

Joshua Derek ROBERTS et al., Defendants and Appellants.

No. B201071.

(Los Angeles County Super. Ct. No. BA295768).

Nov. 18, 2008.

APPEAL from judgments of the Superior Court of Los Angeles County, Lance A. Ito, Judge. Affirmed.

Attorneys and Law Firms

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant Joshua Derek Roberts.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant Derek Daron Cooper.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Opinion

KLEIN, P.J.

*1 Defendants and appellants, Joshua Derek Roberts and Derek Daron Cooper, appeal from the judgments entered following their convictions, by jury trial, for first degree murder with firearm and criminal street gang enhancements (Pen.Code, §§ 187, 12022.53, 186.22). Defendants were sentenced to state prison for terms of 50 years to life.

The judgments are affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (People v. Ochoa (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

1. Prosecution evidence.

On July 25, 2005,¹ Carolyn Whitfield was living on the bottom floor of an apartment building on Crenshaw Boulevard. Her 28-year-old son, Donte Loeb, lived with her. About 6:00 p.m. that night, Whitfield heard gunshots coming from outside her apartment building. She knew Loeb had been taking out the trash and she saw that the kitchen door was open. Whitfield went to the front door and looked out. At the corner of 78th Place and Crenshaw, she saw a car and two African-American men; one was standing by the car and the other

¹ All further calendar references are to the year 2005 unless otherwise specified.

was sitting in the driver's seat. The man standing by the car was wearing "a red football type jersey with some white figures" on it. Whitfield then went to her front window, which looks out onto Crenshaw, and peeked through the blinds. She saw Loeb leaning on a flower bed and holding his side. Whitfield called 911. While she was still on the phone, she looked through the blinds again and saw Loeb take a couple of steps and then scream. When Whitfield called out to ask Loeb if he was okay, someone said, "No, he's not okay. He's been shot."

Loeb had been shot four times, fatally.

When the police showed Whitfield two photo arrays, she identified defendant Roberts and defendant Cooper as the two men she had seen at the corner of 78th and Crenshaw. At trial, Whitfield identified Cooper as the man who had been standing next to the car, and Roberts as looking like the man who had been inside the car.

At the time of the shooting, Albertha Vaultz was standing across the street from Whitfield's apartment building. She saw Loeb sitting on a planter box and two African-American men crossing 78th Place. Vaultz heard someone say, "What's up, Blood?" Then there were gunshots and Loeb collapsed. The two men Vaultz saw that night had darker complexions than the defendants.

Marcus Anderson was across the street from Whitfield's apartment building. Hearing gunshots, he looked out the window and saw two men facing Loeb, who was lying face down on the ground. The men were backing away from Loeb, going toward 78th Place. Both men had their right arms out in front of their bodies, and each was holding a four-to-five inch long metallic object. The men turned and ran. One of them was wearing a white T-shirt and the other was wearing a red jersey. The police showed Anderson the two photo arrays. In the first array, he identified Roberts as the man who had been wearing the white shirt. In the second array, he picked out someone other than Cooper as the man in the red shirt. At trial, Anderson made in-court identifications of both Roberts and Cooper, but conceded he had identified someone else in the second array.

* Ricardo Sanders was across the street from Whitfield's apartment building. He noticed two African-American men. One was wearing a red, football type jersey with numbers and white stripes on it. The other man was wearing a red T-shirt. Neither man had anything in his hands. Then he heard gunshots. Sanders did not see the men after that. Sanders told police the man in the red T-shirt had also been wearing a red and white cap, and red and white shoes. Sanders identified Roberts from a photo array, and again in court, as one of the two men he had seen that night. Sanders could not identify Cooper.

The police had no leads in the case until October, when they were contacted by a woman claiming to have information about a murder that had occurred near 78th and Crenshaw. The woman, L.J., gave police a statement implicating Roberts and Cooper. The statement was surreptitiously recorded.² In it, L.J. said that on the day Loeb was shot she learned Cooper and Roberts had been the perpetrators. At the time, Cooper had been her boyfriend for a couple of weeks. Cooper and Roberts were friends and they both belonged to a Crips gang. On the night of the shooting, she accompanied them several times to the shooting scene because they wanted to make sure the victim had died. Thereafter, whenever they passed that spot, Cooper and Roberts would say, "[T]hat's where we flat lined that guy." L.J. told police that when Cooper wanted to go out and kill Bloods, he would wear a red hat, a red shirt, and red, pink and white shoes. This outfit would make people think

² L.J. was put into a witness protection program after she told authorities she had been threatened. She was later terminated from the program for violating the rules. L.J. eventually appeared as a trial witness, testifying under a grant of immunity. She denied much of her police statement.

he belonged to a Bloods gang. L.J. believed Loeb's killing had been "really foul" because Cooper told her that, "as a friendly gesture," Loeb had warned Cooper, "[Y]ou need to be careful wearing all that red over here," just before Cooper and Roberts shot him.

Officer David Ross testified as a gang expert. He described the Rollin' 60s Neighborhood Crips as the largest African-American street gang in Los Angeles County. Their primary rivals were all of the different Blood gangs. Ross identified both defendants as members of the Rollin' 60s. Cooper's gang moniker was Young Khaki Blue, and Roberts's was Tiny Khaki Blue. The area around Crenshaw and 78th is on the border separating the Inglewood Family Blood Gang to the south, and the Rollin' 60s to the north. The two gangs are bitter rivals. Loeb had the initials "NHP" tattooed on his chest. These letters stood for Neighborhood Piru, a small Blood gang in Inglewood. Some Neighborhood Pirus wear brown shirts, the color of dried blood. Loeb had a brown shirt on when he was shot. Asked a hypothetical question based on the facts shown at trial, Ross opined Loeb's shooting had been committed for the benefit of the Rollin' 60s. Shooting a rival gang member in the rival's territory, on a busy street and in front of many witnesses, helped maintain a gang's reputation

2. Defense evidence.

Dr. Mitchell Eisen, an expert on eyewitness identification, testified for the defense. He described the mechanisms by which people remember an event, and the effects of stress and trauma on memory. He testified there is almost no relationship between witnesses' confidence in identifications they have made and the accuracy of those identifications.

*3 Eisen explained how police lineups should be constructed in order to reduce the chance of misidentification. Any type of lineup in which one person sticks out noticeably is an unfair or suggestive lineup. When putting together a photo array, the police should try to include pictures of persons who share the same general features as the suspect, but who do not look like clones.

CONTENTIONS

1. Defense counsel were ineffective because they did not object to unduly suggestive photo arrays.
2. The trial court erred by prohibiting a defense expert from testifying about the suggestibility of the photo arrays.
3. Cooper's defense counsel was ineffective for failing to cross-examine a witness about a prior misidentification.

DISCUSSION

1. The photo arrays were not unduly suggestive.

Defendants contend their defense attorneys rendered ineffective assistance because they failed to challenge the suggestiveness of the photo arrays shown to the eyewitnesses. This claim is meritless.

a. Legal principles.

A claim of ineffective assistance of counsel has two components: “ ‘First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’ [Citation.] [¶] To establish ineffectiveness, a ‘defendant must show that counsel’s representation fell below an objective standard of reasonableness.’ [Citation.] To establish prejudice he ‘must show that there is 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.’ [Citation.]” (Williams v. Taylor (2000) 529 U.S. 362, 390-391 [120 S.Ct. 1495].)

“ ‘If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.’ [Citation.]” (People v. Hernandez (2004) 33 Cal.4th 1040, 1053.) “In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny” in order to avoid “the adverse consequences that systematic ‘second-guessing’ might have on the quality of legal representation provided to criminal defendants and on the functioning of the criminal justice system itself.” (People v. Ledesma (1987) 43 Cal.3d 171, 216.)

A defendant bears the burden of showing that an identification procedure was unfair “as a demonstrable reality, not just speculation.” (People v. DeSantis (1992) 2 Cal.4th 1198, 1222.) “[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance. [Citation.] Nor is the validity of a photographic lineup considered unconstitutional simply where one suspect’s photograph is much more distinguishable from the others in the lineup.” (People v. Brandon (1995) 32 Cal.App.4th 1033, 1052; see also People v. Floyd (1970) 1 Cal.3d 694, 713, disapproved on another ground in People v. Wheeler (1978) 22 Cal.3d 258, 287, fn. 36 [“There was no need for the police to match the outfits of everyone in the lineup anymore than the police were required to match the physical proportions of the other men with scientific exactitude.”].) The relevant question “ ‘is whether anything caused defendant to “stand out” from the others in a way that would suggest the witness should select him.’ ” (People v. Cunningham (2001) 25 Cal.4th 926, 990.)

b. Discussion.

*4 Roberts claims that, because he was so much lighter in complexion than all the other men pictured in the photo array, the array was unduly suggestive. He asserts the difference was so marked the trial court commented that even the jury had noticed Roberts’s complexion was “dramatically different.” The record does show that, after the trial court invited the jury to submit clarification questions, a single juror asked: “[I]f the photos are supposed to resemble the suspect, why are there not more light skinned ‘photo fillers’? [E]specially in [the photo array that included Roberts’s picture.]” ‘ However, the juror did not say Roberts’s complexion was “dramatically different” from the others in the photo array. This was merely the trial court’s interpretation of

the juror's question about why there weren't more light-skinned filler photos in the array.³ The juror did not say Roberts was the only light-skinned person depicted.

Roberts's reliance on *People v. Caruso* (1968) 68 Cal.2d 183, is misplaced because in that case the defendant had been the only person in a live lineup who manifested three very prominent physical characteristics: "[T]he uncontradicted testimony of all those who viewed the lineup demonstrates that it was conducted under circumstances which could only have suggested to [the victims] that defendant was the man to be charged with the offense. Defendant is of imposing stature, being 6 feet 1 inch tall, and weighing 238 pounds. He is of Italian descent, with a very dark complexion, and has dark wavy hair. The two victims, the officer in charge of the investigation, ... and defendant all testified that the other lineup participants did not physically resemble defendant. They were not his size, not one had his dark complexion, and none had dark wavy hair. During the robbery both [victims] had noted the driver's large size and dark complexion, and, if they were to choose anyone in the lineup, defendant was singularly marked for identification. We can only conclude that the lineup was 'unnecessarily suggestive and conducive to irreparable mistaken identification' [citation], and we hold that its grossly unfair makeup deprived defendant of due process of law. [Citation.]" (Id. at p. 187, fn. omitted, italics added.)

The identification procedure in the case at bar is nothing like what occurred in *Caruso*. We have examined the photo array in question. Although Roberts arguably has the lightest complexion among the six photographs, two of the other men depicted in the array also appear to be fairly light-skinned. What is certainly not true is Roberts's assertion his "photograph is the only one that depicts an individual with the combined attributes of a 'dramatically' lighter complexion, a thin face, and youthfulness." The man depicted in photograph No. 3 looks younger than Roberts, and the faces of two or three others are as thin as Roberts's face. Roberts has failed to show "as a demonstrable reality" (*People v. DeSantis*, supra, 2 Cal.4th at p. 1222) that the photo array was impermissibly suggestive.

*5 Cooper also asserts his "photograph is 'dramatically different' in complexion compared to the other photographs in the [array]" because he was "clearly the lightest person." Again, we have examined the photo array in question and, although Cooper appears to have the lightest complexion, at least two of the other men pictured are only marginally darker. As the Attorney General points out, the array "depicts six African-American men appearing to be within the age range of 18 to their mid-20s, all with short haircuts, all similarly built.... Appellant Cooper and the men in the numbers one and four positions all have light goatees...." Cooper has failed to show "as a demonstrable reality" (*People v. DeSantis*, supra, 2 Cal.4th at p. 1222) that the photo array was impermissibly suggestive.

Hence, defense counsel did not render ineffective assistance by failing to challenge the photo arrays.

2. Trial court did not improperly restrict testimony of defense expert.

Defendants contend the trial court improperly prevented the defense expert, Mitchell Eisen, from answering a hypothetical question about the proper way to construct an unbiased photo array. This claim is meritless.

³ The trial court paraphrased the juror's question as: "[T]he jurors [sic] have already asked questions, 'Why is this man's complexion dramatically different than everybody else?' "

Roberts argues, “[D]efense counsel posed a hypothetical question concerning whether in a photographic lineup comprised of five filler photos of black males who are not light-skinned a photo of one light-skinned male black would stand out. The trial court sustained the prosecutor’s objection that the question called for an improper expert opinion on the ground that the question concerned a subject matter that did not require expert opinion.”

But this argument misstates the hypothetical question defense counsel posed to Eisen. That hypothetical question was the following: “Now assume that five of the six pictures in the six-pack with the fillers depicted males who are either not light-skinned or not natural, short hair, or were not between 17 and mid 20’s. Rather, only one of those pictures clearly depicts a male black, light-skinned, natural, short hair, and that was the suspect. [¶] Based on the research in this area and your background, training, and expertise, could this create a circumstance where one picture stands out from the others?” Hence, the hypothetical did not ask about only one characteristic, viz, complexion. Rather, it asked about three characteristics, viz, complexion, age and hair style.

Moreover, the trial court gave two reasons for sustaining the prosecutor’s objection: (1) there was no need for expert testimony on this topic; and (2) Eisen had already testified a lineup would be unfair if there was, in effect, only one logical choice. The first reason was arguably sufficient to sustain the objection. (See *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1298 [claim that others in lineup were “too dissimilar from the robber’s description to constitute a fair selection” does not warrant expert testimony because “similarity in appearance of members of a lineup ... is completely within the task of the trier of fact to resolve”].) The second reason was definitely sufficient because Eisen had indeed already testified a lineup would be unfair if, given the initial eyewitness descriptions of the perpetrator, there was only one viable choice.⁴

*6 Hence, the trial court properly excluded the hypothetical question as essentially redundant.

3. Cross-examination of defense witness did not constitute ineffective assistance of counsel.

Cooper contends he was denied effective assistance when his attorney failed to adequately follow up a promising line of impeachment during the cross-examination of one of the eyewitnesses. This claim is meritless.

Marcus Anderson testified he heard gunshots and saw two men standing over Loeb’s body. Anderson picked out Roberts’s picture from the first photo array, but in the second array he identified someone other than Cooper.

⁴ Eisen had testified earlier: “Any type of lineup ... where one person sticks out unduly from the group as either being the only viable choice or there’s something distinguishing about them that would indicate that they would be the right person to choose would be the form of bias that’s most typically examined in the literature that would make the six-pack suggestive or unfair.”

Nevertheless, at trial Anderson identified Cooper as being the second gunman. On cross-examination, the following colloquy occurred:

“Q. At the preliminary hearing in this proceeding, you never identified my client, did you?

“A. I believe I did, sir.

“Q. You believe you did. All right.”

Pointing out that Anderson in fact had not been able to identify him at the preliminary hearing, Cooper complains: “Although this was a direct contradiction of Anderson’s testimony, and although it would be a significant blow to the credibility of Anderson’s identification of appellant [at trial], counsel for appellant never followed up on this line of impeachment by showing Anderson the transcripts from the preliminary hearing, asking if it refreshed his memory or otherwise attempt to inform the jury that Anderson was mistaken and he had not identified appellant at the earlier hearing. [¶] As a result, the jury was left with the false impression that Anderson did make an earlier identification of appellant....”

But “[s]uch matters as ... the manner of cross-examination are within [defense] counsel’s discretion and rarely implicate ineffective assistance of counsel. [Citation.]” (People v. McDermott (2002) 28 Cal.4th 946, 993; People v. Bunyard (1988) 45 Cal.3d 1189, 1215 [deference is shown to counsel’s tactical choices].) Cooper’s ineffective assistance claim fails because, although confronting Anderson with his failure to identify Cooper at the preliminary hearing would have tended to impeach his credibility, defense counsel simply chose a different approach to the same end.

On direct-examination, Anderson testified Roberts had been the perpetrator in the white shirt and Cooper had been the perpetrator in the red shirt. On cross-examination, defense counsel showed Anderson a copy of the photo array in which he had picked the person in the fourth position instead of Cooper, whose picture was in the second position. Defense counsel then asked him:

“Q.... Number 4, look at that please, does that look like my client?

“A. To my knowledge, yes, sir.

“Q. Really? All right. [¶] You see any others there that look like my client?

“A. No, sir.

“Q. How about number 2?

"A. No, sir.

"Q. If I told you that was my client, what would you say? Take a look.

*7 "A. I would say they look very similar, sir."

Then on recross-examination, defense counsel asked:

"Q. Now, I showed you ... that six-pack, correct?

"A. Yes.

"Q. You picked out number 4, correct?

"A. Yes.

"Q. Now, is number 4 the same person that's sitting next to me that I'm putting my right hand on, (indicating)?

".....

".....

"The witness: The gentleman that's circled right here, (indicating), is not the gentleman that's sitting there.

"Q. By [defense counsel]: He's not the gentleman. So then you made a misidentification; is that correct?

"A. Yes, sir.

"Q. And who is the person that's sitting here? Is he on this?

"A. It is this gentleman in photo number 2, (indicating).

"Q. And that's because I told you ... number 2 was my client; is that correct?

"A. Yes.

"Q. So it was not until I told you number 2 was my client that you made the identification in court today; is that correct?

"A. Correct."

Hence, defense counsel's approach was quite effective because: (1) he impeached Anderson with the fact he had failed to identify Cooper when the police initially showed him a photo array; (2) he let the jury see that, even after making an in-court identification, Anderson still thought Cooper looked more like a filler photo than his own photo; and, (3) he got Anderson to apparently concede he had been able to identify Cooper at trial only because he figured out Cooper was sitting next to defense counsel.

Cooper has failed to show defense counsel rendered ineffective assistance by not asking Anderson about his preliminary hearing testimony.

DISPOSITION

The judgments are affirmed.

We concur: CROSKEY and ALDRICH, JJ.

All Citations

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