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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN PHILLIPS McCOWAN,

Defendant and Appellant.

H038707

(Santa Clara County

Super. Ct. No. C1095703)

Defendant John Phillips McCowan pleaded no contest to second degree robbery (Pen. Code, § 211),¹ possession of a short-barreled shotgun (former § 12020, subd. (a)(1), now § 33210), and possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)) and admitted the allegation that he was armed with a shotgun during the course of the robbery (§ 12022, subd. (a)(1)) as well as the allegations that he had two strike priors (§§ 667, subds. (b)-(i), 1170.12); two serious felony prior convictions (§ 667, subd. (a)); and two prison priors (§ 667.5, subd. (b)). McCowan was sentenced to 25 years to life in state prison.

We appointed counsel to represent McCowan in this court. Counsel has filed a brief stating the case and the facts, but raising no specific issues. We notified McCowan of his right to submit written argument in his behalf within 30 days, and he has filed a letter brief raising claims of ineffective assistance of counsel, error in the conduct of his preliminary hearing and sentencing error.

¹ Further unspecified statutory references are to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

At about 7:00 p.m. on October 12, 2010, 18-year-old Vincent Wygal was walking home from a gym in Campbell. As he walked along Hamilton Avenue, he became aware that a couple of men got out of an older maroon four-door sedan and walked up behind him. He heard the words “gang bang.” Wygal turned around and said “What?” The men repeated the words “gang bang” and one of them showed Wygal “some sort of weapon on [his] forearm” which he thought was an altered bat. One of the men told Wygal to give them all of his stuff. Neither man wore a mask or tried to cover his face. Wygal was frightened but did not try to run or physically resist. He did not say anything to the men. One of the men took the duffle bag, which contained Wygal’s cell phone, wallet and keys, off of Wygal’s shoulder, and emptied Wygal’s pockets. The men took the iPod Wygal was listening to at the time. The two men told him to get on the ground, and Wygal complied. They went back to their car, where someone was waiting in the driver’s seat, and drove off. Wygal was not directly threatened or physically assaulted during the incident.

Wygal went to his neighbor’s house and called 911 within three or four minutes of the robbery. Campbell Police Officer Kurt Melcher responded and interviewed Wygal, who said the men told him if he did not cooperate they would hurt him.

Two days after reporting the incident to the police, Wygal was shown two photo lineups by Detective Brian Sessions. One of the lineups contained a photo of Raymond Carpue and one contained a photo of defendant. Neither contained a photo of Arthur B. He was not able to make a positive identification, but told police that “it might have been one of them.” He selected the photo of Carpue. After viewing a second set of photographs, Wygal identified someone who “kind of seemed familiar.” He was not 100 percent sure of his identification and at the time of the preliminary examination, he thought he would probably not be able to recognize either of the men who robbed him or

the driver of the car. When shown the lineup containing a picture of defendant, Wygal selected a different photo as someone who looked familiar.

At the time of the robbery, codefendant Carpue was dating Erika Luna.² Luna was with Carpue when he was arrested. Also in the car were McCowan and two women. They dropped off the two other women at their residence and then left with Carpue driving, Luna in the front seat, and McCowan in the back. The car in which they were riding kept overheating and they stopped to put water in the radiator. They had picked up another young man whom Luna had never seen before but whom she identified in court as codefendant Arthur B.³ The three men talked together in front of the car with the hood up, but Luna could not hear what was being said. The four of them just drove around, stopping every so often at gas stations to put water in the radiator.

As they drove around, they saw a man who looked as if he were returning home from work. Someone in the car said “Let’s ask him for a sack of weed.” Carpue drove into the parking lot of the apartment complex, and the man came up to the passenger’s side of the car. Someone in the car asked if he knew where they could get some weed, but it did not appear to Luna that the man knew anyone in the car.

Carpue then asked “where are you from” and the man got a frightened look on his face and ran. Carpue drove away, and McCowan and Arthur B. said they thought the man had been scared by what Carpue had said.

Some time later, they were driving in Campbell, and started following a young guy who looked to Luna like he was coming from a gym. Luna heard someone in the car

² Luna testified at the preliminary hearing and, once it became apparent her testimony might be self-incriminating, her further testimony was postponed and counsel was appointed to represent her. After speaking with counsel, she invoked her Fifth Amendment privilege. The People agreed to confer use immunity to Luna for her testimony. Subject to that grant of immunity, the court directed Luna to resume her testimony.

³ Arthur B. was a minor at the time of the offense.

say something like “look at that guy right there. It looks like he has an i-Phone [*sic*] or something or an i-Pod [*sic*].” Carpue stopped the car and Luna heard the back doors open. At the preliminary hearing, Luna first testified she neither heard nor saw what happened after that. However, when she was interviewed by Detective Sessions about what had happened, she said that Arthur B. and McCowan got out and said “Let’s get that guy.” While they were still in the car, she had heard them say they were going to get his phone and the gym bag he was carrying. She also heard one of them say “check his pockets for wallets.”

After about a minute to a minute and a half, the two men got back in the car and Luna saw that they now had a phone and an iPod. They were in an excited state and wanted to leave the area.

The group then drove to Santa Cruz and as they were driving Luna heard someone in the backseat say “There’s one right there, let’s get him.” Carpue stopped the car and Luna heard the back doors close. After about a minute or a minute and a half, McCowan and Arthur B. got back in the car and said “Go.” Carpue drove quickly away. The car was subsequently pulled over by the police, at which time Luna heard Carpue, McCowan and Arthur B. saying “hide the gun.” Before then, she was not aware that there was a gun in the car.

At about 9:45 p.m., Santa Cruz Police Officer David Emigh responded to a report of a robbery which indicated the suspects had fled in a burgundy four-door Cadillac. Emigh took a position at the entrance to Highway 17 leading to San Jose. Within a few minutes he saw a car fitting the description he had been given and Emigh followed the car onto Highway 17 northbound. When sufficient backup arrived, he initiated a traffic stop. McCowan, Carpue, Arthur B. and Luna were taken into custody and the car was searched. Emigh found an unloaded sawed off shotgun on the rear floorboard behind the driver’s seat where Arthur B. had been seated. Wygal’s phone was found in the car, and his iPod was located with Arthur B.’s property at the juvenile hall in Santa Cruz.

On the morning of October 22, 2010, Detective Sessions met with Arthur B. at juvenile hall. Arthur B. admitted that he and McCowan had robbed Wygal.

On August 4, 2011, an information was filed in Santa Clara County Superior Court charging McCowan, along with codefendants Carpue and Arthur B., in count 1 with second degree robbery (§ 211) with allegations that he was armed with a shotgun (§ 12022, subd. (a)(1)), and in count 2 with possession of a short-barreled shotgun (former § 12020, subd. (a)(1)). McCowan was charged in count 3 with possession of a firearm by a felon (former § 12021, subd. (a)(1)). It was further alleged that he had two strike priors within the meaning of sections 667, subdivisions (b) through (i) and 1170.12; two serious felony prior convictions within the meaning of section 667, subdivision (a); and two prison priors within the meaning of section 667.5, subdivision (b).

On March 13, 2012, a hearing was held pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. The motion was denied.

On March 14, 2012, McCowan pleaded nolo contendere to all counts, admitted the allegation that he had been armed with a shotgun, and admitted the strike priors and the prison priors. The court took under submission the People's motion to dismiss the prior convictions alleged pursuant to section 667, subdivision (a). The plea was entered on condition that McCowan would be sentenced to serve 25 years to life in state prison and would be awarded presentence credits from the date of his arrest until the date of sentencing.

On June 22, 2012, McCowan was sentenced to serve 25 years to life in state prison for count 1 along with a concurrent 25 to life sentence on count 2. On count 3, a sentence of 25 years to life was imposed but stayed pursuant to section 654. The punishment for the enhancement charged pursuant to section 12022, subdivision (a)(1), the prison priors were stricken pursuant to section 1385. The serious felony priors alleged pursuant to section 667, subdivision (a) were also dismissed.

Notice of appeal was timely filed on August 21, 2012.

McCowan's letter brief appears to state a claim of ineffective assistance of counsel, citing his unsuccessful *Marsden* motion, as well as issues with how Luna was allowed to testify even though she "has a record." However, an ineffective assistance of counsel claim cannot be resolved on the appellate record before us. The California Supreme Court has "repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

McCowan also complains that one of his serious felony prior convictions should not have been considered a "strike" prior, because he had that conviction struck by way of a successful *Romero*⁴ motion in an unrelated case back in 2010. There is no merit to this claim. It is well-settled "in a Three Strikes case, as in other cases, when a court has struck a prior conviction allegation, it has not 'wipe[d] out' that conviction as though the defendant had never suffered it; rather, the conviction remains a part of the defendant's personal history, and a court may consider it when sentencing the defendant for other convictions." (*People v. Garcia* (1999) 20 Cal.4th 490, 499.)

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *People v. Kelly* (2006) 40 Cal.4th 106, we have reviewed the entire record and have concluded that there is no arguable issue on appeal.

II. DISPOSITION

The judgment is affirmed.

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.