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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MELVIN LEONARD,

Defendant and Appellant.

A131245

(Contra Costa County
Super. Ct. No. 5-100717-8)

Defendant Melvin Leonard appeals from an order denying his motion for judgment of acquittal under Penal Code¹ section 1118.1. He contends the prosecution utilized speculative testimony to bolster otherwise inconclusive evidence, resulting in his conviction for being a felon in possession of a firearm and related offenses. We shall affirm.

Factual and Procedural History

At approximately 12:20 p.m. on November 4, 2009, Richmond Police Lieutenant Michael Booker was on patrol in an unmarked car when he saw defendant speaking to another man in front of a barbershop. Defendant was “clutching his waistband as if he was holding something.” The two men walked to an adjacent driveway and defendant removed a handgun from his waistband, displaying it to the other man. Booker slowed his vehicle to observe the situation. Defendant looked towards Booker and “appeared startled.” Defendant quickly replaced the gun into his waistband and briskly walked up

¹ All statutory references are to the Penal Code unless otherwise noted.

the driveway. Booker turned his patrol car and saw defendant standing by the corner of a building, “looking as if he was peeking.” Defendant then walked behind a building and out of the officer’s sight. Shortly thereafter, defendant was found and arrested. No other person was present at the time.

Defendant did not have possession of a firearm when he was detained. However, officers searched the area and discovered a firearm containing a magazine with live cartridges located in the path defendant had taken from the location at which he was initially observed. The gun appeared clean, covered by no moisture, dirt, or debris.

The Contra Costa County District Attorney filed an information charging defendant with being a felon in possession of a firearm (former § 12021, subd. (a)(1); count 1), unlawfully carrying a loaded firearm (former § 12031, subd. (a)(2)(A); count 2), and carrying an unregistered firearm and ammunition (former § 12031, subd. (a)(2)(F); count 3). The information alleged that defendant had one prior strike conviction (§ 1170.12).

Defendant stipulated at trial that he had suffered a prior felony conviction. At the end of the prosecution’s case, he moved for a judgment of acquittal under section 1118.1.² The court denied the motion. Defendant was found guilty of the three charged offenses and was found to have suffered a prior conviction constituting a strike. He was sentenced to imprisonment for three years and filed a timely notice of appeal. He contends the trial court erred in denying his motion for judgment of acquittal.

Discussion

I. *The trial court correctly denied defendant’s motion for judgment of acquittal under Penal Code section 1118.1.*

On a motion for judgment of acquittal under section 1118.1, the trial court “must consider whether there is any substantial evidence of the existence of each element of the offense charged, sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.” (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) Where a

² Defendant’s argument addresses only the allegations contained in count I but, as he notes, the issues also applies to the other counts.

trial court has denied such a motion, the appellate court must assume in favor of the trial court's order the "existence of every fact from which the jury could have reasonably deduced from the evidence whether the offense charged was committed and if it was perpetrated by the person or persons accused of the offense." (*People v. Wong* (1973) 35 Cal.App.3d 812, 828.) Substantial evidence is that which is "reasonable, credible, and of solid value," including circumstantial evidence and the reasonable inferences flowing therefrom. (*People v. Dooley* (2010) 189 Cal.App.4th 322, 325-326.)

"If the verdict is supported by substantial evidence, [the appellate courts] must accord due deference to the trier of fact and not substitute [their] evaluation of the witness's credibility for that of the fact finder." (*People v. Koonz* (2002) 27 Cal.4th 1041, 1078.)

The elements of felon in possession of a firearm include: (1) a prior conviction of a felony and (2) ownership, possession, custody, or control of a firearm. (Former § 12021, now § 29800; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) There is no specific intent required, as a general intent to commit the proscribed act is sufficient, but knowledge has been held to be an additional element of the offense. (*People v. Snyder* (1982) 32 Cal.3d 590, 592.) Since defendant stipulated that he had previously been convicted of a felony, the only factual issue here was whether he knowingly possessed the firearm in question.

Booker testified that he observed defendant pull a firearm from his waistband, openly display the firearm, and flee from police. Moreover, the weapon was found in defendant's flight path, unexposed to the elements, and the officers did not observe any other person in the general vicinity of the firearm. This evidence was sufficient to support the finding of the jury that defendant was in possession of the firearm.

Defendant argues that the court incorrectly allowed Booker to speculate that he (defendant) "appeared" to be looking in Booker's direction and "appeared startled." However, Booker was not speculating or expressing an impermissible opinion, but describing his personal observations. The use of the word "appeared" does not automatically transform such testimony into an opinion. There is no discernible

difference between the common expression by a percipient witness that a person “appeared” to be looking in one direction and the statement that the person looked in that direction. Booker’s testimony represented his observations and did not constitute inadmissible testimony. (See 1 Jefferson, Cal. Evidence Benchbook (4th ed. 2012) §§ 30.4-30.5, p. 661; see, e.g., *People v. Fields* (1984) 159 Cal.App.3d 555, 564 [defendant “had a ‘look of fear in his eyes’ ”].)

The detail to which Booker testified further indicates that he was describing firsthand observations rather than speculating as to what was in defendant’s mind. Booker testified to seeing defendant “clutching his waistband as if he was holding something.” Defendant “pulled up his hooded sweatshirt with his left hand at his waist. He had the firearm in his right hand. He was grabbing it by the handle, or the grip, and . . . proceeded to display it to the other gentleman.” “[I]t appeared that [defendant] was looking towards [the officer’s] direction” when defendant “appeared startled.” Defendant then disappeared into a nearby driveway. As Booker circled around, defendant stood at the corner of the building, “looking as if he was peeking. When [defendant] looked towards [the officer’s] direction, he subsequently walked out of [the officer’s] sight behind the building.”

Defendant argues that the evidence at best showed that he was present at the scene. Mere presence in a public area where the firearm was located undoubtedly would be insufficient to show that defendant possessed the weapon. And courts are “not to confuse departure from the scene with deliberate flight from the area.” (*People v. Green* (1980) 27 Cal.3d 1, 37, overruled on different grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) But defendant’s argument mischaracterizes the totality of the evidence. Booker observed defendant grasping an object under his sweater, then saw him take a firearm from his waistband and openly display it. The evidence also supports the inference that defendant attempted to flee upon realizing that he had been spotted by a police officer. Defendant was not convicted based on evidence that he simply was present near where the gun was found.

II. *Requested Modification to Abstract of Judgment*

The Attorney General requests that the abstract of judgment be corrected to indicate that the trial court imposed a prison term of three rather than four years. But defendant correctly points out that the Attorney General has referred to an abstract of judgment from January 5, 2004, in a different case for different offenses. The abstract of judgment in this case correctly reflects the three-year sentence shown in the trial court minutes and verbally pronounced by the court.

Disposition

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.