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

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ALBERTO CRUZ,

Defendant and Appellant.

F069601

(Super. Ct. No. F13906889)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Gabriel C. Vivas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Luis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Detjen, J. and Peña, J.

INTRODUCTION

Appellant Luis Alberto Cruz was convicted by a jury of robbery and assault with a semiautomatic weapon. It also was found true that Cruz personally used a firearm. Cruz appeals, contending his convictions should be reversed because the trial court erred in denying his mistrial motion. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

On July 7, 2013, sometime around 2:47 a.m., Cruz and two African-American men robbed Evaristo Zapien, the proprietor of a taco truck, at gunpoint. They took \$400 or more from Zapien. During the robbery, Cruz racked the semiautomatic weapon, causing one of the bullets to come out. Zapien's son, Elian, who witnessed the robbery, found a nine-millimeter round near the taco stand and led law enforcement to it.

Zapien ran to a nearby convenience store, with Cruz chasing him and calling out that he would shoot Zapien if he did not stop. The convenience store employees called 911, while Cruz and the other two robbers ran into a nearby apartment complex.

Elian recognized Cruz; shortly before the robbery, he had seen Cruz in the convenience store arguing with a clerk. Elian had never seen Cruz before seeing him in the convenience store. Venancio Escobar, a clerk at the convenience store, also recognized Cruz. Escobar stated that as Cruz left the convenience store after the argument, Cruz lifted his shirt, revealing a gun.

Elian described Cruz to responding officers as about five feet, one to two inches tall; Hispanic; medium build; in his twenties; wearing a black shirt with a white T-shirt underneath, and dark, baggy jeans, with red and white Adidas shoes; and with a green backpack. Zapien described Cruz as five feet, one to four inches tall; medium build; wearing a black shirt, dark jeans, and red and white Adidas shoes. Both Zapien and Elian told officers Cruz had a tattoo on his forearm; this was proven at trial to be incorrect.

Officers viewed the convenience store videotape. The tape showed Cruz pulling up his shirt and exposing a semiautomatic gun in his waistband. The tape also showed

that Cruz was wearing a black shirt with a white shirt underneath; dark pants; red and white shoes; and carrying a green backpack. Cruz left the store at 2:24 a.m.

Fresno Police Detective Patrick Mares created a “BOL” document or “be on the lookout” for the person depicted in the videotape. Mares found that the person in the videotape strongly resembled Cruz and created a photographic lineup that included Cruz’s picture.

When shown the photographic lineup, Zapien was unable to make a positive identification. When shown still photos from the store videotape, Zapien stated the person on the videotape was the person who had robbed him.

Elian identified Cruz from the photographic lineup as the person at the convenience store and the person who robbed the taco truck. Both Zapien and Elian identified Cruz at trial.

Cruz was apprehended on July 20, 2013, at his girlfriend’s house. Cruz stated there were no firearms at the residence. A consent search revealed a loaded semiautomatic gun and male clothing in the bedroom. Stamps on the ammunition in the gun matched the stamp on the round found at the scene of the robbery.

Cruz was informed of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 and agreed to be interviewed. He admitted being the person in the videotape and having a gun in the store, but denied robbing the taco truck. He acknowledged having a green backpack, but stated he had discarded it. He denied associating with African-Americans. The interview was not recorded.

Cruz was charged with one count of robbery, a violation of Penal Code¹ section 211; and one count of assault with a semiautomatic weapon, a violation of section 245, subdivision (b). It also was alleged as to both counts that he personally used a firearm within the meaning of section 12022.5, subdivision (a).

¹ References to code sections are to the Penal Code unless otherwise specified.

Mistrial Motion

During Mares's testimony he testified that after sending out the BOL, he received a response from Officer Yambupah. The prosecutor then asked, "What did you learn?" The defense objected to the question on the basis of hearsay and a violation of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*); the trial court sustained the objection.

The prosecutor argued that it was not being offered for the truth of the matter, but for "this officer's subsequent actions." The trial court responded that the officer, "can tell us what he did." The prosecutor then had the following exchange with Mares:

"Q. Officer, without telling me what the other officer told you, what did you do next?"

"A. I began researching two particular names.

"Q. And was one of those names Luis Cruz?"

At this point, defense counsel objected on the basis of "hearsay, Sixth Amendment" and the trial court sustained the objection.

The prosecutor asked to be heard and the jury was excused from the courtroom. Outside the presence of the jury, Mares explained that he received two names, one of which was Cruz's name. Cruz's name was more interesting because records showed he had a tattoo on his neck and the person in the video had a tattoo on the back of his neck.

Defense counsel objected to the evidence on the grounds of hearsay, lack of foundation, and confrontation clause grounds. The prosecutor responded that the proffered evidence was admissible in that "It explains what this detective did in order to lead him to Luis Cruz. Otherwise we would have the jury to believe he picked a name out of thin air."

The trial court ruled that Mares would not be permitted to testify that Yambupah stated the person in the picture was Cruz. Mares would be permitted to testify that he received information, based upon that information he secured photographs, one of which was of Cruz. Both the prosecutor and Mares indicated they understood the ruling.

The jury returned to the courtroom and the prosecutor stated, “at this point you have a name of Luis Cruz; what did you do next?” Defense counsel objected, the trial court sustained the objection and stated “that question will be stricken.” The defense moved for a mistrial. The trial court excused the jury.

Defense counsel stated the mistrial motion was brought because the prosecutor had just “referenced the evidence that the Court expressly said that she couldn’t reference in front of the jury.” The prosecutor responded that the violation was not intentional and that it wasn’t offered for the truth.

The trial court denied the motion, finding there was no intentional violation. The trial court continued, “I don’t believe, candidly, it’s particularly prejudicial because this officer is going to testify that he did, assuming this officer testifies, that he did the research to compare.”

When the trial resumed the next day, the trial court informed the jury that the motion for mistrial had been denied. Mares’s testimony continued without incident.

The jury found Cruz guilty of both charges and found the allegations true. Cruz was sentenced to a term of 12 years in prison on December 2, 2013.

On June 5, 2014, this court granted Cruz leave to file a late notice of appeal. On June 23, 2014, Cruz filed a notice of appeal.

DISCUSSION

Cruz argues his motion for a mistrial should have been granted because the prosecutor’s questioning of Mares violated his confrontation clause rights.

Standard of Review

A trial court is vested with “considerable discretion in ruling on mistrial motions.” (*People v. Harris* (2013) 57 Cal.4th 804, 848.) A mistrial should be granted if the trial court “is apprised of prejudice that it judges incurable by admonition or instruction.” (*Ibid.*)

Analysis

Here, the trial court sustained an objection when the prosecutor asked Mares “what did you learn” after sending out the BOL. When the prosecutor then inquired of Mares if he had been given the name of Luis Cruz, the defense objected and the trial court sustained the objection. There was a discussion outside the presence of the jury. When the jury was brought back, the prosecutor asked a question, to which the defense objected. The objection was sustained and the question was stricken by the trial court. After the defense motion for a mistrial was denied, questioning proceeded the next day without incident.

The trial court found the prosecutor’s questions to not be “particularly prejudicial” and we agree. The trial court sustained the defense objections, and struck the question, which Mares did not answer. The jury was specifically instructed that the attorneys’ questions were not evidence; if an objection to a question was sustained, ignore the question and do not speculate as to what the answer might have been. The jury also was instructed that if a question is stricken, they were to disregard it and not consider it for any purpose.

While Cruz speculates that the jury ignored the admonition and instructions, it is mere speculation on his part and he points to no such indication in the record. We presume the jury followed the trial court’s instruction and ignored the questions of the prosecutor to which objections had been sustained, or which had been stricken. (*People v. Cage* (2015) 62 Cal.4th 256, 275.)

Moreover, any potential harm from the prosecutor’s questions, which Cruz alleges violated his confrontation rights under *Crawford*, was not prejudicial. (*People v. Geier* (2007) 41 Cal.4th 555, 608.) Zapien identified the man in the convenience store videotape as the man who robbed him. Elian identified Cruz from the videotape and the photographic lineup. Both Zapien and Elian identified Cruz at trial as the man who robbed the taco truck.

Additionally, Cruz admitted to being the person in the convenience store videotape and the clothing of the person in the tape matched the description given by both Zapien and Elian of the clothing worn by the man who robbed the taco truck. The video showed Cruz leaving the convenience store approximately 23 minutes before the robbery occurred. The firearm found when Cruz was apprehended matched the description of the one used in the robbery and the ammunition in that weapon matched the casing found at the scene of the robbery.

We conclude that any potential *Crawford* violation was harmless beyond a reasonable doubt. (*People v. Jennings* (2010) 50 Cal.4th 616, 665.)

DISPOSITION

The judgment is affirmed.