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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK BASIL YOUSIF et al.,

Defendants and Appellants.

D058710

(Super. Ct. No. SCD223398)

APPEALS from judgments of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

In a second trial, a jury convicted Mark Basil Yousif and Diego A. Gonzalez of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); count 1)¹ and battery with serious bodily injury (§ 243, subd. (d); count 3). The jury also found true enhancements on count 1 (§ 12022.7, subd. (a)), and count 3 (§ 1192.7, subd.

¹ Future undesignated statutory references are also to the Penal Code.

(c)(8)) for defendants' personal infliction of great bodily injury. The court suspended the imposition of sentence against Yousif for three years and placed him on probation, contingent on serving a year in local custody. The court imposed the middle terms of three years each on Gonzalez for count 1 and its enhancement. It suspended execution of the sentence and placed Gonzalez on probation for five years, contingent on serving a year in local custody. The court stayed terms for count 3 and its enhancement (§ 654).

On appeal, Yousif contends his trial attorney was ineffective because he did not move to suppress identification evidence from a curbside lineup as being unduly suggestive and unreliable. Gonzalez joins in this contention, and he also challenges the sufficiency of the evidence to support his convictions. We affirm the judgments.

FACTS

The evening of October 17, 2009, Terrence Tucker went to a nightclub in downtown San Diego with two friends, including Joseph Jennings. The club was on Broadway between Sixth and Seventh Avenues. Tucker ran into an acquaintance there, Quelin Rodriquez, who was with Yousif and Gonzalez. The mood inside the club was friendly. Tucker bought a drink for Rodriquez and Gonzalez.

Around closing time, early morning on October 18, Tucker and his friends left the nightclub and walked to a taco shop a few minutes away on Broadway. When they arrived, Rodriquez, Yousif and Gonzalez were there. Tucker greeted Rodriquez with a hug, and there was no apparent animosity between the two groups.

After about 10 minutes, Tucker and his friends decided the line was too long at the taco shop, and they would go elsewhere to eat. As Jennings was leaving, he noticed

Tucker was already outside. Five men were yelling at Tucker, and there was a "commotion going on." Rodriguez was also outside, yelling at the five men, "Stop. Quit. Stop it. Let's go."

Jennings recognized some of the men as Rodriguez's companions, and he was not initially worried because Rodriguez was present. The five men, however, then surrounded Tucker. One of the men struck Tucker from behind, on the back of his head. The men struck Tucker several more times, in the face and ribs. Jennings tried to intervene, but one of the men struck him in the face, causing him to drop to the ground. The men punched and kicked Jennings and he briefly lost consciousness.²

When Jennings came to, he saw Tucker backing away, going east on Broadway and across the street to Seventh Avenue. Tucker was trying to get away because he realized he "couldn't fight all of these guys." The five men chased him south on Seventh Avenue and continued to beat him, causing him to fall down. They stomped all over his body and kicked him in the head, causing him to lose consciousness. The next thing Tucker recalled was waking up in the hospital the following day.

Alan Robinson was walking east on Broadway and he saw the chase and the beating. To Robinson, "[i]t looked like they were killing" Tucker. Robinson tried to intervene, and one of the five men punched the back of his head several times. Robinson was close to some of the men and got a good look at their faces.

² The information also charged defendants with crimes against Jennings, but the jury rendered verdicts in their favor.

The five men ran south on Seventh Avenue, and Robinson followed them to the corner of E Street, where they ran east to Eighth Avenue, and then north toward Broadway. Robinson stopped following them and went north on Seventh Avenue to return to Tucker. He briefly lost sight of the five men, but then through an open parking structure between Seventh and Eighth Avenues he saw them get into a taxi. Police officers arrived and Robinson directed them to the taxi.

Bahramm Alavijee was working at a nearby parking lot. He also saw the five men chase Tucker down Seventh Avenue, beat and kick him, and flee into the taxi on Eighth Avenue.

Officer Gaines stopped the taxi, detained the five men, and conducted separate curbside lineups for Robinson and Alavijee. During both lineups, Officer Gaines presented the five men individually and in the same order, with Yousif first and Gonzalez fourth. The men were illuminated by vehicle spotlights and flashlights, and they were slowly turned in a circle so the witnesses could see them from different angles. Robinson and Alavijee were approximately 15 feet from the men.

Robinson identified Yousif as "doing the stomping"; he did not identify the second and third men presented; he identified Gonzalez as "definitely doing the stomping"; and he did not identify the fifth man. Alavijee recognized the vest Yousif was wearing, and reported Yousif was kicking Tucker. As to Gonzalez, Alavijee said, "I can't really tell, but it looks like the guy. One of the guys that was fighting." Officer Gaines noted on the lineup form that Alavijee could not positively identify Gonzalez. He also did not identify the second, third and fifth men presented.

At the second trial, Tucker identified Yousif and Gonzalez as among the men who beat him outside the taco bar. Tucker had no memory of the second beating on Seventh Avenue. Robinson could identify only Yousif in court as "one of the guys stomping the guy on the ground." However, from a photograph of five men taken the night of the incident, he identified both Yousif and Gonzalez as the men he identified during the lineup. Alavijee was unable to identify either Yousif or Gonzalez in court. He testified, however, that he did identify two men during the lineup.

DISCUSSION

I

Curbside Lineup/Ineffective Assistance of Counsel

A

Yousif maintains the curbside lineup procedure was unduly suggestive, and the resulting pretrial identifications were unreliable. Gonzalez joins in the argument. Specifically, defendants object that the "circumstances of the [lineup] were not similar to those of the assaults. In particular, the police used vehicle spotlights and flashlights to illuminate the detainees, rather than showing the detainees in the same dim light as existed for the assault." Defendants also object that the "witnesses saw the police detain several persons who had entered a taxi, and knew that the persons who were shown to them were among the people detained." Defendants contend their counsel rendered ineffective assistance by not moving to suppress the identification evidence.

" "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.' ([Citation], italics in original.) In order to demonstrate ineffective assistance of counsel, 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 Richardson* (2011) 196 Cal.App.4th 647, 657.)

" 'We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.' " (*People v. Prieto* (2003) 30 Cal.4th 226, 261.) " 'When . . . the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. . . . Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' " (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.) "However, an ineffective assistance claim may be reviewed on direct appeal where 'there simply could be no satisfactory explanation' for trial counsel's action or inaction." (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, fn. 1.)

"A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], *but also that the motion or objection would have been meritorious* if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the omission a determination more favorable to defendant would have resulted."

(*People v. Mattson* (1990) 50 Cal.3d 826, 876, italics added.) "[D]efense counsel's decision not to file a motion he believes will be futile does not ' ' substantially impair' . . . defendant's right to effective assistance of counsel." ' ' (*People v. Gutierrez* (2009) 45 Cal.4th 789, 804.)³

B

Defendants contend there is no satisfactory explanation for their counsels' inaction, since identification of Tucker's assailants was the key issue at trial. " ' "In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) 'whether the identification procedure was unduly suggestive and unnecessary,' and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances." ' ' (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942.) "The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] 'The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) "A due process violation occurs only if the identification procedure is 'so impermissibly

³ See also *People v. Memro* (1995) 11 Cal.4th 786, 834 ["The Sixth Amendment does not require counsel ' "to waste the court's time with futile or frivolous motions." ' "]; *People v. Freeman* (1994) 8 Cal.4th 450, 509 ["Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances."]

suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.)

"[T]he law favors field identification measures when in close proximity in time and place to the scene of the crime, with the rationale for the rule being stated: 'The potential unfairness in such suggestiveness . . . is offset by the likelihood that a prompt identification within a short time after the commission of the crime will be more accurate than a belated identification days or weeks later.'" (*In re Richard W.* (1979) 91 Cal.App.3d 960, 970.) "Prompt identification of a suspect who has been apprehended close to the time and place of the offense 'aids in quickly exonerating the innocent and discovering the guilty.' " (*People v. Irvin* (1968) 264 Cal.App.2d 747, 759.)

In *People v. Burns* (1969) 270 Cal.App.2d 238, a curbside lineup was held constitutionally valid when the single suspect was illuminated by vehicle spotlights and flashlights. (*Id.* at pp. 244-245.) Improved lighting would presumably increase accuracy, and defendants do not explain how it was unduly suggestive. Here, each of the suspects was shown in the same lighting, and thus defendants were not singled out from the others.

As to the status of defendants as detainees, numerous opinions have approved of curbside identifications under similar circumstances. For instance, in *People v. Craig* (1978) 86 Cal.App.3d, 905, 914, the court rejected the argument an identification procedure was unduly suggestive when the suspect was handcuffed in the back of a patrol car. (See also *People v. Colgain* (1969) 276 Cal.App.2d 118, 128 [single suspect was handcuffed].)

Further, the facts belie defendants' theory of undue suggestiveness. Although all five men presented in the lineup were detained, Robinson identified only two of the men, and Alavijee positively identified only one man. In other words, the witness identifications were not based on the mere fact of detainment.

We conclude defendants have not met their burden of showing ineffective assistance of counsel. Their counsel could have reasonably determined, under established law, that a motion to suppress would be unmeritorious. Defense counsel did not ignore the identification issue. Rather, Yousif presented an expert witness who testified at length on the unreliability of eyewitness identifications, and defense counsel cross-examined Robinson and Alavijee and thoroughly addressed the identification issue in closing arguments.

II

Sufficiency of the Evidence

Gonzalez also challenges the sufficiency of the evidence to support his convictions. "On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns." (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.)

"While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could

reasonably have deduced from the evidence." (*People v. Boyer, supra*, 38 Cal.4th at pp. 479-480.) "Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime." (*Ibid.*)

Gonzalez asserts "there was insufficient evidence by any of the witnesses that [he] personally used physical force against Tucker." Gonzalez is mistaken, however, when he claims Tucker "could not identify [Gonzalez] as having inflicted any of the blows upon Tucker." At trial, Tucker identified Gonzalez as among the men who beat him outside the taco shop. The following exchange took place between the prosecutor and Tucker:

"Q. Can you tell whether or not you recognize anybody in the courtroom from the beating that you took outside of the Mexican food restaurant?

"A. Yes.

"Q. So you recognize people that were *involved in the beating* of yourself outside of the Mexican food restaurant?

"A. These two gentlemen right here [identifying defendants]." (Italics added.)

Tucker conceded he did not know "specifically" what Gonzalez or Yousif did to him. On cross-examination, Tucker confirmed that Gonzalez and Yousif participated in the beating at the taco shop. At the preliminary hearing, Tucker could not identify Gonzalez, but that goes to witness credibility, an issue the jury presumably resolved against Gonzalez. Tucker could not identify defendants as having attacked him during the *second* beating on Seventh Avenue.

Moreover, Robinson testified he got a good look at some of the assailants' faces, and at the curbside lineup he identified Gonzalez as "definitely doing the stomping."

DISPOSITION

The judgments are affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.