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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re E. A., a Person Coming Under the
Juvenile Court Law.

H037642
(Santa Clara County
Super. Ct. No. JV38184)

THE PEOPLE,

Plaintiff and Respondent,

v.

E. A.,

Defendant and Appellant.

The juvenile court sustained a petition that the minor E. A. took property from another minor, E. S., and thereby engaged in conduct constituting robbery. E. S. identified E. A. as one of the persons who acted in concert to take his property. The court placed E. A. on juvenile probation.

On appeal, E. A. (hereafter “the minor”) claims his counsel should have challenged the victim’s identification of him as having been unduly influenced by school-based officials. He also claims that two probation conditions that prohibit his presence at school campuses and his possession of drug paraphernalia must be modified to meet constitutional requirements, since they do not currently specify that he must *know* that he is violating these conditions.

We find no merit to the minor's ineffective assistance of counsel claim but agree that the probation conditions must be modified to include a requirement that the minor know that he is violating his probation conditions. As modified, we affirm the judgment.¹

PROCEDURAL BACKGROUND

The juvenile court sustained a petition adjudicating the minor as committing conduct that, if committed by an adult, would constitute second degree robbery (Pen. Code, §§ 211, 212, subd. (c)).² After a contested hearing, the court declared the minor to be a ward of the court, ordered him to complete 60 days in an electronic monitoring program, and placed him on probation for five years, subject to various conditions.

FACTS

I. *Prosecution Case*

On April 4, 2011, the victim, a high school student, was walking along a road when three juveniles stopped him. The juvenile whom the victim would later identify as the minor herein asked him if he had any money or other valuables. The victim said no. Someone then knocked the victim to the ground and the minor and his cohorts kicked and punched him as he lay there. The perpetrators fled, carrying with them the victim's backpack, which contained educational materials and \$70 in cash; they also took the victim's cell phone.

A passing motorist saw the robbery and called police. Dispatch records registered the call at 2:03 p.m.

¹ In an order filed today, we have disposed of E. A.'s petition for writ of habeas corpus in *In re E. A. on Habeas Corpus* (No. H038413).

² Unless otherwise indicated, all statutory references are to the Penal Code.

Evidently the victim told the police that the robbers were students at the high school he attended. Informed that the robbers could be returning to the campus, a school administrator charged with maintaining discipline and order and a San Jose police sergeant walked through the campus in search of possible suspects. They saw a group of students, including the minor, whose clothing resembled that which the perpetrators were reported to have been wearing. The administrator noticed that the students had take-out bags from a nearby fast-food restaurant.

The next day, the victim told two school-based officials—the school administrator and, apparently, a different San Jose police officer assigned to the school and performing on-campus duties—that the minor was one of his attackers. The victim would see the minor almost daily in school. He recognized him from the fact that they had physical education during the same time period, though they were not in the same physical education class. The victim recognized the minor's morphology. He also described the minor as having a distinct haircut. It would later emerge in cross-examination of a friend of the minor during the defense case, that the minor's haircut was unique in the high school except for that of one other student who, aside from his haircut, bore no resemblance to the minor, had a different race and ethnicity from the minor, and was not in the same physical education class as the victim.

Equipped with this information and their own suspicions that the minor could be one of the assailants, school-based officials showed the victim a printout of six photographs, one of which bore the minor's likeness, although his haircut was different from the one he had on the day of the robbery. The victim said, "I think that's him," identifying the photograph with the minor's likeness. When the minor and his cohorts assailed the victim, the minor was wearing a "beanie" cap that obscured his hair, but that did not interfere with the victim's ability to recognize him.

After the victim viewed the photographic lineup, school-based officials had the minor stand on one side of a glass door and the victim on the other. About 30 feet

separated the two juveniles. The victim immediately identified the minor as one of the assailants. “That’s him,” he said. He also identified the minor as one of the assailants during the juvenile court hearing, but he testified more than once that he was less than 100 percent certain about this. At one point he clarified, “I’m sure, but just not a hundred percent.” A few minutes later, the hearing ended unexpectedly because the victim was experiencing a medical emergency. When it resumed four days later, the victim testified that he was 100 percent sure that the minor was one of the assailants. He had equivocated during his testimony four days earlier because “I felt sorry for” the minor. But now, he testified on cross-examination, “I just want to get it over with,” meaning the court proceedings. Defense counsel also elicited from the victim that the district attorney had spoken with him about the importance of his identification testimony after his equivocal prior testimony.

The victim testified that when he described the minor to the school-based officials, one of them said, in the words of defense counsel, who was cross-examining the victim, “Oh, that sounds like somebody we know.” The officials “were assuming it was him,” the victim further testified—i.e., that the minor was one of the robbers. When defense counsel prompted, “Did they say anything like yeah this looks—this is probably the guy[;] take a look at this picture or anything like that if you remember?” the victim answered “Yeah.” Conversely, one of the officials testified that at no time did any school-based official suggest to the victim, as they sought his help in identifying the minor, that the minor was one of the robbers.

II. *Defense Case*

The defense was alibi. Surveillance video showed the minor and two friends at a fast-food restaurant—an outlet of the restaurant chain whose take-out bags the suspect students had been carrying the day before—between 1:55 and just before 2:00 p.m.,

according to the time stamp provided by the video recording equipment.³ The sequence's final frames showed one of the three diners, who was not the minor, returning to the eating area. One of the two friends testified that he was the person who was shown retrieving the food in the video and taking it to the dining area. He testified that the three of them ate for 10 minutes and that no one committed any conduct constituting robbery. Instead, they walked back to school about 2:30 p.m.

The parties stipulated that the minor was on the high school's grounds until 1:40 p.m. and that the restaurant was situated between 0.2 and 0.24 miles from the robbery location.

DISCUSSION

I. *Ineffective Assistance of Counsel*

The minor claims that he received ineffective assistance of counsel, in violation of his rights under the federal and state constitutions. The claim is without merit.

As mentioned, the minor premises his ineffective assistance of counsel claim on an argument that counsel performed inadequately by failing to challenge the victim's identification of him as unconstitutional by reason of being unduly suggestive—i.e., the police improperly influenced the victim to identify the minor as one of his assailants—as well as unnecessary and, under the totality of the circumstances, unreliable.

³ There was, however, no testimony that the video recording equipment's time stamp was accurate. Rather, the restaurant employee testified that the time stamp was an hour off from the true time. It had not been reset for daylight-saving time, which had begun on the recent date of March 13, 2011. The lack of an automatic adjustment to daylight-saving time would suggest that the time stamp was not controlled by a remote and central source that might be posited as a better candidate than the "special company that [has] access for the cameras" mentioned in the restaurant employee's testimony for maintaining fidelity to the true time. On cross-examination, the restaurant employee testified that, even taking into account the hour difference attributable to the advent of daylight-saving time, the time stamp was "[p]robably not" adjusted to the same time as the time measured by the San Jose Police Department dispatch center.

Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) “The ultimate purpose of this right is to protect the defendant’s fundamental right to a trial that is both fair in its conduct and reliable in its result.” (*Ibid.*) A claim of ineffective assistance of counsel in violation of the Sixth Amendment entails both deficient performance under an objective standard of professional reasonableness *and* prejudice under a test of reasonable probability of an adverse effect on the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694, emphasis added.) The *Strickland* standards also apply to a claim under article I, section 15 of the California Constitution. (E.g., *People v. Waidla* (2000) 22 Cal.4th 690, 718.)⁴

It has been stated that whereas an adult criminal defendant’s right to the effective assistance of counsel “ ‘is based on the sixth amendment of the United States Constitution, made applicable to the states through the fourteenth amendment, [citation], a child’s constitutional right to counsel in a juvenile proceeding is based on the due process clause of the fourteenth amendment and is not necessarily as broad as the right to counsel in a criminal case. [Citations.] As the law relating to the right to effective representation by counsel has developed, however, the distinction as to the source of the right to effective counsel has become “a distinction without a difference.” ’ ” (*In re Kevin S.* (2003) 113 Cal.App.4th 97, 115.)

⁴ Less certain is the extent to which the *Strickland–Ledesma* ineffective assistance of counsel performance and prejudice standards apply to juveniles who are the subject of a delinquency petition. The parties assume that they do but do not cite authority in support. We will assume for purposes of argument that the *Strickland–Ledesma* ineffective assistance of counsel standards apply to a minor who is the subject of a juvenile delinquency proceeding.

It appears from the record that the school administrator, the police officer, and another school official (an associate principal) conducted the photographic lineup and the showup. The People do not contest that state actors were involved, and, given that a police officer was involved at various stages and that the school officials may be state actors for purposes of the minor's due process rights, we will assume that the minor is entitled to assert his constitutional rights in these circumstances. (See *Tarter v. Raybuck* (8th Cir. 1984) 742 F.2d 977, 981 ["School officials, employed and paid by the state and supervising children, are agents of the government and are constrained by the Fourth Amendment"]; but see *State v. Jones* (N.C. Ct. App. 2011) 715 S.E.2d 896, 902 [rejecting the "argument that Principal Hart was acting as an agent of the State when he presented the photos to the two girls at the high school" thus implicating the defendant's due process right to a reliable identification of the suspect.])

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.] [¶] The defendant bears the burden of demonstrating the existence of an unreliable identification procedure.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 243.)

"We independently review 'a trial court's ruling that a pretrial identification procedure was not unduly suggestive.'" (*People v. Avila* (2009) 46 Cal.4th 680, 698-699.)

“ ‘[T]he “single person showup’ is not inherently unfair.” ’ ” (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.) Moreover, here it cannot be said to be either unduly suggestive or unnecessary. Regarding suggestiveness, the victim had already identified the minor in a photographic lineup with six pictures. This is standard procedure—the United States Supreme Court has approved of “present[ing] [the witness] with a photographic array including ‘so far as practicable . . . a reasonable number of persons similar to any person then suspected whose likeness is included in the array.’ ” (*Manson v. Brathwaite* (1977) 432 U.S. 98, 117.) It is unobjectionable in principle—“[g]roup lineups have long been an accepted identification procedure.” (*People v. Johnson* (2010) 183 Cal.App.4th 253, 272.) And given the record before us, it is also unobjectionable here—i.e., “nothing in this case indicates we should question that format.” (*Ibid.*) The victim did offer amorphous testimony suggesting that school-based officials urged him to identify the minor as his assailant as he viewed the photographic lineup. But, as noted, one of the school-based officials testified that at no time did anyone make such a suggestion to the victim. On review of a claim of this type “we must consider the totality of the circumstances to determine whether the identification procedure was unconstitutionally suggestive. We must resolve all evidentiary conflicts in favor of the trial court’s findings and uphold them if supported by substantial evidence.” (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819.) Accordingly, we must credit the testimony of the official as opposed to that of the victim regarding the statements made at the time of the photographic lineup.

The record is unclear whether the other five students in the lineup resembled the minor. But, as noted, it is the minor’s burden to show an unreliable identification procedure (*People v. Huggins, supra*, 38 Cal.4th at p. 243), and he has not shown that the other five students were inappropriately selected for the lineup. As for necessity, in the school setting, officials need to determine quickly and accurately whether violence-minded students are mingling freely with the rest of the student population and looking

for opportunities to prey on them. This was an urgent situation requiring as much certainty as possible about the identities of the students who robbed the victim.

Accordingly, we need not address the second prong of the constitutional test, i.e., whether the identification was sufficiently reliable under the totality of the circumstances. Reasonable counsel could have assessed the circumstances as we do, reached the same conclusion regarding the facts and the law, and correctly concluded that a motion to challenge the identification of the minor would be meritless. It is axiomatic that “[d]efense counsel does not render ineffective assistance by declining to raise meritless objections.” (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 674, fn. 8.) Thus, the minor’s ineffective assistance of counsel claim is without merit.

II. *Validity of Two Probation Conditions*

The minor claims that the following probation conditions are sufficiently vague and overbroad to violate his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and the equivalent guaranty in the California Constitution:

Condition No. 13: “That said minor not be on or adjacent to any school campus unless enrolled or with prior administrative approval.”

Condition No. 16: “That said minor not be in possession of any drug paraphernalia.”

Regarding the location issue, in *People v. Barajas* (2011) 198 Cal.App.4th 748, we identified problems with the same language (*id.* at pp. 760-761) and ordered the probation condition to be modified as follows: “You’re not to knowingly be on or within 50 feet of any school campus during school hours unless you’re enrolled in it or with prior permission of the school administrator or probation officer.” (*Id.* at p. 763.) We will order essentially the same modification here.

Anticipating this result, the minor argues that the condition will still “impinge[] on [his] civil liberty to freely move in public places.” But, even assuming there exists a

constitutional right to freely move in public places, many probation conditions limit constitutional rights and that is not necessarily a barrier to their imposition. All that is required is that “[a] probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) As restructured by us, the condition meets this requirement. We decline to reconsider our holding in *Barajas*.

As for condition 16, we agree, as do the People, that the condition should be modified to include a requirement that the minor not possess any item he knows to be drug paraphernalia. (See *In re H. C.* (2009) 175 Cal.App.4th 1067, 1071.) We will order the trial court to adopt language similar to that which the minor proposes, as follows: “That said minor not knowingly possess any drug paraphernalia whose possession he knows to be illegal.”

DISPOSITION

The trial court is directed to modify probation condition No. 13 to state, “That said minor not knowingly be on or within 50 feet of any school campus during school hours unless he is enrolled in it or has the prior permission of the school administrator or probation officer.” The court is also directed to modify probation condition No. 16 to state, “That said minor not knowingly possess any drug paraphernalia whose possession he knows to be illegal.” With these modifications, the order sustaining the delinquency petition is affirmed.

Márquez, J.

WE CONCUR:

Premo, J., Acting P.J.

Mihara, J.