 350.)”]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 80, fn. 3, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-644.) Thus, we need not engage in comparative juror analysis in this case.

We turn to the defendant's showing of purposeful discrimination to determine whether he has established that a reasonable inference of discrimination can be drawn from the facts. (*People v. Ayala* (2000) 24 Cal.4th 243, 260; *People v. Howard, supra*, 42 Cal.4th at p. 1016.)

There are many ways in which a party may attempt to show that potential jurors are being challenged because of the group association rather than because of any specific bias. A party may show that the opponent “struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group.” (*Wheeler, supra*, 22 Cal.3d at p. 280, rejected on another point in *Johnson, supra*, 545 U.S. 162 [1162 L.Ed.2d 129].) A party may also show “that the jurors in question share only this one characteristic[,] their membership in the group[,] and that in all other respects they are as heterogeneous as the community as a whole.” (*Wheeler*, at p. 280, fn. omitted.) A party may supplement a showing of discrimination by demonstrating that the other side failed to engage the jurors in question

in “more than desultory voir dire, or indeed to ask them any questions at all.” (*Id.* at p. 281.)

Here, defendant argued discrimination could be inferred from the fact that the prosecution excused all the African-American potential jurors. In this case, that was a single potential juror. “[T]he small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible.” (*People v. Bell* (2007) 40 Cal.4th 582, 598.)

We cannot infer improper discrimination from the record in this case where the prosecution excused a single African-American juror, and there was an absence of other evidence that the juror was excused for a discriminatory purpose. That juror had a brother who had been convicted of selling drugs--a charge that was also made against defendant.

Finally, when there is a lack of motive to exercise challenges based on group bias because race is not a factor in the case, courts have viewed this circumstance as a factor cutting against a prima facie finding of discrimination. There is a lack of motive to discriminate when, as here, the defendant and the victim are of the same race. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733-734; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315.)

Defendant failed to establish a prima facie case of discrimination. Therefore, the trial court properly denied the *Wheeler/Batson* motion.

## II

### Sufficiency of the Evidence

Defendant claims there was insufficient evidence to support his conviction on count five, possession of cocaine base for sale, because the person who ingested the substance did not testify and there was no expert testimony establishing that the substance was crack cocaine. (Health & Saf. Code, § 11351.5.) We disagree.

Campbell testified that the drug he saw defendant sell to Batson was crack cocaine. As a regular user of the drug, he was familiar with crack cocaine. He testified that he and Batson were smoking crack cocaine, and that when they ran out, Batson left the apartment to get more. She returned to the apartment with defendant. Campbell testified he saw defendant sell Batson crack cocaine. After Batson purchased the crack cocaine, she proceeded to smoke it while she was sitting with Campbell. Batson smoked the crack from a pipe.

Campbell also reported the circumstances to the investigating officer, who gave an account of the report at trial. Campbell told the officer that he and Batson were going to smoke rock cocaine together, but that he did not get any of the rock cocaine.

The jury was instructed that a conviction under Health and Safety Code section 11351.5 required the prosecution to prove: “One, the defendant unlawfully possessed a controlled substance; [¶] Two, the defendant knew of its presence; [¶] Three, the defendant knew of the substance’s nature or character as a controlled substance; [¶] Four, when the defendant possessed the controlled substance, he intended to sell it; [¶] Five, the controlled substance was cocaine base; [¶] And, six, the controlled substance was in a usable amount.” Defendant contends the prosecution failed to prove the fifth element-- that the substance was cocaine base.

“ ‘ “In reviewing a criminal conviction challenged as lacking evidentiary support, ‘ “the 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.” [Citation.]’ [Citation.]” [Citations.] “An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]” [Citation.]’ [Citation.]” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1014-1015.)

Substantial evidence includes circumstantial evidence together with the reasonable inferences that may be drawn from such evidence. (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) “[T]he nature of a substance, like any other fact in a criminal case, may be proved by circumstantial evidence.” (*People v. Sonleitner* (1986) 183 Cal.App.3d 364, 369.)

The jury drew the reasonable inference that the substance Batson procured from defendant was crack cocaine from the following facts: (1) Campbell and Batson had been smoking crack, and Batson said she was going to get more; (2) Batson smoked the crack out of a pipe; (3) Batson was sitting next to Campbell when she smoked the drug; (4) Campbell said the drug was crack cocaine; and (5) Campbell was a regular user of crack cocaine.

The jury would have been justified in inferring that Campbell, who was familiar with the drug, knew what it was. Campbell testified the drug defendant sold Batson, and that he observed Batson put into the pipe and smoke, was crack cocaine, and there was evidence in the record to indicate Campbell would have recognized the drug. There is no evidence that Batson complained that the drug she was smoking was not crack cocaine, or that she acted as if it was not crack cocaine while or after she smoked it. Defendant demanded that Campbell pay him for the crack cocaine. This was sufficient evidence to support the jury’s verdict.

### III

#### Eyewitness Identification Instruction

The trial court instructed the jury pursuant to CALCRIM No. 315 on the evaluation of eyewitness identification testimony. One of the circumstances the jury was directed to consider was how certain the witness was when making the identification. Defendant contends this part of the instruction violated his state and federal constitutional right of due process because “research has shown that the certainty with which the

witness makes the identification has little correlation with the accuracy of that identification.”

Defendant neither objected to the instruction, nor requested that the certainty language be removed from the instruction. Therefore, the claim is forfeited. (*People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023.) We would reject the claim, even if it were not forfeited.

Defendant acknowledges that in *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232, the California Supreme Court approved the standard eyewitness identification instruction, which included a consideration of the witness’s certainty, but argues the court did not consider the due process implications he now raises. Instead, defendant relies on four out-of-state cases that have either rejected jury instructions on the certainty factor, or required that if such an instruction is given, a cautionary instruction should also be given. (*Brodes v. State* (2005) 279 Ga. 435 [614 S.E.2d 766]; *Commonwealth v. Santoli* (1997) 424 Mass. 837 [680 N.E.2d 1116]; *State v. Guzman* (Utah 2006) 133 P.3d 363; *State v. Long* (Utah 1986) 721 P.2d 483.)

As noted, *People v. Johnson, supra*, 3 Cal.4th at pp. 1231-1232, approved the standard instruction on eyewitness identification, which included the certainty factor. The court found no error in the instruction despite the fact that an expert defense witness had testified that a witness’s confidence in an identification is not positively correlated with the accuracy of the identification. (*Id.* at p. 1231.)

Also in *People v. Arias* (1996) 13 Cal.4th 92, 168, the Supreme Court stated that the level of certainty displayed by the witness is among the factors to be considered in evaluating whether the eyewitness testimony should be suppressed.

In *People v. Ward* (2005) 36 Cal.4th 186, 213, the Supreme Court held that the trial court had no sua sponte duty to modify the eyewitness identification instruction to indicate that the witness’s certainty does not necessarily make the identification accurate.

In *People v. Wright* (1988) 45 Cal.3d 1126, the Supreme Court held that a proper eyewitness identification instruction should list “in a neutral manner, the relevant factors supported by the evidence. [¶] The instruction should *not* take a position as to the *impact* of each of the psychological factors listed.” (*Id.* at p. 1141.)

In this case, the instruction was posed in a neutral manner. The jury was instructed: “In evaluating identification testimony, consider the following questions: [¶] . . . [¶] How certain was the witness when he or she made an identification?” The jury was not told that the identification was more likely to be accurate if the witness was certain.

We conclude that the above California authority indicates approval of the standard instruction given. There was no error in giving the jury a neutral instruction that listed eyewitness certainty as a factor to be considered in determining the accuracy of the identification.

#### IV

##### Ineffective Assistance of Counsel

Defendant claims his trial counsel rendered ineffective assistance in several respects.

Defendant has the burden of proving by a preponderance of the evidence that he is entitled to relief on an ineffective assistance claim. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218 (*Ledesma*)). Defendant must show: (1) that “ ‘ ‘counsel’s performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citation.]” ’ ” and (2) that prejudice flowed from counsel’s deficient performance. (*People v. Avena* (1996) 13 Cal.4th 394, 418 (*Avena*)). Prejudice is shown if it is reasonably probable that that the result would have been different had counsel’s performance not been deficient. (*Ibid.*)

#### A. Failure to Retain Eyewitness Expert

Defendant argues his trial counsel was ineffective because he did not retain an eyewitness identification expert. He argues such an expert was necessary to help the jury understand how Campbell's stress and head wound impaired his memory. He also argues such an expert was necessary to enable trial counsel to adequately cross-examine the officer that administered the photographic lineup to Campbell, in which Campbell identified defendant as the person who shot him. This issue was the subject of a failed motion for new trial filed by defendant after he retained a different attorney.

At the hearing on the motion, defendant testified that prior to his trial he told his counsel multiple times he wanted to get an eyewitness expert. He claimed his counsel said that an expert was not necessary because the jury would be able to see that the victim had been high. Defendant further claimed that he had attempted to tell the court that he wanted such an expert, but that when he raised his hand, the court indicated he had to communicate through his attorney.

Defendant's trial counsel testified at the hearing. He stated that he did not recall multiple discussions with defendant about retaining an eyewitness expert. Counsel stated that he had considered retaining an expert on eyewitness identification, but did not do so because after conferring with such an expert on a previous case, he concluded there were more cons than pros in presenting such expert testimony. He stated that an eyewitness identification expert could hurt a case where there was a lengthy period of contact between the witness and the suspect, there was no cross-cultural identification, and the suspect possessed unusual or memorable characteristics. Because of these considerations, he made a strategic decision that it would hurt defendant's case to hire an eyewitness expert.

Defendant's claim of ineffective assistance fails because he has not shown that his counsel's performance was deficient. In determining whether counsel's performance was deficient, we accord great deference to the tactical decisions of counsel. (*Ledesma*,

*supra*, 43 Cal.3d at p. 216; *Avena, supra*, 13 Cal.4th at p. 444.) We will not second-guess the reasonable tactical decisions of trial counsel. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) “[W]here the record shows that counsel’s omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.” (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Trial counsel’s decision not to call an eyewitness identification expert was within the range of reasonable competence. Even though the eyewitness victim was under the influence at the time of his interaction with defendant and was under the stress of the situation during part of that interaction, the contact was prolonged and there was no cross-racial identification. Trial counsel’s decision not to retain an eyewitness identification expert was justified.

We review the trial court’s ruling on the new trial motion for abuse of discretion. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 127.) The trial court applies the same standard we apply when determining whether a defendant has shown that he received ineffective assistance of counsel. (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659-660.) For the same reasons we have articulated, the trial court did not err in denying the motion for new trial.

#### B. Failure to Object to the Admission of Evidence

Defendant argues he received ineffective assistance of counsel because his trial counsel failed to object to several items of evidence. Because defendant did not raise these issues in his motion for new trial, there is no indication in the record as to why trial counsel failed to raise an objection to the evidence. Accordingly, we must reject the claim of ineffective assistance on appeal “ ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ ” (*People v. Wilson* (1992) 3 Cal.4th 926, 936.) Additionally, “[t]he decision whether to

object to the admission of evidence is ‘inherently tactical,’ and a failure to object will rarely reflect deficient performance by counsel.” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.)

The cases cited by defendant are not on point because they relate to the sufficiency or admissibility of evidence, rather than to the ineffectiveness of counsel in failing to object to the evidence. Because there is no evidence in the record as to why defense counsel failed to object to the evidence, the only question we must resolve is whether there could be a satisfactory explanation for counsel’s failure to object.

1. Evidence from Apartment 231

Defendant argues his trial counsel was ineffective because he failed to object on relevance grounds to the items recovered when officers searched apartment 231 incident to defendant’s arrest there. Officers found three grams of marijuana packaged for sale, a small gram scale, a notebook which had notations that appeared to be buy-owes, \$866 in cash, and some .38-caliber bullets. The items were found in the bedroom/bathroom area of the apartment.

Detective Robert Faine testified that officers searched apartment 231 because they had information that defendant was staying there. When the officers knocked on the door of apartment 231, the door was opened by a woman named Nicole Tyler, and defendant was standing at the back of the living room hallway near the bedroom. Defendant was arrested in the bedroom. There were four people in the apartment at the time of the arrest. Defendant was not the lessee of the apartment.

Defendant argues there was no evidence establishing that he lived in apartment 231, or had actual or constructive possession of the items found there. He argues the items had no relevance unless they belonged to him, and his trial counsel should have objected to the evidence on that ground. He also argues his counsel should have objected to Faine’s statement that he heard defendant was staying in apartment 231 on hearsay grounds.

Defendant relies heavily on *People v. Johnson* (1984) 158 Cal.App.3d 850, for the proposition that the evidence found in apartment 231 was irrelevant because there was no showing the evidence belonged to him. In that case, the defendant was convicted of possessing phencyclidine (PCP) for sale. (*Id.* at p. 852.) The defendant and several other people were discovered in a house during a police raid. (*Ibid.*) The defendant and another person were in the kitchen, and police discovered a bottle of PCP in a hole in the ceiling with defendant's thumbprint. (*Id.* at p. 852-853.) This being the sole evidence of possession, the court held it was insufficient to support a conviction. (*Id.* at p. 856.) However, the court did not hold that the evidence was inadmissible.

Here, the possession conviction related to the cocaine base defendant sold to Batson on the day of the shooting. Whether defendant had sufficient dominion and control over the items in apartment 231 to possess them was not at issue. Instead, defendant's presence at the particular location in the apartment near the room where several items indicative of drug sales were in plain view, had some tendency in reason to prove he was involved in the sale of drugs. This in turn had some tendency in reason to prove he was selling cocaine base on the day of the shooting. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) An objection based on relevance would not have been justified, and defense counsel was not deficient in failing to make such an objection.<sup>2</sup>

As to the hearsay statement that defendant was "staying" at apartment 231, we cannot say on this record that trial counsel was deficient in failing to object. Had counsel

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<sup>2</sup> We acknowledge that the evidence of the small amount of marijuana packaged for sale was minimally relevant and the .38-caliber bullets were arguably not relevant to show defendant was involved in the sale of drugs, but conclude defendant has failed to establish he was prejudiced by the admission of such evidence, and we deny his ineffective assistance of counsel claim regarding such evidence on that ground.

made the objection, the prosecution may well have introduced evidence from the out-of-court declarant, whose testimony may have been more harmful to defendant. Such an objection also would not have prevented the detective from describing the arrest and introducing the evidence discovered in the search, and may have drawn undue attention to the detective's brief mention that he heard defendant was staying at the apartment.

## 2. Evidence from Apartment 222

Police executed a search warrant on apartment 222. Defendant's mother answered the door. Three or four people lived in the apartment. In that apartment, officers found a repair receipt in the name of defendant and a mini scale. Defendant argues this evidence should have been excluded as irrelevant. He argues there was no evidence to show he lived in the apartment with his mother.

As with the items found in apartment 231, the issue was not whether there was sufficient evidence to show the items found there were defendant's. Instead, defendant had ties to this apartment, as evidenced by the fact that his mother was found in the apartment, as was a receipt with his name on it. Also in the apartment was a scale associated with drug sales. The evidence was relevant, both for its tendency to show he was engaged in drug sales, and to show defendant's connection to the apartment building where the shooting took place. The items were relevant to prove the identity of the perpetrator. Defense counsel was not required to make a baseless objection.

## 3. Evidence on Thomas's Cell Phone

Officers took a cell phone from Thomas. The name "Brian" was in the telephone's address book. The number that was listed in connection with that name was a number the Stockton Police Department had listed as previously belonging to defendant. Defendant argues his trial counsel was ineffective because he failed to object that there was no evidence Thomas owned the cell phone, or that defendant was the "Brian" listed in its address book. He argues the evidence was irrelevant.

Any such objection would almost certainly have been overruled. The fact that Thomas was in possession of the phone was some evidence that the phone belonged to Thomas. Likewise, the police department showed the number listed in the phone as belonging to defendant on a prior date, thus evidencing a connection between Thomas and defendant. The evidence was relevant to the identity of defendant as the perpetrator. Defense counsel was not deficient for failing to object on relevance grounds.

Defendant also argues his trial counsel should have objected to the admission of the photographs in Thomas's cell phone on the ground of lack of authentication. He is wrong. Detective Faine testified he viewed the photos on the phone and that the photos introduced into evidence were the pictures printed from the phone. Unlike the cases cited by defendant, there was no issue of whether the photographs on the phone were fake. The issue was whether the photographs shown to the jury were, in fact, found on Thomas's cell phone. Detective Faine's testimony was sufficient to verify this.

For the same reasons expressed above, defense counsel was not ineffective for failing to request that the evidence be excluded under Evidence Code section 352. Defense counsel reasonably could have concluded that such a motion would have been unsuccessful.

### C. Failure to Subpoena Witnesses

Defendant asserts his trial counsel was ineffective because he did not subpoena Devazia Turner and Turner's mother, Penny Scott, for trial. One of the guns used in the shooting was found in Turner's possession in Sacramento. When Turner was apprehended with the gun, he was in the company of Kenneth Jefferson. In one photo lineup, Campbell said that Jefferson looked like one of the men who had attacked him. Scott originally claimed Turner told her that he got the gun from Jefferson, although both Turner and Scott later said the gun came from someone at a Sacramento light rail station.

At the new trial motion, defendant's trial counsel testified that he hired an investigator to look into the gun. He testified that it was his opinion that pursuing the

investigation into the gun further might hurt defendant's case. He stated that the investigator interviewed both Scott and Turner, and that Turner claimed someone gave him the gun at the light rail station in Sacramento. Scott backed up this story.

Defense counsel stated he saw it as a dead end issue at that point. He testified that based upon the investigation he felt the circumstances of how the gun was found would only hurt defendant's case. Counsel's decision not to subpoena these witnesses was within the range of reasonable competence, and does not constitute ineffective assistance of counsel.

Moreover, defendant has failed to establish prejudice. There is no evidence that Turner would have testified, since to do so would have implicated his Fifth Amendment right against self-incrimination. Turner's statements to his mother could not have come in as inconsistent statements without Turner testifying.

#### D. Failure to Supplement CALCRIM No. 315

Defendant argues his trial counsel provided ineffective assistance because he did not request that the instruction on eyewitness identification be modified to instruct the jury to consider the effect of Campbell's brain damage and use of drugs and alcohol on his ability to correctly identify the perpetrator.

We reject this argument. CALCRIM No. 315 contains numerous guidelines for the evaluation of eyewitness identification testimony. Among them is the admonition to consider "any other [circumstance] affecting the witness's ability to make an accurate identification." The jury heard testimony regarding Campbell's drug and alcohol use, and his brain injury from the bullet inflicted by defendant. The instruction was adequate to instruct the jury that it could consider this evidence in evaluating the accuracy of the identification. For the same reason, we reject defendant's claim that the trial court erred in denying his motion for new trial on this basis.

As we find no error, we reject defendant's argument that the judgment must be reversed because of multiple errors.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

MURRAY, J.