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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD DWAIN JOHNSON,

Defendant and Appellant.

G046328

(Super. Ct. No. 09HF1085)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Scott A. Steiner, Judge. Affirmed.

Eric Cioffi, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina, Deputy Attorney General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Richard Dwain Johnson of a single count of second degree robbery. (Pen. Code §§ 211, 212.5, subd. (c).) He was sentenced to a prison term of three years.

On appeal, defendant contends the court prejudicially erred by admitting testimony of an out-of-court identification by the robbery victim. The victim picked defendant out of a six-person photographic lineup, but said she could only “estimate” defendant was the robber, as the victim never got a clear look at defendant’s face. Finding neither error nor prejudice, we affirm.

FACTS

On the afternoon of March 6, 2009, a man walked into a Bank of America in Newport Beach, California, wearing a straw hat. He approached a teller, passed a note to the teller written on a folded paper plate and said, “Read it.” The note read, “Give me a 50, twenties, and tens” “if you don’t want to hurt anyone.” The teller then placed approximately \$1,800 in a black pouch the robber had furnished. The man took the bag and quickly left the bank. The teller never got a good look at the robber’s face because the robber kept his head tilted down so his straw hat blocked most of his face. She did, however, see from approximately the nose to the cheek bone on one side of the robber’s face.

As the robber was walking out, the teller informed another bank employee about the robbery. The employee saw the robber leaving the building wearing the straw hat. The employee then went to lock the door the robber had used, and as she did so she saw through the glass door what she recognized as the robber’s straw hat on the ground in the parking lot. The employee subsequently went outside and collected the straw hat, taking care not to touch the brim or the inside of the hat.

The police arrived to investigate. The police collected the straw hat, which was DNA tested. There were two contributors of DNA to the hat, a major contributor and a minor contributor. The major contributor was the defendant.

Approximately two months after the robbery, the police showed the teller a six-person photographic lineup. The teller stated, "I don't recognize anyone here because I don't [*sic*] see any face." She then said the robber "might be number 5" and that number five "looked similar" to the robber, but that she was only giving an "estimate." She made this estimate based on the height, build, skin color, and lack of facial hair of the robber and the man depicted in the photograph. She used the word "similar" because she could not be certain number five was the robber. At trial, however, she acknowledged during cross-examination she "had no idea if number 5 [was] the man that was standing in front of [her] at [her] counter." Number five was a picture of the defendant.

After the robbery the defendant told his brother he robbed a Bank of America. The defendant would joke about it because he fled the scene on a bike and thus was the "bicycle bandit." Defendant said these things in a bragging manner. Defendant made such comments on four or five different occasions. Defendant's brother did not tell the police because defendant threatened him on several occasions.

Similarly, the defendant told a friend he had robbed a Bank of America in Newport Beach and had worn a straw hat and had passed a note on a paper plate to the teller.

Pretrial, defendant moved under Evidence Code section 402 for an order barring the introduction of the teller's testimony concerning her identification of defendant in the six-person photographic lineup. Defendant contended the teller's act of picking defendant's picture combined with her comment that defendant's photograph "look[ed] similar to the person that committed the robbery" did not constitute an "identification" under Evidence Code section 1238 (section 1238), and was otherwise inadmissible hearsay.

The court denied the motion: “The court had an opportunity to do some more research and had an opportunity to read the *Hatfield* case that I mentioned earlier, [*People v. Hatfield* (1969)] 273 Cal.App.2d 745. ¶ I also found two additional cases, which pretty definitively establish that even a mere description — forget about an I.D. — that a mere description is sufficient under [section] 1238, specifically [*People v. Cooks* (1983) 141 Cal.App.3d 224 and *People v. Gould* (1960) 54 Cal.2d 621]. So it seems clear that the description given by” the teller is sufficient under section 1238. “If case law has subsequently interpreted a prior identification to be demonstrated where the evidence as to that identification is merely a description, then that would, to the court, seem to suggest that whatever bar it is, wherever that bar is set on the issue of identification of [section] 1238, it’s low.” The court also noted, citing *People v. Gonzales* (1968) 68 Cal.2d 467, that the strength of an identification, or lack thereof, is for the jury to weigh. The court encouraged defense counsel to raise an objection if any other foundational requirements of section 1238 were not met: “Again, this assumes that there is compliance with the other foundational elements of [section] 1238. I’m assuming that those elements would be established. Obviously the defense could renew an objection if there was a separate basis for contesting the admissibility of a prior identification.” Defense counsel raised no additional objections at trial.

At trial the principal disputed issue was identity. During closing argument, the prosecutor discounted the importance of the teller’s “estimate” that defendant’s photograph in the lineup looked “similar” to the robber, stating, “Is that enough by itself? Would we be here? No, we wouldn’t.” The prosecutor focused principally on the DNA evidence and defendant’s admissions. Of the 13-page transcript of the prosecutor’s closing argument, only one page is devoted to the six-person photographic lineup evidence. Defense counsel argued the photographic lineup evidence was of no value at all: “The fact that [the teller] said that number 5 looked similar is of no evidence in this case. And in fact, it’s a little disturbing that that’s the kind of square peg that’s tried to

put into the round hole because we don't have a police officer here to explain to you why he would do a six-pack with five guys with hair on their face and one guy without. That's what we call a classic suggestive photo I.D. lineup, and that is a dangerous piece of evidence to rely on. [¶] But you don't need to rely on that evidence because [the teller] told you don't rely on that evidence because 'I don't know at all if that's the man that robbed me.' Period. The end."

During deliberations, the jury asked two questions. Of relevance here, they asked, "On what date was the '6-pack' shown to the bank teller"?

DISCUSSION

Defendant claims a single error on appeal: that the court erred by admitting the teller's testimony regarding the six-person photographic lineup as an "identification" under section 1238, the hearsay exception for prior identifications. We review the court's ruling for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725 ["an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question"].) We hold the trial court did not abuse its discretion, and, even if it had, the error would not have been prejudicial.

The Teller's Testimony Was Admissible — the Weakness in the Identification Went to the Weight, not the Admissibility of the Testimony

Section 1238 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and: [¶] (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence; [¶] (b) The statement was made at a time when the crime or other occurrence was fresh in the

witness' memory; and ¶ (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.”

The only portion of section 1238 at issue here is whether the teller's statements, concerning the defendant's photograph in the lineup, were an “identification” under subdivision (a). The trial court made clear that its ruling was so restricted and invited defense counsel to object if any of the remaining foundational elements that were not met. Defense counsel did not object. Accordingly, the sole issue before us is whether the teller's testimony was an “identification” under subdivision (a).¹

We begin with the principle that even weak, hesitant identifications are admissible — the weakness goes to the weight, not the admissibility of the evidence. (*People v. Jones* (1963) 221 Cal.App.2d 408, 409 [“The strength or weakness of identification is a matter solely within the province of the jury. [Citations.] The jury's determination must be upheld unless the evidence of identification is inherently improbable or incredible as a matter of law”].) *People v. Gonzales, supra*, 68 Cal.2d 467 is instructive. There, an informer phoned defendant requesting to purchase heroin. The defendant left a bar to go complete the sale. An officer was at the bar and saw a man he believed to be the defendant leave the bar shortly after the phone call, but he did not get a good look at the man's face. At trial the officer opined that the man who left the bar was defendant. (*Id.* at p. 471.) On appeal, defendant claimed admission of the testimony was

¹ Defendant mentions in passing in his brief that the teller was not shown the six-person photographic lineup until two months after the crime and asserts the robbery was not “fresh in the witness' memory” under subdivision (b) of section 1238. Likewise in passing, defendant comments that the teller did not “vouch” for the opinion under subdivision (c) of section 1238. Defendant waived such arguments by not objecting at trial. (*People v. Dykes* (2009) 46 Cal.4th 731, 756 [“numerous decisions by this court have established the general rule that trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal”].)

error. Our Supreme Court disagreed: The officer “testified that in his opinion the man he saw leave the bar was defendant, that clothing and specified characteristics of the man appeared to be the same as those of defendant, but that [the officer] did not see the facial characteristics of the man and could not positively identify defendant as the man. *Lack of positiveness as to the man’s identity went to the weight and not to the competency of the evidence.*” (*Id.* at p. 472, italics added.)

The teller’s testimony here was similar. Despite not getting a good look at the robber’s face, she made an “estimate” based on the skin color, height, lack of facial hair, and build of the robber that defendant was the robber. She was not positive defendant was the robber. She was extremely hesitant. She explained she was careful to use the word “estimate” because she was not at all certain defendant was the robber. Nonetheless, she did not pick defendant out at random — she did so based on particular characteristics. Whether the characteristics she relied on resulted in a strong identification, and the teller’s confidence in her “estimate,” were for the jury to consider. They did not render the testimony inadmissible. Thus the court did not err.

In reaching this conclusion we are mindful of the inherent safeguards present in testimony admitted pursuant to section 1238. In *People v. Gould, supra*, 54 Cal.2d 621 (*Gould*), overruled on a different point by *People v. Cuevas* (1995) 12 Cal.4th 252, 257, our high court explained that out-of-court identifications are independently admissible “because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness’ mind.” (*Gould*, at p. 626.) Moreover, “*the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination.*” (*Ibid.*, italics added.)²

² Evidence Code section 1238 “codif[ied] exceptions to the hearsay rule similar to that which was recognized in [*Gould, supra*, 54 Cal.2d 621].” (Cal. Law

The safeguard of cross-examination was put to good use here. Defense counsel capably cross-examined the teller, eliciting many weaknesses in the teller’s “estimate” that defendant was the robber. This effective cross-examination put the evidence in perspective for the jury. As a result of such safeguards, lack of positiveness in the identification — even a very low level of confidence such as the “estimate” the teller gave here — does not render the testimony inadmissible.

We disagree with defendant that a statement in *Gould, supra*, 54 Cal.2d 621, requires a contrary result. In *Gould* the victim who identified the defendant in a photographic lineup also testified in court. “At the trial [the victim] pointed out [defendant] as having ‘some features but not all of the features’ of the man she saw inside her apartment, and added that he seemed thinner than the burglar. She stated that she was unable to point out anyone in the courtroom as the man she saw [at the scene of the crime].” (*Id.* at p. 625.) The *Gould* court stated, “Although her testimony did not amount to an identification, the evidence of her extrajudicial identification was nevertheless admissible.” (*Id.* at p. 626.) Defendant seizes upon *Gould*’s comment that the in-court testimony did not amount to an identification and concludes the *out*-of-court statement here was likewise not an identification: “It follows that . . . an extrajudicial statement that a picture ‘looks similar to the perpetrator’ would not constitute an identification, just like the same in-court testimony in *Gould*.”

Defendant’s argument is clever, but it overlooks an important distinction between this case and *Gould*: unlike *Gould*, here the teller *did* pick defendant out, albeit hesitantly. Defendant’s argument also attributes to *Gould* a proposition the *Gould* court never considered. (See *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278 [““Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not

Revision Com. com., 29B pt. 4 West’s Ann. Evid. Code (1995 ed.) foll. § 1238, p. 249.)

therein considered””].) *Gould* made no attempt to define the scope of an “identification” for purposes of the hearsay exception. Indeed, beyond the one passing comment quoted above, *Gould* did not analyze the definition of “identification” at all. In context, we interpret *Gould* as saying the in-court testimony of the victim there did not amount to a positive identification, and nothing more.

Admission of the Teller’s Testimony Did Not Prejudice Defendant

Even if we were to find admission of the teller’s testimony was error, we would nonetheless affirm for lack of prejudice. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [error is reversible only “when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error”].)

The teller’s testimony regarding the identification was weak to begin with, and it was further weakened by effective cross-examination. (See *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526 [hearsay statements were improperly admitted, but there was no prejudice because the declarant testified at trial and “[t]hus the jury did not have to rely solely on secondhand statements she made to third parties. Rather, it had the opportunity to hear from [the declarant] directly and to judge her credibility”].) Even the prosecutor acknowledged the evidence was weak — both expressly, and tacitly by spending little time arguing about the evidence. Given the inherent weakness of the evidence and the modest role it played in the prosecution’s case, we find it unlikely the absence of such evidence would have swayed the jury.

Moreover, the remaining evidence against the defendant was strong. His DNA was found at the scene of the crime on the hat the robber wore. He admitted to his brother and a friend he committed the robbery, and he even threatened his brother to ensure his brother would not tell the police. Further, he fit the general description of the

robber in terms of height, build, and skin color. Collectively this evidence was persuasive evidence of defendant's guilt.

We acknowledge the jury asked a question about the six-person photographic lineup identification. In some circumstances such questions are suggestive that the evidence was important to the jury, which tends to favor a showing of prejudice. But given the weakness of the teller's testimony combined with the strength of the remaining evidence against defendant, we cannot find prejudice based solely on a single jury question. In light of the totality of the record, it is unlikely a result more favorable to the defendant would have been reached in the absence of the alleged error.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.