

COLORADO COURT OF APPEALS

Court of Appeals No.: 04CA0502
Adams County District Court No. 97CR361
Honorable C. Scott Crabtree, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Johnny Ray Rodarte,

Defendant-Appellant.

ORDERS AFFIRMED IN PART, REVERSED IN PART, SENTENCE REVERSED
IN PART, AND CASE REMANDED WITH DIRECTIONS

Division V

Opinion by: JUDGE WEBB
Russel and Hawthorne, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: February 2, 2006

John W. Suthers, Attorney General, Deborah Isenberg Pratt, Assistant Attorney
General, Denver, Colorado, for Plaintiff-Appellee

Thomas K. Carberry, Denver, Colorado, for Defendant-Appellant

Defendant, Johnny Ray Rodarte, appeals the trial court's order denying his motions under Crim. P. 35(a) and (c) and Crim. P. 33. We affirm in part, reverse in part, and remand for resentencing on one count.

Two armed men entered a credit union during business hours and took approximately \$11,000. The charges against Rodarte and his separately tried codefendant, Jesse Bernal, arose from the robbery. The details of the crime are described in Bernal v. People, 44 P.3d 184 (Colo. 2002).

Two of the employees identified Bernal from a photo array. A third employee identified Rodarte from a separate photo array. A fourth employee, while unable to identify Rodarte from this photo array, identified him at trial.

A jury convicted Rodarte of second degree kidnapping, aggravated robbery, conspiracy, and menacing. He was sentenced to forty years imprisonment. Rodarte's convictions were affirmed on direct appeal. People v. Rodarte, (Colo. App. No. 98CA0430, Aug. 12, 1999) (not published pursuant to C.A.R. 35(f)).

Rodarte filed a motion for postconviction relief under Crim. P. 35(a) and (c) alleging ineffective assistance of both trial and appellate counsel. The motion was denied without a hearing.

Rodarte also filed a motion under Crim. P. 33 for a new trial based on newly discovered evidence, requesting a DNA test of a single hair found in a baseball cap left in a car stolen by Rodarte, which had been used by the robbers. After holding a hearing, the trial court denied the motion.

I.

Rodarte first contends the trial court erred in failing to grant a hearing on the ineffectiveness of his trial and appellate counsel. We conclude that Rodarte is entitled to certain relief, but discern no reason to remand for such a hearing.

A postconviction motion may properly be denied without a hearing where the pleadings, the file, and the record clearly show that the defendant is not entitled to any relief. People v. Kilgore, 992 P.2d 661 (Colo. App. 1999). The defendant has the burden of providing facts and authorities that justify postconviction relief. People v. Rodriguez, 914 P.2d 230 (Colo. 1996). “Whether a motion states a claim for relief is a legal determination subject to de novo

review.” People v. Long, ___ P.3d ___, ___ (Colo. App. No. 04CA0648, Oct. 6, 2005).

To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of proving both that (1) counsel failed to provide reasonably effective assistance because particular acts or omissions of counsel fell outside the wide range of reasonably competent assistance demanded of attorneys practicing criminal law; and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The prejudice component of an ineffective assistance claim requires the defendant to prove a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, *supra*; People v. Garcia, 815 P.2d 937 (Colo. 1991).

If the court determines that counsel’s performance was not constitutionally deficient, it need not consider the prejudice prong. Similarly, if the court determines that a defendant failed to

demonstrate prejudice, it may resolve the claim on that basis alone. Strickland v. Washington, *supra*; People v. Garcia, *supra*.

A.

Rodarte first argues that appellate counsel was ineffective in failing to challenge the trial court's ruling that the second degree kidnapping charge required mandatory crime of violence sentencing. Rodarte's twenty-four-year sentence on this charge fell within both the presumptive range for second degree kidnapping and the aggravated range for crime of violence sentencing. Nevertheless, we conclude that remand for resentencing is required.

Bernal prevailed on this claim in his direct appeal. See People v. Bernal, (Colo. App. No. 98CA0448, Nov. 18, 1999) (not published pursuant to C.A.R. 35(f)), rev'd. on other grounds, Bernal v. People, *supra*. Because the Attorney General does not dispute the division's analysis of this claim in People v. Bernal, *supra*, we adopt it here. The parties agree the remand for resentencing of Bernal resulted in a sentence reduction of six years.

In People v. Bernal, *supra*, the Attorney General agreed that crime of violence sentencing was not applicable to the second degree kidnapping charge, but maintained that resentencing was

not necessary because the record was unclear whether the trial court had applied the aggravated range in that Bernal's twenty-four-year sentence was also within the presumptive range.

Here, the Attorney General does not dispute that appellate counsel's failure to raise this issue amounted to deficient performance. See, e.g., People v. Thomas, 839 P.2d 1174 (Colo. 1992) (declining to address automobile exception to the warrant clause because prosecution did not argue it).

Rodarte's trial counsel raised the issue unsuccessfully during the sentencing hearing. Appellate counsel filed an amended opening brief on March 23, 1999, four days after Bernal filed his opening brief raising this issue. Therefore, counsel had an opportunity to confer with Bernal's appellate counsel or read the opening brief in that case before deciding what issues to raise in her own amended opening brief. We perceive no reason under these particular facts to remand for a hearing on whether appellate counsel's failure to raise the issue fell below the standard of care. Cf. Millhouse v. Wiesenthal, 775 S.W.2d 626 (Tex. 1989) (determination of causation in appellate legal malpractice case is to be resolved by the court as a question of law).

For the first time at oral argument, the Attorney General asserts that Rodarte's appellate counsel may not have raised the sentencing error because on remand for resentencing Rodarte could have been resentenced using the mandatory aggravator applicable to a defendant who was on parole for another felony at the time of the charged offense. See § 18-1.3-401(8)(a)(II), C.R.S. 2005.

Assuming this assertion is properly before us, we reject it as a plausible explanation for failure to raise the sentencing error because the mandatory aggravators under §§ 18-1.3-401(8)(a)(II) and 18-1.3-406(1)(a), C.R.S. 2005, are the same.

The Attorney General also argues that Rodarte has not demonstrated prejudice arising from this error because he failed to show a reasonable probability that, but for the error, he would have received a different sentence. According to the Attorney General, because Rodarte received the sentence recommended in the presentence report, and because Bernal ultimately received the same total sentence of forty years, Rodarte was not prejudiced. We are not persuaded.

Even when a sentence falls within both the presumptive and aggravated sentencing ranges, remand is necessary for

reconsideration of the sentence where the trial court misapprehended the scope of its discretion in imposing the sentence. People v. Willcoxon, 80 P.3d 817 (Colo. App. 2002) (remand for resentencing even though sentence was within the presumptive range because the trial court may have improperly considered the aggravated range in imposing the sentence); see also People v. Andrews, 855 P.2d 3 (Colo. App. 1992), aff'd, 871 P.2d 1199 (Colo. 1994); People v. Zapata, 759 P.2d 754 (Colo. App. 1988), aff'd, 779 P.2d 1307 (Colo. 1989).

The cases discussing this issue do not require the defendant to show a reasonable probability that he would have received a lower sentence in order to obtain a remand for resentencing, as the Attorney General asserts here. We perceive no reason to apply a different rule in Crim. P. 35(c) proceedings, and the Attorney General cites no authority requiring that we do so.

Here, the trial court misapprehended that the sentencing range for the kidnapping conviction was increased under the crime of violence statute, the former § 16-11-309 (now codified as § 18-1.3-406, C.R.S. 2005). Thus, because the trial court may have

relied on the aggravated range in sentencing, remand for resentencing is required.

The Attorney General's argument that on remand Bernal ultimately received the same sentence which Rodarte received is not persuasive. Bernal had been convicted of an additional charge, yet his sentence was reduced by six years.

We are also unpersuaded by the Attorney General's argument that Rodarte cannot show prejudice because he received the sentence recommended by the probation department in his presentence report -- that defendant "be sentenced to the maximum consecutive sentence" -- and his twenty-four-year sentence is the maximum of the presumptive range. The presentence report shows that in making its recommendation, the probation department made the same erroneous assumption that the crime of violence statute applied to the second degree kidnapping charge. Moreover, the probation department's recommendation is only one factor to be considered by the trial court in exercising its sentencing discretion.

Accordingly, we conclude Rodarte is entitled to a remand for resentencing.

B.

Rodarte next argues that his trial counsel was ineffective for failing to object to alleged prosecutorial misconduct during closing argument and that appellate counsel was ineffective for failing to raise this issue. We do not agree.

Rodarte challenges the following statement made by the prosecutor at the end of rebuttal closing argument:

The police take oaths as police officers to follow through with their duties, and that's what they did in this case. Witnesses in this case, [the employees who identified Rodarte] and [a customer] who were in the credit union that day, they came up, took oaths and followed their obligation of telling what happened to them that day. And just like [the individual who identified Rodarte] and all the other ladies lived up to their oath

He asserts that this statement amounts to the prosecutor improperly vouching for the veracity of prosecution witnesses.

“It is improper for counsel to express his or her personal belief regarding the truth or falsity of testimony during final argument because the truthfulness of testimony and the credibility of witnesses are matters to be determined by the trier of fact, and not by the advocates.” People v. Gilmore, 97 P.3d 123, 131 (Colo. App. 2003); see also Domingo-Gomez v. People, ___ P.3d ___ (Colo. No.

04SC640, Dec. 19, 2005) (prosecutor's comments that show personal opinions are improper).

1.

We reject Rodarte's assertion that his trial counsel was ineffective for failing to object to this statement.

We assume without deciding that the statement was improper and that the failure of trial counsel to object amounted to deficient performance. Therefore, we review Rodarte's contentions of prosecutorial misconduct for prejudice, as if a contemporaneous objection had been made and the objection had not been sustained, but we discern no prejudice.

Prosecutorial misconduct requires reversal unless we conclude the error was harmless beyond a reasonable doubt. People v. Dunlap, 975 P.2d 723 (Colo. 1999); People v. Rodriguez, 914 P.2d 230 (Colo. 1996). "In making our determination, we must consider whether, in light of the entire record, 'there is a reasonable possibility that the defendant could have been prejudiced' by the error." People v. Dunlap, *supra*, 975 P.2d at 759 (quoting People v. Rodgers, 756 P.2d 980, 984 (Colo. 1988)).

Factors to consider in determining whether the prosecutorial misconduct requires reversal include the severity and frequency of the misconduct and the likelihood that the misconduct constituted a material factor leading to the defendant's conviction. People v. Merchant, 983 P.2d 108 (Colo. App. 1999).

Here, the prosecutor's statement was an isolated reference made during a lengthy rebuttal argument. The statement was made in the context of a rhetorical device that everyone involved in the trial followed their oaths, and the jurors must now perform the duties to which they committed. The statement concerned the witnesses' performing their duties pursuant to their oaths rather than the prosecutor's personal belief about how the witnesses testified. The prosecutor's statement about oaths was generic to every witness, including those who could not identify either Bernal or Rodarte. Nor did the statement imply any personal knowledge of particular facts beyond the evidence presented.

The record as a whole reflects that the conviction did not turn on the truthfulness of these witnesses, but instead on their ability to perceive during the robbery, and thus identify Rodarte. At trial, Rodarte never suggested that these witnesses were lying or even

had a motive for doing so. Instead, he argued only that their perceptions were impaired by their having been held at gunpoint, and thus, their identifications were likely inaccurate. He also did not raise any issue regarding police misconduct.

Moreover, this statement was not significant considering the other evidence against Rodarte. One victim positively identified him both in the pretrial photo array and at trial. Evidence was also presented that Rodarte and Bernal were associated with one another before the robbery. And Rodarte admitted having stolen the getaway car. Thus, we are not persuaded that this statement constituted a material factor leading to Rodarte's conviction.

Accordingly, considering the closing arguments and the record as a whole, we conclude that the improper statement was harmless beyond a reasonable doubt, and therefore, Rodarte was not prejudiced by his trial counsel's failure to object.

2.

We also reject Rodarte's assertion that appellate counsel's failure to raise this issue deprived him of effective assistance of counsel.

Because Rodarte's trial counsel failed to object to the statement, review on direct appeal would have been for plain error. See People v. Miller, 113 P.3d 743, 749 (Colo. 2005) (unpreserved error is reviewed for plain error); see also People v. Hall, 107 P.3d 1073 (Colo. App. 2004) (same). To constitute plain error, prosecutorial misconduct must be "flagrant or glaringly or tremendously improper" and must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. People v. Salyer, 80 P.3d 831, 839 (Colo. App. 2003). Further, prosecutorial misconduct in closing argument rarely constitutes plain error. People v. Weinreich, 98 P.3d 920 (Colo. App. 2004), aff'd, 119 P.3d 1073 (Colo. 2005).

Under this narrow standard of review, and in light of our conclusion that any error was harmless beyond a reasonable doubt, Rodarte cannot establish ineffective assistance of appellate counsel because he cannot show prejudice.

C.

Rodarte next asserts that his appellate counsel was ineffective for failing to raise the suggestiveness of the pictures in the photo

array used to identify him, although appellate counsel challenged the array on another ground. We disagree.

As an initial matter, Rodarte complains that the trial court declined to address ineffective assistance of appellate counsel under Strickland v. Washington, supra, stating it was unaware of any legal authority to grant a new appeal. In this the trial court erred. See People v. Williams, 736 P.2d 1229, 1231 (Colo. App. 1986) (“trial court incorrectly concluded that Crim. P. 35 motions do not permit the trial court to consider allegations of ineffective assistance of counsel in appellate proceedings”). However, this error does not require a remand. See People v. Quintana, 882 P.2d 1366 (Colo. 1994) (reviewing court may affirm trial court on any ground supported by the record).

In Bernal v. People, supra, the Colorado Supreme Court reversed Bernal’s convictions based on an unduly suggestive photo array. Rodarte only asserts that appellate counsel should have made the same argument regarding suppression of the photo array as Bernal’s counsel made on appeal. That argument was limited to the suggestiveness of the six pictures in Bernal’s photo array and did not raise issues extrinsic to the array.

Because Rodarte does not raise any issue extrinsic to the pictures in the array, we can review the photo array de novo and resolve the issue on the prejudice prong of the Strickland v. Washington, supra, test without remanding for a hearing. See People v. Kyler, 991 P.2d 810 (Colo. 1999) (a postconviction court's legal conclusions are reviewed de novo); see also Bernal v. People, supra (the constitutionality of pretrial identification procedures is a mixed question of law and fact, and an appellate court affords no deference to the trial court in applying the legal standard).

Convictions in cases involving eyewitness identification at trial following a pretrial identification will be overturned only if the identification procedures are so suggestive as to give rise to a substantial likelihood of irreparable misidentification. Bernal v. People, supra; People v. Jones, 191 Colo. 385, 553 P.2d 770 (1976). The defendant has the burden of first proving that the photo array was impermissibly suggestive; no further inquiry is required where the defendant fails to meet this burden. Bernal v. People, supra.

In an appropriate photo array, all the pictures are similar in characteristics such as race, approximate age, facial hair, and other physical features, especially as to features mentioned by

eyewitnesses before seeing the array. See Bernal v. People, supra; see also People v. Borghesi, 66 P.3d 93 (Colo. 2003). But exactly matching pictures are not required. Bernal v. People, supra; People v. Borghesi, supra.

Here, pictures of Bernal and Rodarte were placed in separate photo arrays from which witnesses identified each of them. Rodarte argues that if the suggestiveness of his photo array had been raised on appeal, his conviction would have been reversed, as was Bernal's. Rodarte asserts that only a hearing with expert witnesses on appellate practice could establish whether appellate counsel provided ineffective assistance. We are not persuaded.

In Bernal v. People, supra, the supreme court focused on several factors unique to Bernal's photo array in concluding that the pictures in the array were impermissibly suggestive. The most important factor was its determination that only Bernal's picture displayed characteristics stereotypical of "Hispanics," which was the description provided by the witnesses. Thus, the court concluded that Bernal's picture leapt out due to his ethnicity. The court also observed that Bernal's picture was against a clear white background, while the other five pictures were taken against

colored venetian blinds. And the suggestiveness of the array was not diluted by a number of pictures, because only six pictures were used. Bernal v. People, supra.

In contrast, Rodarte's photo array was not tainted by these suggestive factors. All the pictures depict young men with characteristics described in Bernal v. People, supra, as stereotypical of Hispanic ethnicity. Each of the men has dark hair, mustaches, and brown eyes. Each of the pictures was taken against white venetian blinds. We discern no suggestiveness from the slightly different lighting in the picture of Rodarte. Thus, we cannot conclude the photo array was suggestive.

Therefore, even assuming Rodarte's appellate counsel was deficient for failing to raise this suggestiveness issue, we conclude that Rodarte was not denied effective assistance of counsel because he suffered no prejudice from counsel's failure to raise the issue as framed in Bernal's appeal.

D.

Rodarte next argues that his trial counsel was ineffective for failing to request an in camera hearing to suppress an in-court

identification by the employee who could not make a pretrial identification from the photo array. We disagree.

When deciding whether an out-of-court or in-court identification should be suppressed, the first step of the analysis is to “determine whether the pretrial identification procedures were impermissibly suggestive.” People v. Weller, 679 P.2d 1077, 1083 (Colo. 1984). Colorado has adopted the independent source rule for in-court identifications that follow an illegal pretrial identification procedure. See People v. Monroe, 925 P.2d 767 (Colo. 1996); People v. Walker, 666 P.2d 113 (Colo. 1983). In-court identification by a witness who was exposed to an illegal pretrial identification procedure is permissible only after the prosecutor proves by clear and convincing evidence an independent source for the identification. See People v. Monroe, supra; People v. Horne, 619 P.2d 53, 56 (Colo. 1980).

“The purpose of the independent source doctrine is to address those situations where identification procedures have been found to be unconstitutionally tainted.” People v. Monroe, supra, 925 P.2d at 774. The independent source rule is triggered only where the in-court identification stems from an unconstitutionally suggestive

pretrial procedure. People v. Monroe, supra (finding no burden under independent source rule where witness has not previously made an identification in the case); People v. Weller, supra (where pretrial procedures were not impermissibly suggestive, in-court identification was admissible without independent source determination).

A witness's inability to identify a defendant from a photo array does not preclude later identification testimony at trial, but instead goes to its weight. See People v. Thorpe, 641 P.2d 935, 942 (Colo. 1982); see also People v. Horne, supra.

Here, one of the tellers present during the robbery testified as a witness for the prosecution. Before trial, she was shown the photo array that contained Rodarte's picture, but she did not identify him as having been involved in the robbery. At trial, she testified that she thought the man at defense counsel's table was the robber, but she was not positive.

Rodarte argues that trial counsel should have requested an in camera hearing to suppress this in-court identification. Rodarte specifically contends that on proper request, the prosecution would have been required to establish an independent basis for

identification, before this teller was allowed to identify Rodarte in the courtroom. We are not persuaded.

We need not address whether counsel's performance was deficient because we discern no prejudice from counsel's failure to raise this issue. We have already determined that the photo array was not unduly suggestive, and thus, the pretrial procedure was not constitutionally impermissible. Therefore, because the independent source rule was not triggered, defense counsel's request for an in camera hearing would have been futile. The inherently suggestive atmosphere of an in-court identification alone is not a basis for relief. People v. Monroe, supra.

Accordingly, we conclude Rodarte failed to establish ineffective assistance of counsel on this basis.

E.

Rodarte next argues that all his prior lawyers were ineffective for failing to raise a merger issue involving his kidnapping and robbery convictions. Because this argument was not raised in his Crim. P. 35(c) motion, we decline to address it. See People v. Boyd, 23 P.3d 1242 (Colo. App. 2001); see also People v. Goldman, 923 P.2d 374 (Colo. App. 1996).

II.

Defendant finally contends the trial court erred in denying his motion for a new trial based on newly discovered evidence in the form of mitochondrial DNA (mtDNA) testing to be performed on a single hair found in the getaway car. We disagree.

Colorado courts have not resolved whether the availability of postconviction DNA testing constitutes newly discovered evidence that could warrant a new trial. Other states addressing this issue have used tests and standards for newly discovered evidence. See, e.g., Sireci v. State, 773 So. 2d 34 (Fla. 2000); People v. Dodds, 801 N.E.2d 63 (Ill. App. Ct. 2003); Commonwealth v. Reese, 663 A.2d 206 (Pa. Super. Ct. 1995).

Since 2003, a statute has directly addressed the procedure to follow and the test to apply when a defendant requests postconviction DNA testing. See § 18-1-413, C.R.S. 2005. However, when the issue arose in this case the statute (Senate Bill 03-164) had yet to become law in Colorado, and thus, was not applied.

To obtain postconviction relief based on newly discovered evidence, a defendant must show (1) the evidence was discovered

after trial; (2) such evidence could not have been discovered through the exercise of reasonable diligence; (3) the newly discovered evidence is material to the issues involved; and (4) the newly discovered evidence would probably produce an acquittal on retrial. People v. Schneider, 25 P.3d 755 (Colo. 2001); People v. Gutierrez, 622 P.2d 547, 559-60 (Colo. 1981); see also § 18-1-410(1)(e), C.R.S. 2005.

“Motions for new trial based on newly discovered evidence are not looked on with favor, and a denial of such a motion will not be overturned absent a showing of clear abuse of discretion.” People v. Gutierrez, supra, 622 P.2d at 559.

Here, Rodarte filed a Crim. P. 33 motion for new trial requesting mtDNA testing of the single hair found in the getaway car. At trial, a prosecution expert testified that this hair, from a baseball cap found in the car, was “consistent” with Rodarte’s hair. The expert also testified that testing for mtDNA would either positively prove or disprove that the hair came from Rodarte, but such a test was unavailable.

After a hearing, the postconviction court denied Rodarte’s motion for mtDNA testing, finding that the results of the testing

would not require vacation of his convictions in light of the other evidence in the case. The court relied on the test set forth in § 18-1-410(1)(e) and People v. Schneider, *supra*, which Rodarte agrees was proper. The Attorney General applies this same standard on appeal.

The Attorney General does not dispute the first, second, and third elements of the newly discovered evidence test. Hence, the only issue is whether an mtDNA test excluding the hair would probably produce an acquittal on retrial.

Rodarte asserts that although an mtDNA test could not uniquely identify the person from whom the hair had come, it could exclude him. He argues that the latter result “will considerably weaken the People’s case,” creating a substantial probability that he would not have been convicted. We are not persuaded.

We do not perceive the hair evidence as significant to Rodarte’s conviction. On the one hand, because Rodarte admitted stealing the car, finding his hair in the car was not strong evidence that he was also involved in the robbery. The prosecutor only mentioned the hair evidence once during closing argument. This statement was effectively countered by the defense argument that hair is not a

unique identifier and the best which can be said of hair identification is that it matches hundreds and maybe thousands of other similar people in the country, as the hair expert had admitted on cross-examination.

On the other hand, mtDNA evidence showing the hair was not Rodarte's would not exonerate him for the robbery. The hair was not found at the crime scene but in the getaway car.

Moreover, in light of our conclusion that the photo array was not suggestive, and therefore, the in-court identifications by the two tellers would not have been suppressed, we cannot conclude that an mtDNA result excluding Rodarte as the donor would "probably produce an acquittal on retrial." The evidence that he had stolen the car and was seen in it with Bernal before the robbery was inculpatory.

Accordingly, we conclude that the trial court did not abuse its discretion in denying the motion for mtDNA testing.

The Crim. P. 35(c) order is reversed as it relates to the sentence on the second degree kidnapping count. That sentence also is reversed, and the case is remanded for resentencing on that count. The orders are affirmed in all other respects.

JUDGE RUSSEL and JUDGE HAWTHORNE concur.