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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KENYATTA DEVAIL PHILLIPS,

Defendant and Appellant.

F062689

(Super. Ct. No. MF008620A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Kenyatta Devail Phillips was convicted after jury trial of carjacking. (Pen. Code, § 215, subd. (a).)¹ The court found true special allegations that appellant suffered three prior strikes (§§ 667, subd. (c)-(j), 1170.12, subd. (a)-(e)) and served two prior prison terms (§ 667.5, subd. (b)).² He was sentenced to 25 years to life imprisonment.

Appellant raises two instructional challenges, arguing that CALCRIM No. 362 and CALCRIM No. 318 violated his constitutional due process and fair trial rights. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15.) He also argues that defense counsel was ineffective. These arguments are not persuasive. The judgment will be affirmed.

FACTS

Catherine Black testified that at approximately 12:50 p.m. on February 18, 2009, she drove her red Ford 500 car to a post office in Rosamond and parked it in the lot. While she was still in the car, she saw appellant. He was standing nearby, waiting for her to get out of the car. As she got out of the car, appellant approached her. Appellant said that “he had some products for sale.” Black told him that she did not “have any money.” Appellant put his hand in his pocket. Black thought he was holding a gun. Appellant said, “This is a stickup. I want your car.” Black handed appellant her car keys and he got into the car.

Black had left her purse on the front passenger seat. She asked appellant if she “could at least have my purse.” He looked into the top of the purse and asked, “Do you

¹ Unless otherwise specified all statutory references are to the Penal Code.

² Appellant was also charged with robbery and receiving a stolen vehicle. (§§ 212.5, subd. (c), 496d, subd. (a).) The jury was unable to reach a verdict on count 2. A mistrial was declared. On motion of the prosecutor, the court dismissed counts 2 and 3 in furtherance of justice.

have any money in here?” Black replied, “No, I don’t have any money.” Appellant handed Black her purse. Appellant drove away.

Black ran into the post office and called emergency services (911). Black told the dispatcher that the person who stole her car was a Black male in his 30’s who wore a brown shirt.³

Kern County Sheriff’s Sergeant Tim Posey was on patrol. At 12:55 p.m. he heard a radio broadcast to be on the lookout for a red Ford 500. Shortly thereafter, he saw a car matching this description traveling southbound on Highway 14. Sergeant Posey ran the car’s license plate through the dispatcher and learned that the car was registered to Black. He initiated a traffic stop. Appellant was driving the car; he was wearing a brown jacket. Appellant was detained without incident.

Meanwhile, Black had been driven home. About 20 to 30 minutes later, the police called and said they found her car. Police officers transported Black to the location where Sergeant Posey stopped appellant. Black identified the vehicle as her car and appellant as the man who took it from her.⁴

Appellant was arrested. Kern County Sheriff’s Deputy Daren Ellison transported him to the police station. Deputy Ellison gave appellant a *Miranda* advisement. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)). Appellant stated that he understood each constitutional right. Deputy Ellison spoke with appellant about his arrest during the drive to the police station and interviewed appellant shortly after their arrival. Appellant said that a man named “Kevin,” who he met yesterday, loaned him the car. He last saw Kevin at about 11:30 a.m. He did not know Kevin’s last name or phone

³ This call was recorded on an audio CD, which was played for the jury and admitted into evidence as defendant’s exhibit A.

⁴ At trial, Black identified appellant as the person who approached her and stole her car. Sergeant Posey identified appellant as the man who was driving the red Ford 500.

number. Initially, appellant said that he met Kevin during a bus ride. When Deputy Ellison pointed out the improbability of a man who owned an operable vehicle riding on a bus, appellant said that he met Kevin at a gas station. Another deputy entered the room holding a videotape. He said it was a video of the post office parking lot and that “Kevin” was not on the video. Appellant changed his story. He said that he asked Black for permission to borrow her car and drive it to the Metrolink bus station in Lancaster. She agreed to loan it to him.⁵ The deputies suggested to appellant that he write an apology letter to Black. Although appellant said he did not want to write a letter, he did so after he was provided with a piece of paper.⁶

Appellant did not call any witnesses on his behalf.

DISCUSSION

I. The Jury Was Properly Instructed With CALCRIM No. 362 and CALCRIM No. 318.

A. CALCRIM No. 362 did not lower the prosecution’s burden of proof.

At the prosecutor’s request, the court gave CALCRIM No. 362, which instructs on false or misleading statements. During the instructional conference, defense counsel said that he did not have any objection to this instruction because “there’s some relevance to it.” CALCRIM No. 362 provided:

“If the defendant made a false or misleading statement before this trial relating to the charged crime knowing that his statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime. And you may consider it in determining his guilt.

⁵ Black testified that appellant did not ask to borrow her car and he did not “say anything about where [she] could pick up [her] car.”

⁶ The interview was recorded on an audio CD, which was played for the jury and admitted into evidence as People’s exhibit No. 3. Appellant’s letter to Black was admitted into evidence as People’s exhibit No. 4.

“If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance; however, evidence that the defendant made such a statement cannot prove guilt by itself.”

Relying on *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143 (*Littlefield*), appellant argues that CALCRIM No. 362 should be given only when the defendant’s purportedly false pretrial statements are incredible or completely implausible. Appellant asserts that his pretrial statements about Kevin were not “completely implausible.” Therefore, in his view CALCRIM No. 362 had the effect of reducing the People’s burden of proof in violation of his constitutional rights to due process and a fair trial because it “single[d] out the defendant’s pretrial statements, and then highlighte[d] the possibility that his testimony may be false, that he knows he is guilty, and that he is guilty.”⁷ We are not persuaded.

Under well-settled California law, a consciousness of guilt instruction like CALCRIM No. 362 is proper if it is supported by evidence of false or misleading pretrial statements. The California Supreme Court upheld use of CALJIC No. 2.03, a predecessor to CALCRIM No. 362. (*People v. Kelly* (1992) 1 Cal.4th 495, 531-532; *People v. Stitely* (2005) 35 Cal.4th 514, 555.) The *Stitely* court wrote,

“... We also have upheld CALJIC No. 2.03 against all other challenges raised here. The instructional language sufficiently protects against conviction based on the defendant’s false statements or consciousness of guilt alone. [Citation.] Nor is it argumentative or biased in the prosecution’s favor. [Citation.] Finally, insofar as the jury believed defendant lied about the charged crimes, the instruction did not generate an irrational inference of consciousness of guilt.” (*People v. Stitely, supra*, 35 Cal.4th at p. 555.)

⁷ We reject respondent’s contention that appellant forfeited this instructional challenge because he did not object to CALCRIM No. 362 at trial. Failure to object to an instruction does not preclude review for constitutional error. “The appellate court may ... review any instruction given, ... even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” (*People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028 (*Hudson*).)

In *People v. McGowan* (2008) 160 Cal.App.4th 1099, the Third Appellate District explained that CALCRIM No. 362 “is the successor to CALJIC No. 2.03.” (*Id.* at p. 1103.) There are only minor differences between CALCRIM No. 362 and CALJIC No. 2.03. The *McGowan* court determined that CALCRIM No. 362 is not an improper pinpoint instruction that highlighted particular evidence because, like CALJIC No. 2.03, it warns the jury that a defendant’s false or misleading pretrial statement cannot alone establish guilt. (*Id.* at pp. 1103-1104.)

Appellant urges this court to reject CALCRIM No. 362 based on the analysis used by First Circuit Court of Appeals in *Littlefield, supra*, 840 F.2d 143. The *Littlefield* court concluded that a consciousness of guilt instruction “should not be given when ... the jury could find the exculpatory statement at issue to be false only if it already believed evidence directly establishing the defendant’s guilt.” (*Id.* at p. 149.) It reasoned that such an instruction encourages circular thinking, whereby the jury must first conclude a defendant is guilty in order to find his or her statement to be false. (*Ibid.*) To avoid this circularity, the *Littlefield* court held that a consciousness of guilt instruction should only be given when the purportedly false statement is about a collateral matter or when it is “so incredible that its very implausibility suggests that it was created to conceal guilt [citation].” (*Id.* at p. 149.) Yet, the *Littlefield* court acknowledged that the federal circuit courts are not in agreement on which evidence justifies giving a consciousness of guilt instruction. It cited, inter alia, *United States v. McDougald* (4th Cir. 1981) 650 F.2d 532, 533, which concluded that any exculpatory statement, other than a general denial of guilt, that is contradicted by evidence at trial justifies the giving of a consciousness of guilt instruction. (*Littlefield, supra*, at p. 149.)

“[T]he holding of the federal court, although entitled to respect and careful consideration, would not be binding or conclusive on the courts of this state.” (*Bank of Italy Nat. Trust & Sav. Assn. v. Bentley* (1933) 217 Cal. 644, 653.) Only one California appellate court has considered the *Littlefield* analysis. In *People v. Wimberly* (1992) 5

Cal.App.4th 773 (*Wimberly*), the First Appellate District “neither endorse[d] *Littlefield* nor suggest[ed] that California courts follow it.” (*Id.* at p. 796, fn. 18.) The *Wimberly* court found that even if it were to apply the *Littlefield* analysis, it would not help appellant because the “very implausibility” of the defendant’s statements suggested that he made them “to conceal his guilt.” (*Id.* at p. 796.)

Appellant argues that California courts have ruled in a way that are consistent with the *Littlefield* analysis, citing *People v. Kelly*, *supra*, 1 Cal.4th at pages 531-532, and *People v. Stitely*, *supra*, 35 Cal.4th at page 555. This ignores the fact that the analyses in those cases focused entirely on the inconsistent nature of the statements without regard to their implausibility. California courts have upheld use of consciousness of guilt instructions based on inconsistency where the prior statements were not incredible or implausible. (See, e.g., *People v. McGowan*, *supra*, 160 Cal.App.4th at pp. 1102-1104; *People v. Russell* (2010) 50 Cal.4th 1228, 1253-1255.) Appellant’s arguments why *Littlefield*’s analysis should be applied in this case are unpersuasive.

In any event, like *Wimberly*, *supra*, 5 Cal.App.4th 773, application of the *Littlefield* analysis would not help appellant because his statements to Deputy Ellison were so incredible that their very implausibility suggested they were created to conceal guilt. Appellant stated that he last met Kevin at 11:30 a.m., which is more than an hour before Black was carjacked. His story that a stranger, who he met the day before the crime at a gas station, loaned him Black’s car “is so incredible that its very implausibility suggests that appellant created it to conceal his guilt.” (*Wimberly*, *supra*, 5 Cal.App.4th at p. 796.) Appellant’s statement that Black allowed him to borrow the car is equally implausible.

Accordingly, we hold that the trial court did not err by giving CALCRIM No. 362. The instruction does not lower the prosecution’s burden of proof. Evidence was presented at trial from which the jury could rationally conclude appellant made one or more deliberately misleading or false statements to explain his conduct. This evidence

justified inclusion of CALCRIM No. 362 in the jury charge. The jury was warned that it could not rely on appellant's false or misleading statement as evidence of guilt by itself. We presume the jury followed this instruction. (*People v. Cain* (1995) 10 Cal.4th 1, 34.) Since we have determined that CALCRIM No. 362 was properly included in the jury charge, appellant's contention that defense counsel was ineffective because he did not object to the instruction necessarily fails.

B. CALCRIM No. 318 did not lower the prosecution's burden of proof.

On its own motion, the court gave CALCRIM No. 318, which instructs on witness's prior out-of-court statements. This instruction provided: "You have heard evidence of statements that a witness made before the trial... [¶] If you decide that the witness made those statements, you may use those statements in two ways: First, to evaluate whether the witness's testimony in court is believable; and second, as evidence that the information in those earlier statements is true."

Appellant argues that CALCRIM No. 318 lessens the prosecution's burden of proof by effectively instructing the jury that if a witness made an out-of-court statement, it may conclude the statement is true simply because it was made. We are not persuaded. There is nothing in the permissive language of CALCRIM No. 318 to support the interpretation suggested by appellant. This instruction does not undermine other instructions requiring the prosecution to prove guilt beyond a reasonable doubt.⁸

In *Hudson, supra*, 175 Cal.App.4th 1025, the Third Appellate District rejected defendant's claim that CALCRIM No. 318 reduced the prosecution's burden of proof. The court explained:

⁸ We reject respondent's contention that this instructional challenge was forfeited. Failure to object to an instruction does not preclude review for constitutional error. (*Hudson, supra*, 175 Cal.App.4th at p. 1028.)

“CALCRIM No. 318 informs the jury that it may reject in-court testimony if it determines inconsistent out-of-court statements to be true. By stating that the jury ‘may’ use the out-of-court statements, the instruction does not require the jury to credit the earlier statements even while allowing it to do so. [Citation.] Thus, we reject defendant’s argument that CALCRIM No. 318 lessens the prosecution’s standard of proof by compelling the jury to accept the out-of-court statements as true.” (*Hudson, supra*, 175 Cal.App.4th at p. 1028.)

Hudson continued:

“We also reject defendant’s alternate argument that CALCRIM No. 318 disallows the jury from using ‘the evidence of a prior out-of-court statement as evidence the information in that statement is false.’ In considering this argument, we heed the well-established rule that the “correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citations.] Here, the trial court gave additional instructions that properly informed the jury of its prerogative to ignore any evidence found to be trustworthy. [CALCRIM No. 226.]” (*Hudson, supra*, 175 Cal.App.4th at pp. 1028-1029.)

The *Hudson* court explained that “CALCRIM No. 226 informed the jury that it could accept or reject any testimony, and in making that determination could also consider past inconsistent statements. CALCRIM No. 226 negates the possibility, imagined by defendant, that the jury would believe itself bound to rely on out-of-court statements that it found noncredible.” (*Hudson, supra*, 175 Cal.App.4th at p. 1029.)

We find *Hudson* convincing and will follow its reasoning and result. CALCRIM No. 318 does not contain a permissive presumption that a witness’s prior out-of-court statements are true. In this case the court instructed the jury with CALCRIM No. 226 as well as CALCRIM No. 302 [evaluating evidence] and CALCRIM No. 315 [evaluating eyewitness identification]. Appellant’s challenges to CALCRIM No. 318 do not have merit. CALCRIM No. 318 was supported by the evidence and properly included in the jury charge.

II. The Ineffective Assistance Claims Fail For Lack Of Prejudice.

Appellant argues his attorney was ineffective for two reasons: (1) he failed to raise involuntariness as a ground to suppress his pretrial statement to the police; and (2) he failed to object to Deputy Posey's testimony that based on his experiences investigating car thefts it is common for suspects to falsely claim that a friend loaned or gave them the stolen vehicle. As will be explained, both of these claims fail for lack of prejudice.⁹

A. Legal standard.

The law governing direct appellate review of ineffective assistance claims is undisputed:

“... First, a defendant must show his or her counsel's performance was ‘deficient’ because counsel's ‘representation fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.’ [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citations.] We will find prejudice when a defendant demonstrates a ‘reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.] ‘Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.’ [Citation.]” (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.)

When an ineffective assistance claim can be resolved solely on the absence of prejudice there is no need to determine whether counsel's alleged failings constituted deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Jackson* (1992) 3 Cal.4th 578, 604.)

Reviewing courts will reverse on the ground of inadequate counsel only if the appellate record affirmatively establishes counsel did not have a reasonable tactical

⁹ In light of our determination that appellant did not establish prejudice, we have no need to, and do not address appellant's claims that defense counsel's performance fell below an objective standard of reasonableness.

purpose for the challenged act or omission. (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) The standard for judging counsel's representation is extraordinarily deferential. The appellant bears the burden of overcoming strong presumptions that counsel's conduct fell within the wide range of reasonable professional assistance and that the challenged act or omission might be considered sound trial strategy. (*Strickland v. Washington, supra*, 466 U.S. at p. 689; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

An attorney can choose not to object to admission of evidence for many reasons. The absence of objection "rarely establishes ineffectiveness of counsel" [citation]. [Citation.] (*People v. Gurule, supra*, 28 Cal.4th at pp. 609-610.) Counsel does not have a duty to make futile or frivolous objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834.) The failure to object is considered a matter of trial tactics "as to which we will not exercise judicial hindsight. [Citation.]" (*People v. Kelley, supra*, 1 Cal.4th at p. 520.)

B. Appellant has not demonstrated a reasonable probability of a more favorable outcome if his statements that Black allowed him to borrow her car and his apology letter had been suppressed.

1. Facts.

The transcript of the interview shows that before the deputy entered the interview room with the videotape, Deputy Ellison urged appellant to tell him the truth. Deputy Ellison said that if appellant confessed, "The Judge is going to go ... right on. Maybe the DA's going to go ..., I don't want to throw the book at this guy. Let's go ... low term or something. That's how [stuff] happens in the real world. You know what I'm saying?" Appellant continued to maintain his innocence. Appellant continued to maintain that Kevin loaned him the car. Next, Deputy Ellison told appellant that he was in possession of a video of the parking lot which showed everything that happened involving the car. A deputy entered the room with the videotape and said, "There ain't no Kevin in this video." At this point, appellant changed his story and said that the victim agreed to let him borrow her car and drive it to the bus station in Lancaster. Deputy Ellison urged

appellant to write an apology to the victim. He said, “Here’s the deal with that, you want everything to look better when you go to court? ... What looks better? If you appeal to the jury then you’re not this thieving ... guy and a liar, and that you have a care, concern for this lady and it happened you saying it happened, put it on paper. This will look better for you.” Appellant continued to maintain that he did not steal the car. After Deputy Ellison gave him a piece of paper, he wrote a letter to Black.

Appellant orally motioned in limine to suppress his pretrial statement “on Miranda grounds.” Deputy Ellison testified about the circumstances surrounding appellant’s *Miranda* advisements. Deputy Ellison said that he did not ask any questions of appellant before starting the audiotape, no weapons were drawn during the interview and there were no indications appellant might have been under the influence of drugs or unable to understand the questions. Deputy Ellison also testified that the videotape was an investigative ruse; there was no video surveillance of the parking lot. Defense counsel submitted the matter without calling any witnesses or making any affirmative argument in support of the suppression motion. The trial court denied the suppression motion. It found “by a preponderance of the evidence there was a proper advisal and waiver of rights pursuant to the Miranda decision and it was a knowing, intelligent waiver and that the statement was voluntarily made.”

2. Admission of appellant’s pretrial statements about borrowing Black’s car and his apology letter were not prejudicial.

Appellant argues defense counsel was ineffective because he did not argue that his statements about the victim allowing him to borrow the car were the product of express and implied promises of lenity. We have examined the record carefully and conclude this claim can be resolved on the basis of lack of prejudice. As will be explained, it is not reasonably probable that the jury would have returned a more favorable verdict if appellant’s statements that he asked, and received permission, from Black to borrow her car and his apology letter had been suppressed.

It is no overstatement to characterize the evidence proving that appellant carjacked Black as overwhelming. Black told the emergency dispatcher and Kern County Sheriff's Deputy Deanna Ortiz that she had been carjacked by a Black male. A few minutes later, Deputy Posey apprehended appellant, a Black male, driving Black's car. Black identified appellant as the car thief during an in-field show-up. At trial, Black's testimony was largely consistent with the contents of the 911 call and statements she made to Deputy Ortiz. She identified appellant as the person who stole her car.

The record also shows that appellant did not call any witnesses or offer any alibi evidence. During closing arguments, defense counsel stated: "I think we all can agree that [Catherine Black] was carjacked." He argued that Black mistakenly identified appellant as the perpetrator. Neither the prosecutor nor defense counsel mentioned the contents of the apology letter during closing arguments.

The jury would not have acquitted appellant of carjacking if appellant's statements that Black loaned him the car and his apology letter had been suppressed. Appellant's statements to Deputy Ellison that Kevin loaned him the car were not believable. Appellant said that he last saw Kevin at approximately 11:30 a.m. Yet, the carjacking did not occur until 12:50 p.m. Also, appellant did not know Kevin's last name or phone number. Appellant first told Deputy Ellison that he met Kevin on a bus. When Deputy Ellison challenged the likelihood of a person with an operable car using public transportation, appellant said he met Kevin at a gas station. We agree with respondent that, "This implausible story of a stranger from a gas station loaning appellant a car would not have convinced any reasonable juror in light of Black's eye-witness identification and the fact appellant was driving Black's car shortly after it was carjacked."

Further, it is possible that appellant's statement that Black loaned him the car actually operated to his advantage. Appellant told Deputy Ellison that Kevin loaned him the car to go to the bus station in Lancaster. Later, he said that Black gave him

permission to drive the car to the bus station in Lancaster. There was no direct evidence proving that appellant did not intend to leave the car at the bus station. Appellant allowed Black to keep her purse and did not physically harm her. He pulled the car over when directed to do so by the police and was detained without incident. During closing arguments the prosecutor explained the difference between carjacking and robbery, as follows: “For robbery, unlike carjacking, it can’t be a temporary thing. When you rob somebody, it’s kind of got to be: I’m going to take it.” The jury was unable to reach a verdict on the robbery charge and it was dismissed on the prosecutor’s motion. On this record, it would not have been unreasonable for one of the jurors to conclude appellant was not guilty of robbery because he intended to abandon Black’s car at the bus station.

For these reasons, we hold that appellant did not demonstrate a reasonable probability of a more favorable outcome if appellant’s statements about borrowing the car from Black and his apology letter had been suppressed. Since appellant failed to establish prejudice, the ineffective assistance claim fails.

C. Appellant has not demonstrated a reasonable probability of a more favorable outcome if Deputy Posey’s testimony about his experiences with suspects in car theft cases had been excluded.

1. Facts.

During redirect examination, the prosecutor asked Deputy Posey the following series of questions, without objection by defense counsel:

“Q. Regarding your experience in car investigations, have you ever had the opportunity to speak with persons who were suspected of possessing a stolen vehicle?”

“A. Yes.

“Q. Did you ever have them give you any explanations trying to deflect guilt?”

“A. Yes.

“Q. Have you ever heard of a suspect possessing a stolen vehicle saying: A friend gave it to me?

“A. Absolutely.

“Q. In your experience with car thefts, would you say that it is a common defense to say that a friend gave me the stolen vehicle?

“A. Yes or borrowed, you know. I was loaned the vehicle by someone.

“Q. And during the course of your investigations in car thefts, have you found that those types of statements often turn out to be untrue?

“A. Most times, yes.”

2. Appellant was not prejudiced by admission of Deputy Posey’s testimony.

Appellant contends that his attorney was ineffective because he did not object to the prosecutor’s questions to Deputy Posey concerning his experiences with suspects in car theft investigations “trying to deflect guilt” by falsely saying the stolen vehicles were loaned or given to them. As will be explained, this claim fails for lack of prejudice.

We have previously explained that the evidence in this case overwhelmingly proved that appellant was guilty of carjacking. Defense counsel did not present any evidence or argue that Kevin, or someone else, loaned Black’s car to appellant. Appellant’s story about Kevin loaning him Black’s car was so implausible that no reasonable juror would believe it. It is not reasonably probable that the jury would have returned a more favorable verdict on the carjacking charge if Deputy Posey’s testimony had not been permitted to testify that in his experience investigating car thefts it is common for suspects to falsely claim that a friend loaned or gave them the stolen vehicle. Appellant did not demonstrate a reasonable probability of a more favorable verdict in the absence of the challenged testimony. Therefore, defense counsel’s failure to object to this line of questioning was not prejudicial. Since appellant did not demonstrate prejudice, the ineffective assistance claim fails.

DISPOSITION

The judgment is affirmed.

LEVY, Acting P.J.

WE CONCUR:

POOCHIGIAN, J.

FRANSON, J.