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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIPE DEJESUS BAUTISTA,

Defendant and Appellant.

F066370

(Super. Ct. No. F11907330)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Stephen M. Hinkle, 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, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Franson, J. and Peña, J.

A jury convicted appellant, Felipe DeJesus Bautista, of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)) and found true an enhancement allegation that in committing that offense appellant personally used a firearm (Pen. Code, § 12022.53, subd. (b)). The court imposed a prison term of 13 years.

On appeal, appellant's sole contention is that at trial he was denied his constitutional right to the effective assistance of counsel by his counsel's failure to elicit from the victim testimony that it appeared another man ordered appellant to commit the robbery. We affirm.

FACTS

Prosecution Case

At approximately 10:00 p.m. on December 24, 2011 (December 24), 16-year-old Giovanni S. (Giovanni) was walking near Fresno High School on his way to a friend's house when a "burgundy" colored minivan with two men in it drove by him and stopped in front of him.¹ Giovanni kept walking and the van slowly drove off before stopping a second time, this time in the middle of the street. At that point, Giovanni turned onto a different street and started walking as fast as he could. He heard screeching tires, and appellant, who was holding a gun, and another man got out of the minivan and approached Giovanni.

Appellant said to Giovanni, "Give me all your shit." Giovanni handed his headphones, cell phone, iPod, jacket and five dollars to the other man. At that point, appellant told Giovanni to "Get on the floor," and Giovanni "squatted down" and put his hands over his head. Appellant and his companion got in the minivan and drove off. Giovanni then walked to his friend's house and called his mother.

Giovanni was held at gunpoint for approximately one to three minutes. Giovanni did not know if the man to whom he handed his property had a gun; he saw only one gun.

¹ Except as otherwise indicated, the "Prosecution Case" portion of our factual summary is taken from Giovanni's testimony.

At no point during the encounter did Giovanni hear the man to whom he handed his property say anything.

Fresno Police Officer Gregory Nichols testified that at approximately 11:00 p.m., on December 24, he and his partner, Officer Jessica Gonzalez, received a call requesting assistance in the investigation of an armed robbery and advising them to look for a red or maroon minivan.² The officers drove to the area where the robbery had been reported and saw a van matching the description they had been given. Nichols began following the van but lost sight of it for approximately five to ten seconds as it made a turn. When he regained sight of the van, it was parked. Nichols and Gonzalez approached the van and determined there was no one inside. A gun was found on the floorboard on the passenger side.

Other officers arrived on the scene, and subsequently appellant and his codefendant, Ricardo Obeso, were found behind the garage of the house the van was parked in front of. Obeso had the keys to the van in his pocket. Officer Gonzalez testified that a cell phone, a jacket, an iPod and headphones were found in the van.

Defense Case

At approximately 9:00 p.m., on December 24, appellant was at the apartment of a neighbor, located in an apartment complex next door to appellant's house. Ricardo Obeso was also there. Appellant had never met Obeso before, but they conversed for approximately 45 minutes and when appellant said he had been invited to his father's house, Obeso offered to give him a ride. Appellant accepted, and Obeso drove him to his father's house in Obeso's van. The two stayed for approximately 45 minutes, and then left.

Appellant thought Obeso was taking him home, but when Obeso drove past the turn he should have taken to get to appellant's house, appellant asked him where they

² Except as otherwise indicated, the remainder of the "Prosecution Case" portion of our factual summary is taken from Nichols's testimony.

were going. Obeso responded, ““We’re going to go make some money.””³ At some point thereafter, Obeso stopped and parked the van. A person who appellant identified in court as Giovanni was walking on the sidewalk, and Obeso handed appellant a gun and said, ““Hey, why don’t you rob this guy and make some money.”” Appellant told Obeso, “no, I’m not going to do anything,” at which point Obeso grabbed the gun and said, ““If you want to get home, you’re going to do this.”” Appellant responded, “I don’t want to do anything. I just want to go home.”

Obeso then drove off, reached behind his seat, pulled out a fake gun and said, ““Here, use this one and I’m going to hold the other one.”” He then pulled over and stopped a second time. Obeso told appellant, ““Just hurry up and do it so you can get home,”” and handed appellant the fake gun he had just pulled out from behind the seat. Appellant, who was afraid for his life, got out of the van, as did Obeso. Appellant approached Giovanni, pointed the fake gun at him, and told him, ““Give me everything you’ve got.”” Giovanni “turn[ed] over his property” to Obeso. Appellant and Obeso then got back in the van and drove away.

As Obeso drove, appellant threw the scarf and gloves he had been wearing out the window, because they made him feel “dirty.” Obeso pulled over and began examining the things that had been taken from Giovanni, and appellant said, ““Can you take me home already?”” Obeso began driving again, and appellant asked him, ““You got what you needed, can I go home now?”” Obeso said he “wanted to make some money,” and “kept driving around.”

Approximately 10 minutes later, a police car passed them, made a U-turn and began following them. Obeso made a few turns, stopped the car, and told appellant to run. Appellant then got out of the car and “tr[ie]d to get as far as [he could] away from [Obeso].”

³ The majority of appellant’s conversations with Obeso were in Spanish.

Appellant did not tell Giovanni he (appellant) was being forced to rob him because Obeso “still had a gun and [appellant] was afraid he might use it.” Appellant did not tell investigating officers “how this all went down,” because he was afraid his family would “get hurt.”

DISCUSSION

Appellant argues that appellant’s trial counsel was constitutionally ineffective in failing to elicit testimony from Giovanni that it appeared Obeso ordered appellant to commit the robbery.

Procedural Background

On cross-examination of Giovanni by appellant’s counsel, shortly after Giovanni testified that he spoke to police officers after the robbery, the following exchange occurred:

“Q Do you remember telling the officer that it appeared to you that one subject ordered another subject to commit the robbery?

“A I don’t recall.

“Q You don’t recall, so it is possible that you had told him –

“A It is possible I said that, but I don’t recall at this moment.”

Appellant’s counsel did not question Giovanni further on this point.

Thereafter, Fresno Police Officer Dominic Alvarado testified on direct examination that in conducting an investigation of the December 24 robbery, he “[took] a statement” from Giovanni. On cross-examination, after Alvarado testified he prepared a written report regarding that investigation, defense counsel asked him, “Do you remember speaking with [Giovanni] and [Giovanni] telling you -- or [Giovanni] describing this incident that one suspect appeared to order the second suspect to commit the robbery?” Obeso’s counsel objected on hearsay grounds, and a hearing was conducted outside the presence of the jury.

At that hearing, defense counsel stated that it was his “belief” that Officer Alvarado would testify “that [Giovanni] told him that it appeared to him that one person ordered the other person to commit this act, or to do this, or something similar to that.” In response to a question from the court as to the basis for Giovanni’s statement, counsel stated, “[Giovanni] saw two people interact, the nonverbal communication, the postures of the two people, and so he drew that conclusion.” The court sustained the hearsay objection.

Appellant’s counsel also told the court that Giovanni “was left at the conclusion of his testimony subject to recall by myself,” and “I don’t think there is anything that would prevent me from calling him ... on behalf of [appellant] and addressing those issues again.” The court confirmed that Giovanni was subject to recall.

Giovanni was not recalled as a witness.

Legal Background

“To prevail on a claim of ineffective assistance, a defendant must show both that counsel’s performance was deficient—it fell below an objective standard of reasonableness—and that defendant was thereby prejudiced.” (*People v. Cash* (2002) 28 Cal.4th 703, 734.) “We reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational tactical purpose for counsel’s act or omission.” (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1148.)

“[P]rejudice must be affirmatively proved....” (*People v. Hart* (1999) 20 Cal.4th 546, 624.) The defendant must show ““a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different....”” [Citation.]” (*People v. Staten* (2000) 24 Cal.4th 434, 451.) “[T]here is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel’s performance was deficient before examining the

prejudice suffered by the defendant as a result of the alleged deficiencies.” (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

“[T]his court is, of course, limited to the record on appeal and may not speculate about matters outside that record.” (*People v. Moreno* (1987) 188 Cal.App.3d 1179, 1185.)

Contentions and Analysis

Appellant asserts Giovanni “evidently” told Officer Alvarado that it appeared to him (Giovanni) that Obeso ordered appellant to commit the robbery. He argues that his trial counsel was constitutionally ineffective in failing to elicit from Giovanni testimony that Giovanni made such a statement to the officer because: (1) there could have been no rational tactical purpose for failing to attempt to elicit such testimony from Giovanni—an attempt, he argues, that would have been successful; and (2) the failure to do so was prejudicial because had the jury had before it evidence corroborating appellant’s version of events—that he was ordered and/or forced to commit the robbery—in the form of the victim’s own testimony, it is reasonably probable the jury would have reached a result more favorable to appellant. Appellant’s argument fails for at least two reasons.

The major factual premise of appellant’s argument is that Giovanni told Officer Alvarado it appeared Obeso ordered appellant to commit the robbery. This purported fact, however, is not supported by the record. Appellant asserts that “evidently” Alvarado wrote in his report that Giovanni made this statement, but the report was not introduced into evidence and no evidence of the content of the report was adduced at trial. Appellant argues that the report must have contained this statement because his counsel had received police reports in discovery; counsel, in questioning Alvarado, confirmed that Alvarado had written a report; and counsel’s question to Giovanni regarding the purported statement “did not come out of nowhere.” However, the record admits of the possibility that counsel simply misread the report and that it did not contain the statement counsel apparently believed was reported there. Unless, as appellant

asserts, Giovanni in fact told Alvarado that it appeared Obeso forced appellant to commit the robbery, there is no likelihood further examination of Giovanni would have elicited any testimony favorable to appellant and therefore, because the record does not demonstrate Giovanni made the statement in question, it cannot be said that prejudice has been affirmatively shown. Thus, even assuming for the sake of argument that the failure to examine Giovanni further was objectively unreasonable, appellant's claim of ineffective assistance of counsel fails.

Moreover, even if it could be said that the record contains evidence that Giovanni made the statement in question to Alvarado and that further questioning would in all likelihood have produced this evidence, appellant's claim would still fail. Again, we assume for the sake of argument that there could be no rational tactical purpose for counsel's failure to attempt to elicit from Giovanni testimony that Giovanni told the officer it appeared that Obeso ordered appellant to commit the robbery. Such testimony, however, without more, would not have been particularly helpful to appellant's cause, because it begs the question: What was the basis for Giovanni's conclusion that Obeso forced appellant to commit the robbery? Counsel indicated to the court he had information that Giovanni based this conclusion on the body language of appellant and Obeso. But this raises such questions as the following: What did Obeso and/or appellant do that made it appear to Giovanni that Obeso issued some kind of nonverbal order to appellant? Was Giovanni's conclusion a reasonable one based on what he observed? Given that Giovanni had a gun pointed at him, was he so upset that his ability to accurately perceive and interpret the nonverbal conduct of the two men was compromised? If so, to what extent?

Conceivably, further questioning could have provided answers to these questions that would have constituted compelling evidence supporting appellant's defense. However, as the court stated in *People v. Medina* (1995) 11 Cal.4th, 694, 773: "On direct appeal, a claim of ineffective counsel cannot be established by mere speculation

regarding the ‘likely’ testimony of potentially available witnesses. [Citation.] We cannot assume from a silent record that particular witnesses were ready, willing and able to give mitigating testimony, nor can we speculate concerning the probable content or substance of such testimony.” Thus, we cannot speculate that defense counsel could have elicited additional testimony more supportive of appellant’s version of events, and without such testimony, we are left with only the unsupported, conclusory statement that it *appeared* to Giovanni that Obeso ordered appellant to act as he did. This is opinion evidence, without any showing of the basis for the opinion. Indeed, it cannot be determined on this record whether appellant could have established the conditions necessary for the admission of this opinion evidence, viz., that such opinion was “*Rationally based* on the perception of the witness” (Evid. Code, § 800, subd. (a), italics added) and would be “[h]elpful to a clear understanding of [the witness’s] testimony” (Evid. Code, § 800, subd. (b)). Thus, although the record admits of the possibility that defense counsel, with further questioning, could have elicited testimony from Giovanni that would have been sufficient to create a reasonable doubt in the mind of at least one juror, it is not affirmatively established on this record that such a result was reasonably probable. Therefore, in the absence of the affirmative showing of prejudice required to establish ineffective assistance of counsel, appellant’s claim must be rejected.

DISPOSITION

The judgment is affirmed.