

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO LOPEZ,

Defendant and Appellant.

B229939

(Los Angeles County
Super. Ct. No. KA090361)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Horan, Judge. Affirmed.

G. Martin Velez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Arturo Lopez appeals from a judgment of conviction of six felonies. His sole contention on appeal is that his conviction of attempted first degree robbery (count 1) was not supported by substantial evidence. We conclude that substantial evidence supports the conviction, and we affirm the judgment.

BACKGROUND

1. Procedural Background

Defendant was charged with the following seven felony counts: attempted first degree robbery in violation of Penal Code section 664/211¹ (count 1); two counts of first degree burglary with a person present in violation of section 459 (counts 2 and 6); assault with a firearm in violation of section 245, subdivision (a)(2) (count 3); two counts of false imprisonment by violence in violation of section 236 (counts 4 and 7); and discharge of a firearm with gross negligence in violation of section 246.3, subdivision (a) (count 5).

The information alleged as to count 1 that defendant personally and intentionally discharged a firearm in the commission of the crime, within the meaning of section 12022.53, subdivision (c), and that he personally used a firearm in the commission of the crime, within the meaning of section 12022.53, subdivision (b). As to counts 2, 3, and 4, the information alleged that defendant personally used a firearm in the commission of the crimes, within the meaning of section 12022.5, subdivision (a).

A jury found defendant guilty of counts 1 through 5 as charged, and found true all special allegations. Defendant's motion to dismiss count 7 was granted during trial and the jury acquitted him of the charges in count 6. On December 29, 2010, the trial court sentenced defendant to a total of 25 years 4 months in prison, with presentence credit of 294 days. Defendant filed a timely notice of appeal from the judgment.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

2. Prosecution Evidence

On April 18, 2010, at approximately 9:15 p.m., Phan Luu and her brother Cuong Luu were at home with their sister and mother in El Monte.² While Cuong was watching television in the living room and their sister and mother were upstairs, Phan heard a noise and saw defendant, a stranger to her, pulling on the sliding door near the kitchen. The sliding glass door had been closed and locked, but the lock was weak and could easily be forced open; so Phan called to Cuong for help, and the two attempted to hold the door closed while defendant repeated, “Open the door, open the door.” When they refused, he pointed a gun at them, and they fled. Cuong ran up the stairs and Phan left the house by another door and went to a neighbor’s residence, where she called the police.

As Cuong climbed the stairs, he shouted a warning to the others in the house. Just as he was about to enter the master bedroom he heard defendant behind him ordering him to lie down. Defendant asked Cuong several times, “Where is your wife?” and after Cuong replied that he did not know, defendant was quiet. After some moments without hearing defendant, Cuong got up and called the police. Defendant had not demanded any money, jewelry or other property, and neither Cuong nor Phan saw that anything was missing from the home.

Later Cuong saw blood spots all over the house. The parties stipulated at trial that the blood found in the house belonged to defendant. Officer Ralph Batres found a spent bullet inside the wall framing, near a broken pane of the sliding door. When defendant was arrested later that night officers observed scratches and cuts on him.

After leaving the Luu home defendant went to the Tapia home on another street. There, he knocked on the door of the backyard shed that served as Rene Tapia’s bedroom, gave his name as Juan, and said, “Let me in. Your mom let me in. Some guys are chasing me.” Tapia testified that when he opened the door defendant entered, looking panicked, ordered him to lock the door, and sat on the bed where Tapia’s girlfriend, Kaylyn Quintana was lying, watching television. Tapia asked defendant several times to

² We hereafter use the Luus’ first names to avoid confusion.

identify himself and say who was chasing him, but defendant repeatedly told him to be quiet. After approximately 20 minutes defendant told Tapia to call him a taxi but when it came and the driver called, defendant did not leave.

Tapia heard helicopters overhead and attempted to make a call, but defendant ordered him to put the telephone away and would not allow anyone to speak. Quintana however, was able to surreptitiously use her cell phone under a blanket to text Tapia's brother in the main house. Tapia's mother knocked at the door to the backyard bedroom and Tapia told her no one was there with them. Tapia's brother then called the police.

The police came and ordered the occupants of the shed out one by one, first Tapia, then Quintana, and then defendant. When defendant left the shed, he was wearing Tapia's Nike athletic shoes and some of Tapia's clothes. Defendant left his Vans athletic shoes and other clothing, as well as his belt, bandana, flashlight, cell phone, folding knife, lighter, cash, and holster in the shed. Vans shoe prints were found in the Luus' yard and patio.

3. Defendant's Testimony

Defendant testified that he was riding in a car with a friend when they passed a police car that then made U-turn behind them. Defendant believed he had outstanding warrants, and when headlights appeared close behind them, defendant thought it might be the police car. Defendant's friend sped up, made several right turns, and then stopped to let defendant out of the car. Defendant jumped over the nearest fence and landed in the Luus' backyard. Defendant did not know whether the police saw him. No one chased him.

Defendant testified that he saw Phan at the door and ran to ask her to hide him. He claimed he did not want to hide in the backyard without first asking permission. Defendant admitted that when Cuong arrived to help his sister hold the door closed he took out his gun, but denied pointing it, claiming that he took it out in order to hide it or throw it away. Defendant also claimed that the gun discharged accidentally shooting out the glass. When he reached in to open the door he cut his hand on the broken glass. Defendant merely wanted to open the door in order to ask whether he could hide there,

but never got the chance, because Phan and Cuong ran away. Defendant denied that he ran upstairs to follow Cuong, claiming that he was simply looking for a place to hide. Defendant insisted that Cuong was already on the floor when defendant reached him. Nevertheless, he ordered Cuong to get down on the floor.

Defendant claimed that he just wanted permission to hide, explaining, “You know, I am a pretty nice guy, usually people get comfortable with me, and I wanted to ask them if I could hide or something.” Defendant acknowledged however, that the only thing he asked was where Cuong’s “wife” was. Defendant left the house quickly because he had “done something wrong, just by letting the gun [go] off.” He did not “bother looking everywhere for [Phan].” Defendant claimed he never had the chance to explain that he was just trying to hide.

Defendant testified that he saw a woman standing near the open front door at the Tapia house. He asked her to let him hide, and looking frightened, she motioned to the backyard. To gain entry to the shed, defendant knocked, made up a name and said gangsters were chasing him. He stayed there approximately one hour. Defendant acknowledged that the knife recovered from Tapia’s room was his, and that he took Tapia’s shoes and left his Vans shoes behind. Defendant left a black hat and sweater behind at the Luu house.

DISCUSSION

Defendant contends that his conviction of attempted robbery (count 1) was not supported by substantial evidence. In particular, defendant contends that insufficient evidence supported the jury’s conclusion that he had the specific intent to commit a robbery.

When a criminal conviction is challenged as lacking evidentiary support, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) We do not

reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Reversal on grounds of insufficient substantial evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) The two elements of attempted robbery are “a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.” (§ 21a; *People v. Medina* (2007) 41 Cal.4th 685, 694; see also *People v. Dillon* (1983) 34 Cal.3d 441, 453-454.)

As defendant acknowledges, intent must usually be inferred from the circumstances. As respondent notes, “[e]vidence of a defendant’s state of mind is almost inevitably circumstantial [Citations.]” (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*Ibid.*)

Defendant argues that the evidence was insufficient to prove an intent to steal because nothing was taken during the incident, defendant demanded no property, he was not carrying a bag to facilitate removal of stolen items, and there was no evidence that he had a vehicle nearby.

Defendant has recited only those facts that support his argument. However, on appeal, the whole record must be examined in the light most favorable to the judgment. (*People v. Johnson, supra*, 26 Cal.3d at p. 578.) Although defendant minimizes his breaking through a locked door by firing into a glass pane, as well as his forcible entry into the Luu home at gunpoint, defendant’s intent to steal may reasonably be inferred from these facts alone. (See *People v. Nichols* (1961) 196 Cal.App.2d 223, 227.) Moreover, other facts omitted from defendant’s argument support that inference. As

respondent points out, defendant had the following items in his possession: a flashlight, which could be useful in a search for valuables; a knife, useful as an additional weapon; and a bandanna, useful as a mask. Defendant also had a black hat and sweater, useful for camouflage at night. There were drops of defendant's blood all over the house, from which the jury could have inferred that he searched the house for valuables, particularly in light of his denial that he searched the house looking for Phan. Nothing was missing, but the jury could reasonably have inferred that defendant abandoned his plan to rob the residents when he was unable to find Phan.

“Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences and determines whether the People have established guilt beyond a reasonable doubt. [Citation.]” (*People v. Yeoman* (2003) 31 Cal.4th 93, 128.) We conclude from our review of the whole record that substantial evidence supported a reasonable inference that defendant intended to rob the residents of the Luu house when he forced his way in. Defendant's argument that the evidence was also susceptible to a contrary finding does not justify reversal of the judgment. (See *People v. Kraft, supra*, 23 Cal.4th at pp. 1053-1054.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST