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

In re EFRAIN FRAGA,  
  
on Habeas Corpus.

H037900  
(San Benito County  
Super. Ct. No. CR-100-00152)

**I. STATEMENT OF THE CASE**

A jury convicted defendant Efrain Fraga of assault on a police officer, and the trial court found that he had a prior strike conviction and had served three prior prison terms. (Pen. Code, §§ 245, subd. (c); 667, subds. (b)(i); 1170.12, subds. (a)-(d); 667.5, subd. (b).)<sup>1</sup> The court then imposed a 12-year sentence comprising a five-year aggravated term for the assault, doubled under the “Three Strikes” law, plus two one-year prison term enhancements.<sup>2</sup>

In this petition for a writ of habeas corpus, defendant alleges that defense counsel rendered ineffective assistance. In particular, defendant complains that counsel failed to (1) present an expert on eyewitness identification and effectively cross-examine the eyewitnesses, (2) present additional evidence to impeach the eyewitness identifications,

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<sup>1</sup> Defendant was also charged with resisting arrest (Pen. Code, § 148, subd. (a)), but that charge was dismissed shortly before the trial commenced.

All unspecified statutory references are to the Penal Code.

<sup>2</sup> The court struck one of the prison term enhancements.

(3) object to certain testimony about defendant, and (4) seek a limitation on evidence of defendant's parole status.<sup>3</sup>

We requested an informal response from the Attorney General. (Cal. Rules of Court, rule 8.385(b) &(c); see *People v. Romero* (1994) 8 Cal.4th 728, 741-742.)

We conclude that defendant has failed to make a prima facie showing sufficient to warrant habeas relief and deny the petition.

## **II. Background**

### ***The Prosecution's Case***

On July 3, 2009, Parole Officer Fitzroy Stevens, Officer Leticia Ramirez of San Benito County Probation Department, Sergeant George Ramirez of the Hollister Police Department, and Agent Marcia Ferguson of the state Department Of Alcohol Beverage Control were at the Cantina Bar & Grill in Tres Pinos as part of a multi-agency team assigned to monitor bars during the Hollister Motorcycle Rally. Around 7:40 p.m., Officers Stevens and Ramirez, who were in tactical clothing identifying them as parole and probation officers, were outside behind the Cantina and saw a man and a woman exit quickly. Officer Stevens immediately recognized the man as defendant and identified him to Officer Ramirez.

Defendant headed toward a Harley Davidson motorcycle. Officer Stevens called to him by name. Defendant ignored him, mounted the motorcycle, and put on his helmet, which had no visor and simply covered his head. Officer Stevens approached him and said "I know you're Efrain Fraga on parole." Defendant denied being Fraga and being on parole and started the engine. Officer Stevens ordered him to turn it off and then put his hand on a handlebar and straddled the motorcycle. He was about one foot away from

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<sup>3</sup> Defendant also appealed from the judgment. In a separate opinion in H036566, we reverse the judgment due the erroneous denial of a continuance at sentencing and remand the matter for that purpose. The reversal, however, does not render the habeas petition moot because the underlying conviction for assault remains valid, and the petition seeks relief from the conviction due to ineffective assistance at trial.

defendant, and there was nothing obstructing his view of defendant's face. At that point, defendant stepped on the accelerator and released the clutch. The motorcycle reared up and came back down, hitting Officer Stevens's knee. He immediately drew his gun. Defendant said, "[You] ain't going to shoot me," revved the engine, and sped away, forcing Officer Stevens to move to avoid getting hit.

After this happened, a "be on the lookout" report was broadcast over the radio using defendant's name. Sergeant Ramirez and Officers Stevens and Ramirez then went to the police station, where Sergeant Ramirez assembled a six-person photographic lineup. He told the officers that the lineup might or might not include the photograph of the person they saw on the motorcycle. It did in fact include defendant's photograph. Officers Stevens and Ramirez viewed the lineup separately, and each immediately identified defendant as the person they had seen.<sup>4</sup>

At trial, Officer Stevens testified that he recognized defendant at the Cantina because he knew who he was from reviewing parole office "face sheet[s]" and from seeing him on numerous occasions in the parole office talking to other parole officers.

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<sup>4</sup> At trial, Officer Stevens identified the photo lineup that Sergeant Ramirez had presented to him, and the lineup was admitted into evidence. The record on appeal includes a copy of Sergeant Ramirez's police report, and the report includes a copy of the photo lineup. The lineup consists of photographs of six male individuals. No one photograph is so different from the others as to draw special attention to it. (See *People v. Johnson* (2010) 183 Cal.App.4th 253, 272 "[A]n identification procedure is considered suggestive if it "caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." ' '].)

Moreover, all six men appear to be Hispanic and approximately the same age and build. They all have dark hair; one has closely cropped hair, and the others have short hair. All have dark mustaches; their complexions appear to be about the same, and all have the same expression on their faces. Their faces in the photographs are about the same size, and the background is the same.

Having reviewed the lineup (see *People v. Kennedy* (2005) 36 Cal.4th 595, 609, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459 [independently reviewed concerning whether lineup is unduly suggestive]), we do not find that it had any tendency to focus special attention on defendant's photograph or otherwise suggest that he was the person to be identified.

He said that he and his office partner, Officer Mace, often talked about their “problem case[s],” and defendant was one of Officer Mace’s problem cases. He explained that defendant was a “parolee-at-large,” which meant that he was not following the rules and avoiding parole supervision and contact with his parole officer. He said that in the past, he and Officer Mace had gone to defendant’s residence to find him or gather information concerning his whereabouts. He said that defendant had a history of denying his identity to police officers, but he was surprised that defendant would do so to a parole officer who knew him.

At trial, both Officer Stevens and Officer Ramirez said they were certain that the man was defendant.

Dennis Lucia, a friend of defendant, testified as a prosecution witness. He had previously testified for the defense at the preliminary hearing. At that time, he said he was at the Cantina that evening and saw two officers approach a man on a motorcycle, who he thought was defendant. Lucia approached him to say hello but realized the man was not defendant. Lucia further testified that he saw defendant in Gilroy one day and told him that a defense investigator had called him a few weeks before to talk about a newspaper report about a high speed motorcycle chase.

At trial, Lucia acknowledged his former testimony. The prosecutor asked Lucia to explain how the defense investigator would have known to call him if, as he had testified, defendant was not the person he had seen at the Cantina and he did not talk to defendant about the case until *after* he had spoken to the investigator. Lucia became unsure about the timing of his conversations with defendant and the investigator and then said that he first spoke to defendant and later “got some phone call.” Concerning his encounter with defendant in Gilroy, he said that he told defendant he had read a newspaper article about him.

## *The Defense*

The defense was that Officers Stevens and Ramirez had misidentified defendant, who at the time of the incident was miles away in Half Moon Bay celebrating the Fourth of July weekend with his then girlfriend, Amber Steits.

At the time of trial, Amber Steits was no longer defendant's girlfriend, but she remained his friend. She testified that on July 3, 2009, defendant picked her up at her house between 10:00 and 11:00 a.m., and they drove to Half Moon Bay and Soquel, where they went on a boat ride and watched fireworks. In Half Moon Bay, they ate dinner at a Mexican restaurant called La Bomba and afterward spent the night at a campsite on the beach.

Steits further testified that a couple of months before trial, she went to Half Moon Bay with defendant and his father to talk to a waitress at La Bomba and a cashier at a Quick Stop convenience store to see whether they had seen defendant on July 3, 2009. Both persons remembered seeing defendant. Steits admitted that she did not volunteer this information until after the defense investigator came to her house. She explained that before doing so, her relationship with defendant had ended, the matter was of no concern to her, and she had decided to move on with her life.

Concerning the events July 3, 2009, Steits conceded that her recollection was vague because she had had four or five margaritas before defendant arrived, and she continued drinking the rest of the day. For example, she testified that defendant picked her up mid-morning at her house in Gustine, and she left with only the clothes she was wearing. However, she told the defense investigator that he picked her up in San Martine, not Gustine, and she said that in Half Moon Bay, she had to change her shirt because she had spilled hot chocolate on it at a convenience store. She told the investigator that they got to the campsite first and then went to dinner later. However, she testified that they ate at La Bomba first and then went to the beach and got a campsite. She later testified that they met up with a number of her relatives who were

already at the beach and had secured a number of campsites. She and defendant left for dinner and later returned to the campsite, where they continued to drink. Steits then explained that upon arriving in Half Moon Bay, they went on a boat ride. After that, they stopped at the Quick Stop on their way to dinner. There they ran into her relatives. She testified that the cashier asked her how her Fourth of July was, even though it was July 3.

Gabriella Brito, who worked at a “More for Less” store in Half Moon Bay, testified that defendant came into the store on July 3, 2009, sometime between 5:00 and 9:00 p.m. because it was not quite dark yet. She remembered recommending La Bomba restaurant. Brito testified that it took her an hour and a half to get to the courthouse from Half Moon Bay.

Serafina Machado, who worked at La Bomba restaurant, testified that defendant came in on July 3, 2009, sometime between 6:30 and 8:30 p.m. It was still a little light outside. She said that some months later, defendant came in again and reminded her about that night. Machado testified that it took her an hour and forty minutes to drive to court, which is almost eight miles closer to Half Moon Bay than the Cantina.

### **III. APPLICABLE PRINCIPLES**

“An appellate court receiving [a petition for a writ of habeas corpus] evaluates it by asking whether, assuming the petition’s factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC [(order to show cause)]. [Citations.] . . . Issuance of an OSC, therefore, indicates the issuing court’s *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved.” (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

To obtain reversal due to ineffective assistance, a defendant must first show “that defense counsel’s performance fell below an objective standard of reasonableness, i.e., that counsel’s performance did not meet the standard to be expected of a reasonably

competent attorney[.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*); *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*)).

Second, the defendant must show that there is “a reasonable probability that defendant would have obtained a more favorable result absent counsel’s shortcomings.” (*Cunningham, supra*, 25 Cal.4th at p. 1003.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.)

#### **A. Eyewitness Identification Expert and Cross-Examination**

Defendant claims that counsel was incompetent in failing to consult an expert in eyewitness identification, have the expert testify at trial, and use the expert testimony to guide cross-examination.<sup>5</sup>

Defendant submits declarations from trial counsel and Robert Shomer, Ph.D., an expert on the psychological factors that affect the accuracy of eyewitness identifications.

Trial counsel asserts that before trial he consulted Dr. Shomer about two cases, one of which was defendant’s case. Counsel outlined the circumstances of each case without naming the parties and asked whether expert testimony would be useful. He hired Dr. Shomer for one case but not for defendant’s case because Dr. Shomer did not think his testimony would be helpful given the fact that defendant was identified from a close distance by a person familiar with him.

Dr. Shomer asserts that his records contain no indication of any “involvement” in defendant’s case.

Concerning eyewitness identification, Dr. Shomer states that research data shows that generally (1) police officers are not better eyewitnesses than anyone else; (2) there is no correlation between a witness’s confidence and the accuracy of an identification, and (3) cross-racial identification is less accurate than same-race identification.

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<sup>5</sup> Defendant raised this claim of ineffective assistance in his motion for a new trial, which was denied.

Dr. Shomer also discussed photographic lineups. He explained that to avoid being potentially suggestive, a lineup should be administered by a person who does not know whether the suspect is among the choices, the photographs should be similar, the photographs should be displayed one at a time, and the witnesses should not know whether other witnesses have selected a photograph, and if so, which one.

Turning to this case, Dr. Shomer did not think the nature and fairness of the photographic lineup were critical concerning Officer Stevens' identification because in his opinion, Officer Stevens had "selected the photo of the person he had already made his mind [*sic*] he had seen exit the bar and get on the motorcycle . . . ." However, the nature of the lineup was still important concerning Officer Ramirez's identification because that identification was the "critical" issue in the case, her identification corroborated Officer Stevens's identification, and she was not familiar with defendant.

Dr. Shomer opined that the cross-examination here was "woefully lacking." He believed that more thorough and informed cross-examination would have been "very helpful" in this case. Nevertheless, Dr. Shomer conceded that he had not seen Sergeant Ramirez's photo lineup and thus could not evaluate whether it was a fair and valid set of individuals or was unduly suggestive.

Defendant alleges that trial counsel failed to consult Dr. Shomer and misrepresented the nature of his investigation. Counsel's and Dr. Shomer's declarations create a factual dispute concerning whether counsel consulted Dr. Shomer about this case. It is not our function to resolve factual disputes concerning the allegations. Rather, in reviewing the sufficiency of defendant's petition, we shall assume that counsel failed to consult with Dr. Shomer (see *People v. Duvall, supra*, 9 Cal.4th at pp. 474-475) and further assume that because the eyewitness identifications were the primary and most potent evidence against defendant, a failure to consult would fall below an objective standard of reasonableness. (See *Strickland, supra*, 466 U.S. at pp. 690-691 [duty to investigate possible defenses or make reasonable tactical decisions that render such

investigation unnecessary]; *In re Hill* (2011) 198 Cal.App.4th 1008, 1016-1017.) Thus, we turn to whether such an omission was prejudicial.

Dr. Shomer's testimony, if credited (see CALJIC NO. 2.80 [jury may disregard expert opinion]; see also § 1127b), could have caused jurors to discount the officers' status as officers and their certainty about their identifications in evaluating the accuracy and reliability of those identifications.<sup>6</sup> Dr. Shomer's testimony also would have advised jurors to consider the cross-racial nature of Officer Stevens's identification.

That said, such general, cautionary advice does not diminish the probative value of the circumstances tending to show that Officer Stevens's identification was accurate and reliable and that support his certainty about defendant. As noted, he had seen defendant on numerous occasions and was familiar what he looked like. He immediately identified defendant to Officer Ramirez at the Cantina. He confirmed that identification later while standing close to him with an unobstructed view of his face. And later, he identified defendant's photograph in a photo lineup without knowing whether the person he saw would be among those in the lineup.

Dr. Shomer's speculation that Officer Stevens selected defendant's photograph because he had already decided that the person he saw was defendant does not implicate the validity of the lineup procedure. Moreover, it is not clear how Dr. Shomer's speculation undermines Officer Stevens's identification. On the contrary, his selection of

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<sup>6</sup> Although Dr. Shomer implied, in essence, that jurors should not give weight to a witness's certainty, an eyewitness's degree of certainty remains a valid and relevant factor, which jurors are advised they may consider. (See CALJIC No. 2.92 [instructing that jurors may consider degree of certainty]; CALCRIM No. 315 [same]; see court's instructions, *post*, fn. 7.) Indeed, courts have rejected claims that a witness's degree of certainty is an improper, inappropriate, or irrelevant factor. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230-1231; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561-562; see *People v. Wright* (1988) 45 Cal.3d 1126, 1154 [approving standard instruction and factors enumerated therein].)

defendant's photograph confirms that he knew what defendant looked like and conclusively demonstrates his ability to accurately and reliably identify him.

Defendant asserts that Officer Stevens's identification was not "invulnerable." He notes that Officer Stevens did not know the color of defendant's motorcycle or its license plate number, which, he argues, demonstrates that "his perception of the biker was imprecise at best."

We do not agree that these facts necessarily demonstrate, or even suggest, that Officer Stevens's unobstructed perception of a person he knew and recognized from a close distance was "imprecise at best." As Officer Stevens testified, when he approached defendant, he was focusing all of his attention on what defendant was doing. In any event, we note that trial counsel elicited Officer Stevens's failure to remember the color and license plate of the motorcycle and emphasized it during final argument to challenge the identification. Thus, defendant did not need an expert's testimony to challenge Officer Stevens's identification.

The inherent strength of Officer Stevens's identification explains why Dr. Shomer focused instead on Officer Ramirez's identification, considered it to be the "critical" issue in the case, and thought his testimony would be the most helpful in cross-examining her.

Again, given Dr. Shomer's testimony, jurors could have discounted Officer Ramirez's status and certainty. On the other hand, her identification did not have a cross-racial issue. Moreover, Dr. Shomer's summary of the best lineup procedures does not provide much, if any basis, to question the accuracy and reliability of her identification. He did not state that unless these procedures were followed, a photographic lineup was inherently flawed or impermissibly suggestive. Rather, his implicit point was that these procedures eliminated the possibility of undue suggestion.

It is true that Sergeant Ramirez knew he had put defendant's photograph in the lineup. However, there is no evidence that he directly or indirectly conveyed this to

either officer. Rather, both testified that they did not know whether the lineup contained a photograph of the person they had seen. Moreover, as noted, the photographs in the lineup were quite similar, and none had any tendency to draw more attention to itself than any other. Finally, although Dr. Shomer's testimony could have helped guide a more probing cross-examination about the lineup procedure, it is speculation to suggest that it would have been helpful to the defense by revealing evidence that the procedure was unduly suggestive—for example, that Sergeant Ramirez suggested defendant's photograph was in the lineup or pointed to it or told her that Officer Stevens had selected it. Indeed, more probing cross-examination could have revealed that the procedure was not suggestive and thereby strengthened the identification.

Next, we note that even without Dr. Shomer's testimony, the jury did not lack appropriate guidance. The court gave extensive instructions that enumerated the factors most relevant in determining the accuracy and reliability of the officers' testimony in general and their identifications in particular, including whether the witness and the person identified were the same race.<sup>7</sup>

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<sup>7</sup> The court instructed the jury that “[i]n evaluating a witness’s testimony, you may consider anything that reasonable tends to prove or disapprove [*sic*] the accuracy of that testimony. Among the [facts] you may consider are, how well could the witness see, hear or otherwise perceive the things about which the witness testified? How well was the witness able to remember and describe what happened. What was the witness’s behavior while testifying?”

The court further instructed jurors that “[y]ou have heard eyewitness testimony identifying the Defendant. As with any other witness, you must decide whether an eye witness [*sic*] gave truthful and accurate testimony. In evaluating identification testimony, consider the following questions: Did the witness know or have contact with the Defendant before the event? How well could the witness see the perpetrator? What were the circumstances affecting the witness’s ability to observe, such as lighting, weather conditions, obstructions, distance, and duration. ¶ How closely—how closely was the witness paying attention? Was the witness under stress when he or she made the observation? Did the witness give a description . . . [?] [H]ow much does that description compare to the Defendant? How much time passed between the event and the time when the witness identified the Defendant. Was the witness asked to pick the perpetrator out of a group? Did the witness ever fail to identify the Defendant? Did the

Furthermore, Lucia's testimony that he thought he saw defendant at the Cantina but was mistaken was impeached by incredible testimony that he did not speak to defendant until after he had spoken to a defense investigator and later his equivocation about the timing of the two conversations. Indeed, given Lucia's testimony, the court instructed jurors that it was permissible to infer a consciousness of guilt from a defendant's effort to secure false or misleading testimony. (See CALCRIM No. 371.)

Last, although Brito and Machado corroborated Steits's testimony about being at La Bomba and a convenience store in Half Moon Bay, their testimony did not preclude defendant's being at the Cantina earlier in the evening and it did not corroborate Steits's testimony about being with defendant almost all day long. And, as a witness, Steits had a potential bias as defendant's longtime friend, she admitted that alcohol had affected her recollection, and her testimony on certain factual issues was contradictory.

In sum, the officers' identification testimony was credible and strong. The circumstances surrounding the identifications supported their accuracy and reliability. The photographic lineup was not inherently suggestive, the officers did not know whether the person they sought to identify would be included, and there is no evidence that Sergeant Ramirez said or did anything to suggest that defendant's photograph was the one to select. The court instructed the jury on how to assess the identification testimony. And the alibi evidence was either inconclusive or had inherent weaknesses in that it rested to a large degree on the testimony of defendant's former girlfriend.

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witness ever change his or her mind about the identification? *How certain was the witness when he or she made an identification?* Are the witnesses and the Defendant of different races? [¶] Was the witness able to identify the Defendant in a photographic or physical lineup? Were there any other circumstances affecting the witness's ability to make an accurate identification." (Italics added.)

Accordingly, the prosecutor could properly emphasize the certainty of the officers' identifications. This is especially so given circumstances surrounding Officer Stevens's identification.

To state a prima facie case for relief due to ineffective assistance, defendant must establish prejudice not as a matter of speculation but as a matter of demonstrable reality. (See *People v. Garrison* (1966) 246 Cal.App.2d 343, 356.) Considering all of the circumstances noted above, we do not find a reasonable probability the jury would have returned a more favorable verdict had Dr. Shomer testified.

## **B. Impeachment Evidence**

Defendant contends that counsel failed to present evidence that could have impeached the officers' identification. Specifically, he claims counsel should have introduced evidence of heightened motorcycle traffic the day of the incident, discrepancies in descriptions of what defendant was wearing that day, and the distance between the Cantina and Half Moon Bay and the speed defendant would have had to maintain to be seen there by 9:00 p.m.

### **1. Motorcycle Traffic**

Defendant submits a declaration from Ron LaPlante, a member of the Boozefighters Motorcycle Club. LaPlante states that many motorcycle groups gathered in the Hollister area on the July 4th weekend in 2009. He notes that there was a considerable amount of motorcycle traffic moving between Bolano Park, which is near Tres Pinos and the Cantina, and Hollister on the evening of July 3.

Defendant argues that counsel's failure to present these circumstances was unreasonable because the increased motorcycle traffic in the Tres Pinos area heightened the potential for Officers Stevens and Ramirez to misidentify defendant.

In his declaration, counsel stated that he had no tactical reason not to present such evidence.

It is undisputed that there was a motorcycle rally over the July 4 weekend. Indeed, the officers had been assigned to monitor the rally and were at the Cantina doing a bar check. However, because defendant was identified at the Cantina and not while riding in heavy traffic, we fail to see, and defendant does not explain, how heightened traffic could

have affected the officers' ability to see and identify defendant at the Cantina or heightened the potential for misidentification. There is no evidence that the Cantina was overcrowded with people who looked like defendant. And LaPlante offered no information concerning the number of people at the Cantina that night apparently because he was not there. In short, evidence of increased traffic on the road had little, if any, relevance concerning the accuracy and reliability of the officers' identifications.

Thus, even though counsel had no tactical reason for not introducing evidence of increased motorcycle traffic, his apparent failure to even think of doing so does not fall below a standard of objective reasonableness.

## **2. Clothing, Distance, and Speed**

Defendant notes that a computer-assisted dispatch (CAD) printout of activity on July 3, 2009, has an entry that reads, "BLUE WEANS [sic] WHI T WITH ANOTHER T SHIRT OVER THAT," which defendant asserts describes the person whom the officers saw as wearing blue jeans and a T-shirt over a white T-shirt. Defendant also notes Serafina Machado's testimony that at the La Bomba restaurant, defendant was "in his motorcycle outfit."

Defendant also points out that the incident occurred at 7:43 p.m., and both Machado and Brito said they saw defendant in Half Moon Bay no later than 9:00 p.m. He notes that (1) the distance between the Cantina and Half Moon Bay by the shortest route was 88.7 miles, (2) he had only one hour and 17 minutes to get to Half Moon Bay and change his clothing by 9:00 p.m., and (3) to do so, he would have had to maintain an average speed of 69 miles per hour.<sup>8</sup> Defendant further notes Machado's testimony that it took her an hour and forty minutes to get to court, which is almost eight miles closer to Half Moon Bay than the Cantina is; and Brito's testimony that it took her about an hour and a half to go the same distance.

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<sup>8</sup> Defendant presented evidence concerning distance and route in his motion for new trial.

Defendant argues that counsel was ineffective for not presenting any of this information.

In his declaration, counsel said he did not present evidence concerning the route between the Cantina and Half Moon Bay because the defense was misidentification, and it seemed counterproductive and speculative to argue about which route defendant might have taken while asserting that he had not in fact made the drive.

Decisions relating to the evidence to be offered at trial are typically tactical choices within defense counsel's discretion. (*People v. Stanley* (2006) 39 Cal.4th 913, 955; see also *People v. Frierson* (1979) 25 Cal.3d 142, 158.)

The point of presenting any of this evidence was to show how unlikely it was for defendant to have driven from the Cantina to Half Moon Bay and changed his clothes in time for Machado and Brito to see him around 9:00 p.m.; thereby imply that he was not at the Cantina in the first place; and thus undermine the officers' identifications.

The record reveals that counsel made this point at trial without having to delve into the speculation about the route, distance, time, and speed. The jury heard Machado and Brito say how long it took them to drive from Half Moon Bay to the courthouse. And during closing argument, counsel stated, "This is Half Moon Bay. This incident's happening in Hollister at 7:40 p.m. in the evening, almost 8:00. Mr. Fraga, Amber Steits are in . . . Half Moon Bay; it's not dark. It's between 5:30 and 8:30. They don't have time to be here involved in a situation in the Cantina restaurant and being in Half Moon Bay at the same time. *It can't be done.*" (Italics added.)

Moreover, the additional evidence did not establish that it was impossible for an experienced rider to drive a Harley Davidson motorcycle from the Cantina to Half Moon Bay in an hour and 17 minutes, especially if the rider was fleeing from the authorities. Under the circumstances, defendant does not convince us that counsel's tactical decision was unreasonable. Moreover, the probative value of Machado's and Brito's testimony

about how long it took them to get to the courthouse was limited because they did not say whether they drove cars or motorcycles.

Concerning the difference in the descriptions of defendant's clothing on July 3, counsel said he was not aware of the description in the CAD printout and conceded that it "might" have been helpful to explore the differences between that description and Machado's testimony that defendant was in a "motorcycle outfit."

Defendant cannot show that presenting the CAD description and exploring the discrepancy between its description of defendant and Machado's description of defendant's clothing would have helped the defense because Machado did not say what that "motorcycle outfit" was or suggest that he was not also wearing a T-shirt. Indeed, it is speculation to think that presenting the CAD description and exploring the discrepancy would have been helpful. Thus although, as counsel concedes, doing so *might* have been helpful, we do not find a reasonable probability that the jury would have rejected the officers' identifications or returned a more favorable verdict had counsel done so.

### **C. Failure to Object**

Officer Stevens testified that he and fellow Officer Mace often discussed "problem cases" such as defendant. On redirect examination, Officer Stevens testified that he was surprised that defendant ignored him and then denied his identity to someone who knew him. The district attorney asked if defendant had done that in the past, and Officer Stevens responded, "Actually, yes. He has quite a bit of that in his history. And the story's always the same: It wasn't me."

Defendant claims that counsel was ineffective in failing to object to the testimony that he was a "problem case" and had a history of denying his identity to authorities. Defendant argues that there was no foundation for the testimony, it was probably based on inadmissible hearsay, and jurors might have unfairly and impermissibly considered it evidence of his bad character.

In his declaration, counsel explained that he did not object because he did not want to open the door to evidence that defendant had fled from law enforcement officers on a motorcycle on at least two prior occasions.

The reference to defendant as a “problem case” was brief, and it related to Officer Stevens’s testimony that he knew defendant was a parolee-at-large, which meant that he was avoiding supervision and not complying with the terms of parole. In our view, it is not unreasonable to call cases involving parolees-at-large problem cases. Thus, an objection to the brief reference would likely have been overruled. Generally, the failure to object rarely establishes ineffectiveness of counsel, especially when an objection would have been overruled and thus futile. (*People v. Kelly* (1992) 1 Cal.4th 495, 540; *People v. Price* (1991) 1 Cal.4th 324, 387.) Here, we do not consider counsel’s omission to be objectively unreasonable.

We reach a different conclusion concerning counsel’s failure to object to testimony that defendant had a history of denying his identity to authorities. Even if, as counsel declares, there was evidence that defendant had fled from the police on previous occasions, counsel did not also assert that in those instances, defendant had denied his identity. Moreover, Officer Stevens had never been defendant’s parole officer, and thus his testimony about defendant’s history was most likely based on hearsay.

We also consider it likely that if the prosecutor had admissible evidence of an identity-denying modus operandi, the prosecutor would have sought to introduce it directly. (See Evidence Code section 1101, subd (b) [prior conduct admissible to prove relevant issue such as identity, motive, etc.] ) However, as defendant points out, the prosecution’s witness list did not include any witness who could have provided non-hearsay testimony about instances in which defendant had previously fled from authorities.

Under the circumstances, the potential benefits of an objection were obvious. Officer Stevens would not have answered the prosecutor’s question about whether

defendant had ever denied his identity in the past, the court would have instructed the jury to disregard the question or Officer Stevens's answer, and later the prosecutor would not have been able to argue to the jury that defendant was conforming to this history on July 3. Moreover, it appears that an objection on hearsay, if not also foundational, grounds would have been potentially meritorious, and we fail to see how a successful objection would have opened the door to evidence that defendant had fled in the past, even if the prosecutor had such evidence. Finally, even if an objection would have been overruled, defendant would not have been any worse off than he was without an objection.

In short, we agree with defendant that the failure to object to this testimony fell below an object standard of reasonableness.

Concerning whether the omission was prejudicial, we note that defendant's status as a parolee-at-large was relevant and admissible to explain how Officer Stevens was familiar with defendant and why he wanted to detain him and further to show that defendant had a motive to deny his identity and flee. Moreover, both the testimony about defendant's history and the prosecutor's remarks to the jury were brief. On the other hand, the officers' identification testimony was credible and strong, and a successful objection would not have undermined those identifications or otherwise supported the theory of the defense. Finally, compared with identifications, the alibi/misidentification defense evidence had factual and credibility weaknesses.

In short, we do not find a reasonable probability that the jury would have reached a more favorable verdict had it not heard Officer Stevens's testimony and the prosecutor's references to it during closing argument.

#### **D. Failure to Request Limiting Instruction**

Defendant claims counsel was incompetent for not requesting an instruction that limited the purposes for which jurors could consider testimony about his parole status and

prohibited them from considering it evidence of bad character and a propensity to commit criminal acts and inferring from it that defendant was guilty.

In his declaration, counsel said he did not request a limiting instruction because it did not seem necessary or useful because most jurors would understand that a parolee is a person who previously has been incarcerated.

In our view, counsel reasonably could have concluded that the benefit of an express warning about testimony concerning defendant's parolee-at-large status was outweighed by risks of focusing jurors on his status and telling them they could consider it to explain why Officer Stevens was familiar with defendant, why he attempted to detain him at the Cantina, and why defendant denied his identity and fled. (*People v. Hawkins* (1995) 10 Cal.4th 920, 942 “[a] reasonable defense counsel may have concluded that the risks of issuing a limiting instruction . . . was not worth the questionable benefits”), disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110; e.g., *People v. Freeman* (1994) 8 Cal.4th 450, 495 [failure to request limiting instruction on evidence of defendant's prior crimes not ineffective assistance because trial counsel “may well not have desired the court to emphasize the evidence”]; *People v. Benavides* (2005) 35 Cal.4th 69, 94 [same]; *People v. Maury* (2003) 30 Cal.4th 342, 394 [same]; see *People v. Hinton* (2006) 37 Cal.4th 839, 878 [failure to request limiting instruction on evidence of prior offense not ineffective assistance of counsel because counsel may have deemed it unwise to call further attention to it].)

Moreover, counsel reasonably could have concluded that the standard instructions on the prosecution's burden to prove all elements of the offense beyond a reasonable doubt would mitigate the risk that jurors might draw unfavorable and improper inferences from defendant's parole status. Finally, we consider it reasonable for counsel to conclude that most people would know that as a parolee, defendant had been incarcerated.

In short, we do not find that counsel's omission was objectively unreasonable.

### **E. Cumulative Prejudice**

Defendant claims that even if no one omission was sufficiently prejudicial to compel reversal, their cumulative impact was. We disagree.

Given our analysis, we look only at counsel's alleged failure to call Dr. Shomer, pursue the apparent difference in descriptions of the clothing defendant was wearing, and object to testimony that defendant had a history of denying his identity when confronted by authorities.

Given our discussion of prejudice relative to each of these omissions, we do not find that collectively their prejudice compels reversal. As noted, Dr. Shomer's testimony would have done little to undermine Officer Stevens's otherwise strong identification, and instructions implied that the cross-racial nature of his identification was a factor to consider. Moreover, Dr. Shomer's testimony about the best lineup procedures did not discredit the procedure used in this case, and there is no evidence that it was suggestive in any way or that more probing cross-examination would have produced such evidence.

Concerning the clothing discrepancy, Machado did not further describe defendant's motorcycle outfit. Thus, in the absence of evidence that he did not also have on two T-shirts or that he would not have had the time to change into a motorcycle outfit, the prejudice from counsel's omission is also speculative.

The prejudice from counsel's failure to object to testimony about having a history of denying his identity was more significant. However, we do not find that it was substantially increased by the potential prejudice from counsel's other omissions, which was negligible. Simply put, the cumulative prejudice was not enough to undermine our confidence in the jury's verdict. Rather, given all of the evidence, we do not find a reasonable probability that the verdict would have been more favorable in the absence of all three omissions.

#### IV. CONCLUSION

Although the allegations in defendant's petition may be sufficient to show that counsel's performance, in part, fell below an object standard of reasonableness, defendant has not demonstrated that the instances of inadequacy were prejudicial. Thus, defendant has failed to state a prima facie case for habeas relief. (See *People v. Romero, supra*, 8 Cal.4th 728, 737.)

#### V. DISPOSITION

The petition for a writ of habeas corpus is denied.

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RUSHING, P.J.

WE CONCUR:

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ELIA, J.

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GROVER, J.