

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

REYNALDO ISSAC FRANCO,

Defendant and Appellant.

H039708

(Santa Clara County
Super. Ct. No. C1198291)

A jury found defendant Reynaldo Issac Franco guilty on two counts of second degree robbery. (Pen. Code, § 211.)¹ The jury also found firearm enhancements on each count true. (§ 12022.53, subd. (b).) The trial court imposed concurrent 12-year sentences on each count.

On appeal, defendant contends his trial counsel provided ineffective assistance. Defendant testified at trial. On direct examination, his counsel elicited basic background information about defendant's work habits and employment, but asked no direct questions concerning money. The prosecutor then cross-examined defendant about his financial situation to show that defendant had little money at the time of the offense. In closing, the prosecutor argued that defendant's poor finances gave him a motive to commit the robbery. Defendant contends his trial counsel should have objected to the

¹ Subsequent undesignated statutory references are to the Penal Code.

prosecutor's closing argument because evidence of poverty may not be used to establish motive.

We agree that defendant's trial counsel should have objected to the prosecutor's closing argument about the defendant's motive to commit the robbery. (*People v. Wilson* (1992) 3 Cal.4th 926, 939 (*Wilson*) [evidence of a defendant's poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft].) And we conclude that defense counsel's performance was deficient. But defendant has not shown he was prejudiced by his counsel's deficient performance. Accordingly, we will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts of the Offense

At around 10:30 p.m. on December 19, 2009, two men with guns robbed a Jack in the Box in San José. Lucila Pineda Galvan, who was behind the cash register at the time, later identified defendant as one of the robbers. Defendant's DNA matched DNA from a blood droplet found on the floor of the restaurant.

1. Galvan's Testimony

Galvan testified for the prosecution as follows. She and another employee, Francisco Torrez, were behind the counter when two men entered the restaurant. The two men were yelling. Defendant was wearing a sweatshirt or jacket with a hood. He was "sort of light" skinned and had "wild" hair sticking out of his hood. Galvan did not notice that defendant had any tattoos. Defendant waved a silver, metallic handgun in front of Galvan and demanded money. The second robber pointed a gun at Torrez and told him not to move.

Galvan took the cash tray out of the register and placed it on the counter. Defendant then switched the gun from his right hand to his left hand and began to put the cash in his pockets. Galvan noticed that defendant's hand was shaking as he grabbed the money, and she saw that he was dripping blood onto the counter. After defendant took

the money, the two men ran out of the restaurant. As they were leaving, Galvan saw defendant dripping blood on the floor.

After they left, Galvan found blood droplets on the floor of the restaurant. Galvan had just mopped the floor about 20 minutes earlier, so she did not think there was any blood on the floor before the robbers entered.

About a year later, police showed Galvan six photographs, including defendant's photograph. Galvan was unable to identify defendant as one of the robbers from the photographs. But she was able to identify defendant in person at the preliminary hearing and again at trial. She testified at trial that there was no question in her mind that defendant was the man with the silver gun.

2. Police Investigation

After the robbers left the restaurant, Galvan immediately called 911. Police arrived "very quickly." On the floor of the restaurant, police found multiple blood droplets in a line directly from the counter to the south doors. They collected one of the droplets and sent it to the crime lab for processing. A forensic biologist at the lab performed a DNA analysis on the droplet and sent the results to the FBI for the purpose of searching the CODIS nationwide DNA database. The FBI notified the crime lab that the DNA from the blood droplet matched defendant's DNA. A second DNA sample was subsequently taken directly from defendant and matched to the DNA from the blood droplet. The forensic biologist testified that he did not perform an exact statistical analysis of the DNA match because the number of matching alleles "exceeded 14 to 15, so it's above, or, more rare than one in 300 billion."

Police gathered fingerprints from the restaurant, but none matched defendant's fingerprints. Police collected a videotape from a surveillance camera at the scene, but the resulting video was of poor quality. Before defendant's DNA was matched to the blood droplet, a police sketch artist worked with Torrez to create a sketch of defendant. Another officer testified that the sketch appeared "similar" to a photograph of defendant.

After defendant's DNA was matched to the blood droplet, police interviewed him in custody. Defendant said he was familiar with the Jack in the Box that had been robbed, but he denied that he had ever been inside the restaurant. He also denied that he was familiar with the neighborhood where the restaurant was located.

3. Defendant's Testimony

Defendant testified in his defense and denied committing the robbery. He admitted that he had lied to police when he told them (1) he had never been inside that Jack in the Box, and (2) he was unfamiliar with the neighborhood. Instead, he testified that in 2009 he had lived with his aunt near the Jack in the Box, and he admitted that he had been in the restaurant "maybe a few" times. He said he lied to the officer because he did not want problems and "Whatever happened over there, I got nothing to do with it."

Defendant admitted that the blood in the restaurant was his, but he could not explain how it got there. He stated that "people bleed. I'm a human. Could have been a nose bleed, a cut, anything." He testified that he had had short hair all his life, and that he gets a haircut every four days because he was going bald. Defendant showed the jury that he had tattoos on his hands and wrists, but he admitted that the tattoos were not visible when his sleeves were down. On cross-examination, appellant admitted three prior convictions for inflicting corporal injury on a spouse, cohabitant, or the mother of his child.

B. Procedural Background

On March 28, 2011, the prosecution charged defendant in an amended information with two counts of second degree robbery, each with allegations that he had personally used a firearm. (§§ 211, 12022.53, subd. (b).) On April 3, 2012, the jury found appellant guilty as charged on both counts and found both firearm allegations true. On May 10, 2013, the trial court sentenced defendant to a total term of 12 years on Count One, composed of the two-year mitigated term for robbery plus 10 years for the

firearm allegation. The court imposed the same 12-year sentence on Count Two, but ordered it to run concurrent to Count One.

II. DISCUSSION

Defendant contends his trial counsel, Cary Lindstrom, provided ineffective assistance by failing to object when the prosecutor argued that defendant's poverty gave him a motive to commit the robbery. The Attorney General contends that the prosecutor's argument was proper because Lindstrom elicited evidence of defendant's financial circumstances on direct examination, giving rise to the implication that defendant had no motive for the robbery.

We agree with defendant that the prosecutor's argument was improper and that Lindstrom should have objected to it. But defendant has not met his burden of showing that his counsel's ineffective assistance resulted in prejudice, and our review of the record reveals no such prejudice.

A. *Background*

At the start of defendant's direct examination, Lindstrom posed several general background questions about defendant's life and his living situation. Defendant testified that he had a four-year old daughter, and that he was living with his aunt in 2009. When Lindstrom asked if he was working at the time, defendant testified that he was doing "side stuff" for his grandparents, who worked in demolition. He also testified that he did chores around the house at his aunt's request to "Pull my weight." These chores included cleaning, yard work, and moving her car. Defendant testified that he did not have an "actual source of employment."

Lindstrom then turned to the police interview, in which defendant admittedly lied. When Lindstrom asked defendant why he lied, defendant answered, "Well, pretty much I was doing good. You know what I'm saying?" Lindstrom asked him to explain further, and defendant answered, "Well, I was working, you know, and I was pretty much *doing*

right. And, when a detective comes to see you, it's not really—something's wrong, obviously.” (Italics added.)

On cross-examination, the prosecutor inquired about defendant's financial circumstances. In response to the prosecutor's question about the costs of raising children, defendant agreed that raising a child was expensive, and he said that he provided “a little bit” of financial assistance to his girlfriend. The prosecutor then asked, “Not a lot of money?” In response, defendant stated that he received some money from his grandparents for occasional demolition work. He did about one week of demolition work each month, but he did not receive an hourly wage; his grandfather just paid “whatever he thought my work was worth.”

In closing argument, the prosecutor stated, “Now, the first thing Mr. Franco provides you with is a motive. He tells you he has a four-year-old daughter. He pays money to his girlfriend, but children are expensive. They cost a lot of money to feed and to clothe, to care for. Mr. Franco wasn't working regularly at that time. At best he was working five days a month, and he wasn't being paid consistently. He was living with his aunt, and money was hard to come by. He's a 20-year-old young man with all of the expenses and desires that come along with that baggage. Mr. Franco didn't have money. Now, he tells you on the witness stand, Yeah, I had money. Where was he getting the money? He wasn't working for it, not routinely, not consistently. He needed to get it from somewhere. On December 19th he got it from Jack in the Box.” Lindstrom lodged no objections.

B. Legal Standards for Ineffective Assistance of Counsel

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability

that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*)). “ ‘Finally, prejudice must be affirmatively proved; the record must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” ’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

Tactical errors are generally not deemed reversible. (*People v. Hart* (1999) 20 Cal.4th 546, 623.) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there could be no satisfactory explanation. (*Id.* at pp. 623-624.) Furthermore, “[i]t is the defendant’s burden on appeal [. . .] to show that he or she was denied effective assistance of counsel and is entitled to relief. [Citations.] ‘[T]he burden of proof that the defendant must meet in order to establish his [or her] entitlement to relief on an ineffective-assistance claim is preponderance of the evidence.’ [Citation.]” (*In re Hill* (2011) 198 Cal.App.4th 1008, 1016.)

C. *The Prosecutor’s Argument Was Improper*

“Evidence of a defendant’s poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft, because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice.” (*Wilson, supra*, 3 Cal.4th at p. 939.) “Poverty as proof of motive has in many cases little tendency to make theft more probable. Lack of money gives a person an interest in having more. But so does desire for money, without poverty. A rich man’s greed is as much a motive to steal as a poor man’s poverty.” (*United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109.) “Under certain circumstances, however, evidence of poverty or indebtedness may be

relevant and admissible for limited purposes, such as to refute a defendant's claim that he did not commit the robbery because he did not need the money." (*Wilson*, 3 Cal.4th at p. 939.)

The Attorney General asserts that on direct examination Lindstrom introduced evidence of defendant's financial circumstances, and that defendant's testimony in response to Lindstrom's questions implied that he (defendant) did not need money. The Attorney General contends that the prosecutor was thereby justified on cross-examination to explore defendant's finances and to argue that defendant had a financial motive to commit the robbery. The record, however, does not support this assertion.

Lindstrom elicited information about the defendant's work habits, but Lindstrom did not ask any questions concerning money or pay. To the extent defendant's testimony about his work history implied something about his finances, the only reasonable inference was that defendant had very little money. Defendant testified that he did "side stuff" for his grandparents and chores around the house for his aunt. He readily admitted that he had no "actual source of employment." Defendant's testimony about "doing good" was not a reference to doing well financially. He gave that statement in response to the question of why he lied to police, and he further explained that he was "doing right" and working—i.e., that he had been staying out of trouble, and therefore did not want to get involved with a criminal investigation. Nothing from defendant's direct examination—and nothing in Lindstrom closing argument—implied that defendant was doing well financially and therefore did not have a motive to commit the robbery.

The record shows that it was the prosecutor—not Lindstrom—who first asked defendant about his need for money. In response to the prosecutor's questions, defendant readily admitted that while he had some money, he was only working sporadically and was not earning an hourly wage. He testified that children were expensive, and it was "tough" for him. But defendant did not state or imply that he lacked a financial motive to commit the robbery because he had enough money to meet his expenses. It was therefore

improper for the prosecutor to raise defendant's financial circumstances as a motive for the robbery. Lindstrom should have objected to this line of argument, and if he had, the trial court should have sustained the objection. Because we discern no tactical reason for Lindstrom's failure to object on this point, and the Attorney General does not suggest one, the failure to object constituted deficient performance.

D. Defendant Suffered No Prejudice

Although Lindstrom's failure to object constituted deficient performance, defendant must also show prejudice—a reasonable probability the jury would have reached a more favorable outcome if Lindstrom had objected. Defendant contends that the jury would have harbored a doubt as to his guilt had it not been permitted to infer that he had a motive to commit the robbery given his financial position. He argues that the jury had doubts because Galvan did not identify him in a photo lineup, Galvan remembered the robber having curly hair while he had short hair, there was no blood on the counter as Galvan had reported, and there were other customers in the restaurant after the floors were mopped.

We conclude defendant suffered no prejudice as a result of his counsel's deficient performance. First and foremost, DNA evidence put defendant's blood at the scene of the crime, and he had no credible explanation for how it arrived there. Second, although Galvan failed to identify defendant in a photo lineup, she was able to identify him twice in court when she saw him in person. Third, defendant admitted to three prior convictions, and he admitted to lying to police. The jury was not likely to credit his testimony even if his counsel had objected to the prosecutor's improper closing argument.

Given the weight of the evidence against him, we conclude it was not reasonably probable that the jury would have reached a more favorable outcome had defense counsel properly objected. Based on the failure to demonstrate prejudice, defendant's claim of ineffective assistance of counsel is denied.

III. DISPOSITION

The judgment is affirmed.

MÁRQUEZ, J.

We concur:

RUSHING, P.J.

PREMO, J.