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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEX MERCADO,

Defendant and Appellant.

E052703

(Super.Ct.No. FWV1001043)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller,
Judge. Affirmed.

Law Firm of Harold Greenberg, Harold Greenberg and Mark E. Beallo for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Scott C. Taylor,
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Alex Mercado was charged by amended information with assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b), count 1),¹ and false imprisonment by violence (§ 236, count 2). It was also alleged, as to count 1, that defendant personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d). As to count 2, it was alleged that he personally used a firearm, within the meaning of sections 1203.6, subdivision (a)(1), and 12022.5, subdivision (a). A jury found defendant guilty of both counts and found true the firearm use allegations. The trial court sentenced him to a total term of six years in state prison.

On appeal, defendant contends that he received ineffective assistance of counsel (IAC) when his attorney failed to present evidence, during the defense's case-in-chief, regarding an alleged offer by the victim to not press charges if defendant paid him money. We affirm.

FACTUAL BACKGROUND

Prosecution Evidence

The victim was 17 years old at the time of the trial. He testified that he started looking for a job because his father had recently passed away, and his family needed money. He was hired by a general contractor, David Gonzales. On his second day of work, the victim and Gonzales worked at defendant's house. Gonzales asked the victim

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

to find a ladder. When looking for a ladder, the victim encountered defendant coming out of his room. He asked defendant where a ladder was located, and defendant said he should ask Gonzales. Later on, Gonzales told the victim that defendant wanted to talk to him. The victim found defendant, who told him to go into the bedroom. Defendant asked the victim if he had stolen anything from him, and the victim denied stealing anything. Defendant pushed him to the ground, face first, and held a gun to his neck. Defendant repeatedly asked the victim what he stole from him, and he moved the gun around, placing pressure on either the victim's neck or back. Then, defendant hit the victim in the back of the head with the gun. The victim stayed on the ground and did not move because he was scared of the gun. The victim never had the chance to fight back or defend himself. At some point, defendant picked the victim up and told him to get out of his house. The victim walked out to Gonzales. Blood was dripping down from the back of the victim's head. He felt weak and dizzy and wanted to go home. Gonzales saw him bleeding and took him to the hospital.

Pictures of the victim's injuries were taken at the hospital and later admitted into evidence. In addition, the clothes that the victim was wearing that day were admitted into evidence. His shirt had a large amount of dried blood on it.

Officer Gabriel Garcia testified that he interviewed the victim at the hospital about two hours later. Officer Garcia testified that the victim seemed stunned or dazed, and the back of his head and his neck were bleeding. He observed scratches on the back of the

victim's head and neck, as well as a red circle at the top of his neck area. Officer Garcia opined that the mark appeared to be from the muzzle of a gun.

Officer Garcia also interviewed defendant at the police station later that afternoon. He did not notice any injuries on defendant, except for a small scratch on his finger.

Defense Evidence

Defendant testified on his own behalf. He testified that he walked into his bedroom and saw the victim going through his dresser drawer, where his wallet and gun were kept. He asked the victim what he was doing. Defendant testified that he thought the victim was going to grab the gun and kill him. They both lunged at each other and started fighting for the gun. They struggled, and defendant gained control of the gun. Defendant said he hit the victim to "get him off of [him]." At some point, they both fell to the ground. Defendant overpowered the victim, and told him to get out of his house.

Rebuttal Evidence

Officer Garcia was recalled to the stand and testified that when he interviewed defendant regarding the incident, defendant's description of the struggle was different than his testimony at trial. Defendant told him that the victim charged at him, but did not have the gun. Defendant said that he grabbed his gun out of the dresser drawer. Defendant never mentioned that he and the victim struggled for the gun.

The prosecution also admitted into evidence a recording of a phone call between defendant and his grandmother, when he was in jail. The recording was played for the jury. During the phone call, defendant told his grandmother that he caught someone

inside his room going through his drawers. Defendant said he had his gun on him, and he “pulled [his] gun out . . . and [he] hit [the person] in the face and then” “[he] hit him in the back of the head”

ANALYSIS

Defendant Has Failed to Demonstrate That His Counsel Was Ineffective

Defendant contends that his counsel was ineffective for failing to present evidence in his case-in-chief concerning a telephone call made by Gonzales, on behalf of the victim, offering not to press charges against defendant, in exchange for \$1,000.

Defendant claims that evidence of the victim’s attempt at extortion “could have led the jury to question [the victim’s] version of events.” Defendant’s IAC claim fails.

A. Relevant Background

During pretrial motions, the prosecutor raised the potential issue of a telephone call that was made by Gonzales to defendant concerning the willingness of the victim or the victim’s mother to not prosecute if defendant paid \$1,000 for the victim’s medical bills. The prosecutor argued that evidence of any such call would be “multiple levels of hearsay,” unless Gonzales testified under a hearsay exception. Defense counsel stated that he “did plan on using that [evidence],” and said he believed “it was done more than once.” The court stated that any conversations with Gonzales would be inadmissible hearsay. The court then asked defense counsel how he intended to use the evidence. Defense counsel said he believed the victim himself had also placed a call to defendant, but he needed to confirm that. He added that if the victim did call defendant, he would

use that evidence, but if he did not, he would not use the evidence. The court instructed both counsel not to raise this issue in front of the jury until they discussed the matter again, after the defense decided what it was going to do.

The prosecution presented testimony from the victim and Officer Garcia. The defense presented testimony from defendant and Gonzales, but did not ask any questions about the alleged extortion attempt. The prosecutor recalled Officer Garcia to rebut defendant's testimony. Defense counsel cross-examined Officer Garcia, and asked him if he remembered defendant telling him that Gonzales and the victim attempted to extort money from him. The prosecutor objected, and a bench conference was held. Outside the presence of the jury, the court admonished defense counsel for raising the issue, in direct violation of its order. Defense counsel said he thought the order was limited to raising the issue with the victim. The court stated that Officer Garcia's testimony on the subject was inadmissible hearsay, and asked how defense counsel was going to properly introduce the evidence.

Defense counsel then, still outside the presence of the jury, recalled Gonzales. Gonzales testified that the victim asked him to call defendant to ask for \$1,000. The victim said if he got the money he would not press charges. He said he wanted the money to pay his bills and to pay for his father's funeral. He added that, since they had worked two days for defendant and were not going to get paid, he would give Gonzales part of the money.

Defense counsel then requested that the court allow Gonzales to testify before the jury on the issue. The court was concerned that defense counsel now wanted to present the testimony in surrebuttal, noting that the evidence was not brought out in the defense's case-in-chief. The court asked defense counsel why, if he felt this evidence was admissible and relevant, he did not bring it out earlier. Defense counsel responded that, at the time, he did not think he would need the evidence, and Gonzales said he would not testify about the issue. However, based on the testimonies that had been presented, defense counsel now felt that he needed to present the evidence. Ultimately, the court ruled that it would not permit defense counsel to question Officer Garcia about the matter, since any response would be hearsay. The court also stated that it would not allow defense counsel to recall Gonzales on the issue, since it was beyond the scope of the rebuttal, and because Gonzales was a highly unreliable witness.

B. Defendant's IAC Claim Fails

A defendant who claims IAC must establish that his counsel's performance was deficient under an objective standard of professional competency, and that there is a reasonable probability that but for counsel's errors, a more favorable determination would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*)). If the defendant makes an insufficient showing on either one of these components, the claim fails. (*Ibid.*) In reviewing claims of IAC, we give great deference to defense counsel's tactical decisions, and "there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas*

(1995) 12 Cal.4th 415, 436-437 (*Lucas*); see also *Holt*, at p. 703.) Thus, a defendant raising a claim of IAC on direct appeal carries a difficult burden: We reverse on the ground of IAC only if the record affirmatively discloses that counsel could have had no rational tactical purpose for the challenged act or omission. (*Lucas*, at p. 437.)

1. *Defendant Has Not Established That His Counsel's Performance Was Deficient*

Defendant asserts that his counsel was ineffective for failing to introduce evidence concerning the victim's offer not to press charges in exchange for money from defendant, and he points out that his trial counsel initially stated that he intended to introduce such evidence but failed to do so. He also points out that his trial counsel failed to investigate the issue (e.g., whether the offer came from the victim or the victim's mother), as he said he would. Defendant then simply concludes that his counsel's failure to introduce the evidence during the case-in-chief fell below the standard of reasonableness.

However, as the People assert, the record reflects that counsel had tactical reasons for not presenting the evidence during the defense case-in-chief. At the time, he did not think he would need the evidence, and Gonzales said he would not testify about the alleged extortion attempt. Moreover, any testimony from Officer Garcia concerning the alleged phone call to defendant would have been inadmissible hearsay, as the court pointed out.

We cannot say that ““the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.”” [Citation.]” (*Lucas*,

supra, 12 Cal.4th at p. 437.) Defendant has not shown that his counsel's performance was deficient.

2. *Defendant Has Not Established Prejudice*

Defendant claims that evidence of the victim's attempt to get money from defendant "could certainly have led the jury to scrutinize [the victim's] testimony [regarding the incident with him] with a more jaundiced and discerning eye." However, he cannot demonstrate a reasonable probability that, but for counsel's purported error, a more favorable determination would have resulted. (*Holt, supra*, 15 Cal.4th at p. 703.) Even if counsel had introduced Gonzales's testimony regarding the victim asking defendant for money, it is not reasonably probable that defendant would have been acquitted in light of the substantial evidence against him. The evidence showed that defendant pushed the victim to the ground and held a gun to him. Defendant pressed the gun against the victim's neck and back, and hit him in the back of his head with the gun. The victim sustained a bruise and scratch on his forehead, and the back of his head was bleeding. Officer Garcia testified that he saw the victim at the hospital two hours after the incident and observed his injuries, including scratches on the back of the victim's head and neck, and what appeared to be the imprint from the muzzle of a gun on the victim's neck. The jury saw pictures of the victim's injuries, as well as the blood-stained shirt he was wearing that day. In contrast, defendant had no injuries, except a small scratch on his finger.

Although defendant testified that he thought the victim was reaching for his gun in the dresser drawer, there was evidence to the contrary. Officer Garcia testified that defendant told him that he grabbed the gun out of the dresser drawer, and that there was never a struggle for the gun. The evidence also showed that defendant told his grandmother that he had his gun *on him*, and he pulled it out and hit the victim in the face and back of the head.

Ultimately, the jury rejected defendant's version of the events that the victim tried to grab the gun and kill him, and that defendant was acting in self-defense. Thus, even if his counsel had introduced evidence of the victim's alleged request for money from him, it is not reasonably probable that a more favorable determination would have resulted.

In sum, defendant has failed to establish that his counsel's performance was deficient.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MILLER
J.