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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.

FABIAN LOPEZ ZARAGOZA,

Defendant and Appellant.

A142429

(Contra Costa County
Super. Ct. No. 05-132119-9)

Defendant Fabian Lopez Zaragoza was charged with residential burglary and alleged to have a prior conviction for robbery. In bifurcated proceedings, the jury found defendant guilty of the substantive offense and found the prior conviction allegation true. The court sentenced defendant to 13 years in prison.

Defendant challenges the prior conviction finding on appeal. He contends the jury, not the judge, should have determined if he was the person named in the record of prior conviction and that insufficient evidence supports the judge's finding of identity. We shall affirm the judgment.

Trial Court Proceedings

Evidence was presented at trial that a family entered their Concord house on the afternoon of August 13, 2013, to find a backyard door open and defendant in a bedroom with a backpack on the bed containing some of their possessions. The police arrested defendant and discovered earrings belonging to one of the residents in the backseat of the patrol car that transported him to the station.

The jury found defendant guilty of first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a))¹ and further found the offense to constitute a violent felony because a person, other than an accomplice, was present in the residence during commission of the burglary (§ 667.5, subd. (c)(21)). The verdict was recorded and a prior conviction allegation submitted for jury determination. It was alleged defendant was convicted on or about June 4, 2008, of second degree robbery. (§§ 211, 212.5, subd. (c)). The robbery was alleged to be a serious felony or “strike” warranting doubling the term otherwise provided as punishment for the current felony conviction (§ 1170.12, subds. (b)-(i)), a serious felony punishable by a five-year enhancement (§ 667, subd. (a)(1)), and a felony for which he served a prison term punishable by an additional one-year enhancement (§ 667.5, subd. (b)).

Certified copies of Contra Costa County Superior Court documents were admitted in evidence over defendant’s objections on grounds of hearsay and denial of the right to confront witnesses. All the documents concern a robbery committed on or about March 24, 2008, by one “Fabian Zaragoza.” The documents consist of a felony complaint, information, a signed no contest plea form, several minute orders, and an abstract of judgment.

The judge advised the jurors “that the defendant is the person who is named in the conviction records that will come before you” and instructed them to determine whether the admitted documents are authentic and, if so, if they “are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged.” The jury found the allegations true.

The court sentenced defendant to an aggregate term of 13 years in prison: eight years for residential burglary (the four-year middle term, doubled for the strike) enhanced five years for the prior serious felony conviction. The court imposed but struck the one-year enhancement for serving a prior prison term. Custody and conduct credits were awarded and various fees and fines assessed.

¹ All further sections references are to the Penal Code.

Discussion

A criminal defendant charged with a prior conviction has a statutory right to have the jury determine whether he or she “has suffered the prior conviction.” (§ 1025, subd. (b); *People v. Epps* (2001) 25 Cal.4th 19, 24.) However, “the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.” (§ 1025, subd. (c), *Epps*, p. 25.) The statutory procedure, followed in this case, is to “instruct the jury to the effect that the defendant is the person whose name appears on the documents admitted to establish the conviction” (*Epps*, p. 27) and leave for jury determination “whether those documents are authentic and, if so, are sufficient to establish that the convictions suffered are indeed the ones alleged” (*ibid.*, italics omitted). In short, “section 1025 gives the question of identity to the court [while] the question whether the alleged conviction ever occurred, when legitimately at issue, remains for jury determination.” (*Epps*, p. 25.)

Defendant contends he has a constitutional right to a jury trial on prior conviction allegations, including the question of identity. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.) He acknowledges that our high court has rejected the contention and he raises the issue only to preserve it for federal court review. (*People v. Epps, supra*, 25 Cal.4th at pp. 23, 28.) We are, of course, bound by California Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The focus of defendant’s appeal is on the sufficiency of the evidence to support the court’s identity determination. Defendant notes that the prior conviction documents do not include a photograph or other identifying information apart from the name “Fabian Zaragoza.” However, “[i]t has also long been the rule in California, in the absence of countervailing evidence, that identity of person may be presumed, or inferred, from identity of name.” (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 401, italics omitted.)

Defendant concedes that it is permissible to infer that a defendant is the same person as the person with the same name convicted in prior proceedings if the name is uncommon. He argues, however, that his name is too common to allow the inference that he is the same Fabian Zaragoza as the person previously convicted of the 2008 robbery.

“Fabian Zaragoza” does not, on its face, appear to be a common name that would preclude the trial court from inferring identity. However, to support his argument, defendant refers us to “[t]wo popular internet search engines [that] reveal no less than five, and potentially 13 people named ‘Fabian Zaragoza’ in California.” He does not submit these search results but asks us to search the sites and take judicial notice of the results. The Attorney General objects to consideration of material found on the internet that was not presented to the trial court and for which no documentary proof has been submitted on appeal. The objection is well taken but the claim also fails on its merits. The parties debate whether the name “Fabian Zaragoza” is sufficiently uncommon to permit an inference of identity, but we need not make that determination. The record provides greater specificity. Defendant’s full name is “Fabian Lopez Zaragoza.” The prior robbery was committed by a person listed as “Fabian Zaragoza” but who, importantly, signed his name as “Fabian Zaragoza Lopez” on the no contest plea form. His name, as signed, appears to follow Hispanic custom in using in order his given name (Fabian), patronymic surname (Zaragoza), and matronymic surname (Lopez). The three names together provide strong evidence that defendant and the person with the prior robbery conviction are the same individual and, in the absence of countervailing evidence, supports the trial court’s finding of identity.

Disposition

The judgment is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Jenkins, J.