

**NOT TO BE PUBLISHED**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Sacramento)**

----

THE PEOPLE,

Plaintiff and Respondent,

v.

JACK EUGENE BARNES,

Defendant and Appellant.

C068093

(Super. Ct. No. 10F04246)

Defendant Jack Eugene Barnes appeals his convictions for robbery and burglary of an inhabited dwelling. He contends he received ineffective assistance of counsel, in that defense counsel's inadequate investigation of an alibi defense resulted in counsel presenting a witness who did not, in fact, supply an alibi. We find defendant has not established that counsel's investigation was inadequate. Accordingly, his claim must fail and we shall affirm the judgment.

## **FACTUAL BACKGROUND**

### ***Opening Statement***

During opening statement, defense counsel told the jury what he expected the evidence in the case to be. He stated the evidence would show on the night of the burglary, the victims did not see the burglar's face, did not recognize him and neither knew who he was. On the day of the burglary, the victim, Lisa Staats, did not connect the burglary with an earlier incident when defendant kicked in the door of the apartment. Then, over a month later, Staats indicated she knew who the burglar was and could identify him as someone who had been in her apartment previously. Almost two months later the other victim, Erica Beauchamp could also identify the burglar. Defense counsel stated the evidence would show defendant's fingerprints were not found inside the apartment. Finally, defense counsel claimed the jury would hear from a friend of defendant's who would testify that defendant was with him at the time of the burglary.

### ***Trial***

In May 2010, Lisa Staats was living with her caregiver, Erica Beauchamp. At about 9:00 o'clock in the morning of May 17, 2010, Staats was in bed watching television when she heard a noise from the patio. She looked out the sliding glass door and saw a man trying to open it. She tried to keep the door shut and screamed for someone to call 911. The man was able to pull the door off the frame. Staats fought to keep him from entering the apartment, but he reached toward his pants as

though going for a weapon. This frightened Staats and she backed away.

The intruder went through the bedroom and into the living room, where Beauchamp had been sleeping on the living room couch before she was awakened by Staats' screams. Beauchamp was groggy and only saw a shadow come through the living room. She saw the front door was open and her purse was gone. From the front door of the apartment, there is an unobstructed view of the parking lot area. The two women looked out the front door and saw a small burgundy colored convertible with a black ragtop leaving the parking lot.

Officers attempted to lift fingerprints from the sliding glass door, screen door and an aerosol can left at the scene. The results were negative. In their initial interviews with law enforcement, neither Staats nor Beauchamp could identify the burglar.

Four days after the break-in, defendant was arrested. In a search incident to arrest, defendant was found in possession of Beauchamp's bank debit food stamp card and her auto insurance card. Beauchamp indicated both had been in her purse when it was stolen. Defendant's car, a maroon Infiniti with a black convertible ragtop, was also towed.

Over a month after the burglary, Staats told a Sacramento County Sheriff's detective that her friend Craig had informed her that defendant was the burglar. Craig did not want to be involved with the police, so Staats did not provide the

detective with any additional information about him. Staats was shown a photo lineup and identified defendant as the burglar. For the first time, Staats revealed that defendant had previously been to her apartment, with his sister "Sissy" and Craig, during the 2009 holiday season. She also told the detective that a few months before the May 17 break-in, defendant had tried to break in her door. About two months after the burglary, Staats and Beauchamp identified a photograph of defendant's car as resembling the one they had seen leaving the parking lot.

In court, Staats and Beauchamp both identified defendant as the person who had visited during the holidays. Staats also identified him as the person who had broken in the door prior to the burglary. They also identified defendant's car as the one they had seen leaving the apartment complex after the May break-in.

Defendant's friend, Alan Hunter, testified he had seen defendant "around May 17." Defendant was at Hunter's home listening to Hunter's band practice over the course of two days on "the weekend of the 17th." Defendant did not leave until between 11:30 a.m. and 12:00 p.m. on the second day. Upon further questioning, it was clarified that defendant was with Hunter on Saturday and Sunday, May 15 and 16. The burglary was committed on Monday, May 17.

### ***Closing Argument***

Defense counsel focused his closing argument on the reliability of the witness identifications. Specifically, that Staats's and Beauchamp's statements were inconsistent and unreliable, that their identifications of defendant came well after the burglary and only after their conversations with Craig. Defense counsel described the various factors that can generally impact the reliability of identifications. He argued both witnesses had been impeached by their various inconsistent statements, and challenged the reliability of any information provided by the unseen Craig, as well as Craig's motives in naming defendant as the burglar. He addressed the "alibi" witness, stating, "Quite frankly, it looks like he was wrong. We stipulated. We agreed. The offense occurred on a Monday. He thought he was with [defendant] on that day. He came in and then . . . he said he was with him over the weekend. So it looks like he was not with him on that day. [¶] But as we talked about before, the burden does not shift. Just because it turns out that he may not have been with [defendant], that he had the date wrong . . . ." Counsel then returned to his primary defense, the lack of reliable identifications from Beauchamp and Staats and the lack of physical evidence connecting defendant to the crime.

The jury was instructed that what the attorneys say is not evidence. Specifically, "Nothing that the attorneys say is evidence. In their opening statement and closing argument, the attorneys discuss the case but their remarks are not evidence."

## PROCEDURAL HISTORY

Defendant was charged with robbery (Pen. Code, § 211),<sup>1</sup> and burglary of an inhabited dwelling (§§ 459, 462, subd. (a)). It was also alleged defendant had a prior serious felony conviction. (§§ 667, subds. (b)-(i), 1170.12.) Following jury trial, in bifurcated proceedings, defendant admitted the prior strike conviction. The jury found defendant guilty on both counts and found the special allegations true. Defendant was sentenced to concurrent four-year terms, doubled to eight years because of the prior strike conviction. The sentence for burglary was stayed under section 654.

## DISCUSSION

Defendant contends the judgment must be reversed as he received ineffective assistance of counsel. Specifically, he contends counsel failed to conduct an adequate factual investigation before presenting an alibi defense. Defendant claims since the alibi witness, Hunter, was in custody at the time he testified, he was available to be interviewed. Yet, "it is clear that if counsel interviewed Hunter at all it was at such a cursory level that he didn't even notice that the dates that Hunter could vouch for [defendant's] whereabouts were different than the date of the offense." Defendant claims this error was prejudicial as it resulted in an "inevitable loss of professional credibility in the eyes of the jury." Defendant claims without the alibi defense issue, counsel would have "been

---

<sup>1</sup> Undesignated statutory references are to the Penal Code.

in a much stronger position to present a focused, authoritative argument dissecting the points of weakness and inconsistency" in the People's case.

"The standard for establishing ineffective assistance of counsel is well settled. A defendant must demonstrate that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [80 L.Ed.2d 674] (*Strickland*).) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*)" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) An appellate court need not address both prongs of the test for ineffective counsel before rejecting a claim of ineffective trial counsel. If a defendant fails to establish either prong, the existence of the other prong is moot, and the claim may be disposed of based upon the one prong. (*Strickland, supra*, 466 U.S. at p. 697 [80 L.Ed.2d at p. 699].)

Our review is limited to the appellate record before us, and that record does not establish that counsel was deficient in his investigation of the alibi witness. (*People v. Scott* (1997) 15 Cal.4th 1188, 1212 (*Scott*).) The record makes clear Hunter was interviewed by a defense investigator. Moreover, it appears from the record that either Hunter made statements to both the defense and prosecution investigators that were different than

his testimony or the investigators misunderstood Hunter's statements. Hunter's testimony was not a model of clarity; even the court expressed confusion about what days he was claiming to have been with defendant. It is not unreasonable to infer from Hunter's lack of testimonial clarity, that his statements to the investigators were equally unclear. We do not know what statements Hunter gave to the defense investigator, so we do not know what information defense counsel had and whether that information should have made him question the alibi further. (See *Scott, supra*, 15 Cal.4th at p. 1214.) In the course of trial preparation and trial, it is not at all unusual that a witness's testimony is different than his or her earlier statements. Nor is it unusual for witnesses on the stand to make unexpected statements in their testimony, even with the most thorough preparation and investigation. Here, the testimony of Staats and Beauchamp provided repeated examples of just that point. The appellate record does not establish what investigation was done or what was learned in the course of that investigation. Accordingly, we cannot conclude that defendant has established that defense counsel conducted a constitutionally inadequate investigation. (*Ibid.*; *People v. Pope* (1979) 23 Cal.3d 412, 429.) Because we find defendant has not met his burden with respect to the first prong of the *Strickland* test—that "his attorney's performance fell below an objective standard of reasonableness"—we need not address the second. (*Strickland, supra*, 466 U.S. at p. 697 [80 L.Ed.2d at p. 699].)

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.