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

THE PEOPLE,

Plaintiff and Respondent,

v.

AUSTIN BILLY WILLIS III,

Defendant and Appellant.

C065346

(Super. Ct. No.
09F00884)

Following a jury trial, defendant Austin Billy Willis III was convicted of two counts of attempted murder (Pen. Code, §§ 664/187, subd. (a); statutory citations that follow are to the Penal Code unless otherwise specified), personally discharging a firearm at an occupied vehicle (§ 246) and possession of a firearm by a felon (§ 12021, subd. (a)(1)). It was also found true defendant had a prior strike conviction (§§ 667, subds. (a)-(d), 1170.12, subd. (b)) and, as to the attempted murder charges, had personally used and discharged a firearm causing

great bodily injury (§ 12022.53, subds. (b), (c) & (d)).

Defendant was sentenced to an aggregate determinate prison term of 23 years eight months, plus 50 years to life. His ensuing appeal is subject to the principles of *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Kelly* (2006) 40 Cal.4th 106, 110. In accordance with the latter, we will provide a summary of the offenses and the proceedings in the trial court.

On January 17, 2009, at 2:30 a.m., defendant got into a fight at a fast food restaurant drive-thru with Alexander C. and Ulises L. Alexander C. and Ulises L. were holding defendant and punching him. They punched him in the face and defendant fell to the ground. Eventually when the pair let defendant up, he went back to his car, reached in to release the hood, stated he had a gun in his car and yelled "I'm going to kill you." Alexander C. and Ulises L. got back in their car and drove away. Defendant followed them, driving a silver Chevy Impala. Alexander C. tried to evade defendant, but defendant continued following them. Eventually Alexander C. and Ulises L. heard what they later identified as gunshots hitting the car.

After the shooting, defendant stopped following Alexander C. and Ulises L. Alexander C. then realized he had been shot. Ulises L. called 9-1-1 and Alexander C. was taken by ambulance to the hospital. Alexander C. had sustained a gunshot wound to the abdomen and required surgery to repair his small intestine.

Alexander C. and Ulises L. and witnesses from the fast food restaurant identified defendant as the person in the fight at the restaurant. However, Alexander C. and Ulises L. could not

identify defendant as the shooter. They had not been able to see the driver of the car and they did not see a gun or muzzle flashes. Even so, they recognized the car as the same one defendant had been driving at the restaurant.

Sacramento Police Officer Tom Shrum viewed video surveillance taken from the fast food restaurant, and tracked the Impala to a car rental agency. Shrum was informed that defendant had picked the car up on January 14, 2009, and the car was scheduled to be returned on Saturday January 17, 2009, at 2:00 p.m. When the manager came back to work on Monday, the car was in the lot. Gunshot residue (GSR) testing found a fairly high concentration of GSR in the car, indicating a weapon had either been discharged within the vehicle near the front headliner or a heavily contaminated article had come in to contact with the headliner. The only person to rent the car after defendant and before the GSR testing was done did not own a gun and had not fired one in the car.

Following a jury trial, defendant was convicted of two counts of attempted murder (§§ 664/187, subd. (a)), personal discharge of a firearm at an occupied motor vehicle (§§ 246, 12022.53, subd. (d)), and possession of a firearm by a felon (§ 12021, subd. (a)(1)). The enhancement allegations that as to the attempted murder charges defendant had personally used and discharged a firearm causing great bodily injury were found true (§ 12022.53, subds. (b)-(d)). In bifurcated proceedings, the court found the prior strike conviction allegation true.

After trial, defendant filed a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) complaining that trial counsel was ineffective in that he did not call a particular witness, Ken A.; did not dispute the evidentiary chain regarding the rental vehicle; refused to file various motions, including a motion to suppress evidence and a section 995 motion; did not challenge the photographic line up; did not communicate with defendant; failed to hire a specialist; had no strategy for the defense; and, refused to let defendant testify.

In response, counsel explained his trial choices. He chose not to call the witness Ken A. because during their investigation of the case, counsel and the defense investigator spoke with several witnesses, including Ken A., and counsel believed Ken A.'s testimony was cumulative to the testimony of the other witnesses. Ken A. was also "semi-hostile" and "not the greatest witness in the world." As to the various motions defendant wanted filed, they were not filed as there were no legal grounds to file them. Counsel stated he communicated with defendant about the strengths and weaknesses of the case, but defendant was frequently unwilling to listen. As to defendant not testifying, counsel had advised defendant not to testify, as his criminal background and history would have impeached him, and counsel did not believe there was any benefit to him testifying. On the record, the court had advised defendant he had the right to testify and defendant affirmed his choice not to testify.

The court denied the *Marsden* motion, finding counsel's representation "was well above what one would expect of a competent attorney. I thought he was able in fact to do an exemplary job in terms of his representation."

Defendant was then sentenced to an aggregate determinate term of 23 years eight months, plus 50 years to life. Defendant was ordered to pay \$1,000 in restitution fund fines, and various fines and fees were imposed.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief and has done so.

In his supplemental brief, defendant complains trial counsel was ineffective based on the same complaints made in his *Marsden* motion.

To obtain reversal of a conviction based on ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient when measured against the standard of a reasonably competent attorney, and (2) counsel's deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218.) To establish incompetent performance, the defendant must affirmatively show counsel's deficiency involved a crucial issue and cannot be

explained on the basis of any knowledgeable choice of tactics. (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147.) To establish prejudice "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694, [80 L.Ed.2d at p. 698]; see also *Ledesma*, at pp. 217-218.) If defendant fails to show the challenged actions affected the reliability of the trial process, we may reject a claim of ineffective assistance of counsel without deciding whether counsel's performance was deficient. (*Strickland*, at p. 697 [80 L.Ed.2d at pp. 699-700]; *People v. Kipp* (1998) 18 Cal.4th 349, 366.)

Defendant claims counsel should have called additional witnesses, Ken A. and a "specialist for intoxicated statements." Defendant also contends counsel did not put forward various pieces of evidence. To the extent this argument relies on matters outside the record on appeal, we cannot consider those matters. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183; *People v. Williams* (1988) 44 Cal.3d 883, 917, fn. 12 ["The scope of an appeal [based on a claim of ineffective assistance of counsel] is, of course, limited to the record of the proceedings below"].) Claims of failure to present evidence or call particular witnesses "must be supported by declarations or other proffered testimony, establishing both the substance of the omitted evidence and its likelihood for [a more favorable determination]. [Citations.] We cannot evaluate alleged deficiencies in counsel's representation solely on defendant's

unsubstantiated speculation." (*People v. Cox* (1991) 53 Cal.3d 618, 662, disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390; see also *People v. Bolin* (1998) 18 Cal.4th 297, 334.) Defendant has not supported his claim with such declarations or proffers. We cannot and will not speculate about the existence of such evidence, its availability, probative value or exonerating affect. (*People v. Wash* (1993) 6 Cal.4th 215, 269.) Accordingly, defendant has not established counsel was ineffective in failing to call a specialist. Moreover, the decision to call a witness is a matter of trial tactics, "unless the decision results from unreasonable failure to investigate." (*Bolin*, at p. 334.) The record here reflects the decision was based on counsel's investigation and conclusion that Ken A.'s testimony would have been cumulative. It is not ineffective assistance to fail to call a witness whose testimony counsel reasonably could have concluded would have been cumulative to testimony already introduced. (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1716.)

Defendant contends counsel should have more vigorously cross-examined various prosecution witnesses. Beyond claims of inconsistencies, defendant's complaints again rely on matters outside the record, as such they may not be considered on appeal. Generally, the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make, and will not implicate inadequacy of counsel. (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.) The record here reflects the witnesses were cross-

examined as to inconsistencies in their testimony and inconsistencies with their statements to police. Defendant has not identified any exculpatory or impeachment evidence that would have been uncovered by "further questioning of prosecution witnesses and that would have produced a more favorable result at trial." (*People v. Cox, supra*, 53 Cal.3d at p. 662.) As such, we cannot find this contention supports a claim of ineffective assistance.

Defendant complains counsel did not adequately communicate with him, investigate the case or review the evidence in the case. Again, much of defendant's claim rests on matters outside the record on appeal. To the extent there is evidence in the record on these points, it does not support defendant's claim. Counsel had numerous conversations with defendant and discussed the relative strengths and weaknesses of the case. He hired an investigator who investigated the case, and both spoke with several witnesses. Just because defendant may be dissatisfied with the communication between himself and counsel, that is not necessarily ineffective assistance. (See *People v. Hart* (1999) 20 Cal.4th 546, 604.) "[T]he record before us does not disclose that trial counsel lacked a tactical basis for representing defendant in the manner now challenged, and counsel's performance was not of the sort for which there could be no satisfactory explanation. [Citations.]" (*Hart*, at p. 627.) Accordingly, defendant's contentions fail.

Defendant contends counsel refused to let defendant testify. The record belies this claim. At the close of the

prosecution's case, counsel indicated he had advised defendant not to testify, but explicitly stated it was "solely" defendant's decision not to testify. The court ensured defendant understood it was his right to testify and defendant affirmed it was his choice not to testify.

Defendant claims counsel should have filed a section 1538.5 motion to suppress the evidence obtained from the Impala, specifically the gunshot residue, "because of broken chain of custody." Defendant had no reasonable expectation of privacy in a rental car which he had returned to the rental car company and therefore, no standing to object to the search or seizure of the rental car after it was no longer rented to him. (*Rakas v. Illinois* (1978) 439 U.S. 128, 143 [58 L.Ed.2d 387, 401].) Thus, there was no basis for a section 1538.5 motion to suppress evidence obtained from the Impala. Failing to make a meritless motion cannot be the basis of an ineffective assistance of counsel claim. (See *People v. Thomas* (1992) 2 Cal.4th 489, 531.)

Defendant also claims counsel should have filed a motion to dismiss the information under section 995. This claim rests on defendant's assertion that a motion to suppress should have been filed and granted. As above, there was no basis to file a motion to suppress, "[s]ince the infirmity asserted does not exist and the evidence sought to be suppressed is admissible, there [was] sufficient evidence to establish that defendant has been committed with reasonable and probable cause." (*People v. Mullins* (1975) 50 Cal.App.3d 61, 69.)

Defendant claims ineffective assistance of counsel as a result of counsel's failure to assert his right to a speedy trial. Defendant has neither claimed nor demonstrated that any delay had any impact on his trial or ability to defend himself. Accordingly, defendant has not demonstrated prejudice and his claim of ineffective assistance of counsel fails.

Defendant contends he was denied effective assistance of counsel, in that counsel was not present at the photo lineup. There is "no Sixth Amendment right to counsel at a photographic lineup. (*United States v. Ash* (1973) 413 U.S. 300, 321 [37 L.Ed.2d 619].)" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1250.) Accordingly, there was no ineffective assistance of counsel.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.