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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN OLIVERAS,

Defendant and Appellant.

B233764

(Los Angeles County
Super. Ct. No. LA063495)

APPEAL from a judgment of the Superior Court of Los Angeles County, Clifford Klein, Judge. Affirmed as modified.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Martin Oliveras of first degree robbery (Pen. Code, § 211¹), first degree burglary with a person present (§ 459), false imprisonment by violence (§ 236), possession of a firearm by a felon (former § 12021, subd. (a)(1), repealed by Stats. 2012, ch. 711, § 4, now § 29800, operative Jan. 1, 2012), and assault with a firearm (§ 245, subd. (a)(2)). The jury found true the allegation that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b) in the commission of the robbery, and personally used a firearm within the meaning of section 12022.5, subdivision (a) in the commission of the burglary, false imprisonment by violence, and assault with a firearm. As to each offense, defendant admitted that he suffered a prior conviction within the meaning of the “Three Strikes” law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) As to the robbery, burglary, and assault with a deadly weapon convictions, defendant further admitted that he suffered a prior serious felony within the meaning of section 667, subdivision (a)(1). The trial court sentenced defendant to 23 years in state prison for his first degree robbery conviction and imposed and stayed sentence on defendant’s remaining convictions pursuant to section 654.

On appeal, defendant contends that the trial court erred in admitting an inventory sheet for certain evidence as the evidence was hearsay and violated his Sixth Amendment right to confrontation as set forth in *Crawford v. Washington* (2004) 541 U.S. 36 and his Fifth and Fourteenth Amendment due process rights. Defendant further argues that if he is found to have forfeited appellate review of his claims, defense counsel provided ineffective assistance.

We asked the parties to submit letter briefs addressing whether the trial court erred in imposing a four-year firearm use enhancement pursuant to section 12022.5, subdivision (a) as to defendant’s conviction for possession of a firearm by a felon, and whether the abstract of judgment must be modified to reflect section 12022.5, subdivision (a) sentence enhancements as to defendant’s convictions for burglary, false imprisonment

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

by violence, and assault with a firearm. We order the section 12022.5, subdivision (a) sentence enhancement stricken as to defendant's conviction for possession of a firearm by a felon. We order the abstract of judgment modified to reflect section 12022.5, subdivision (a) sentence enhancements as to defendant's convictions for burglary, false imprisonment by violence, and assault with a firearm. We otherwise affirm the judgment.

BACKGROUND

About 9:15 p.m. on January 24, 2008, Kevin Blum answered a knock on the door of his North Hollywood duplex. At the door were two Hispanic men. One of the men wore a black leather jacket and a beanie, the other a dark-colored hooded sweatshirt. The man in the leather jacket stood about five feet five inches tall and weighed about 175 to 185 pounds. The man in the sweatshirt stood about six feet two inches tall, weighed "200 plus" pounds, and had a gray and black goatee.

The two men pretended to know Blum. Blum was unsure who the men were and was about to shut the door when the men pushed their way into Blum's home. When Blum attempted to shut the door, the man in the leather jacket pulled out a handgun and put it in Blum's face. From that point on, Blum did what the men told him to do. The man in the sweatshirt also was armed with a handgun. At trial, Blum described the handguns as a 9 millimeter or .45 caliber black semiautomatic and a "brushed alloy-type metal" revolver that was not nickel-plated or chrome. Blum told a police officer that the revolver's barrel was about two inches long.

The men guided Blum to a couch and told him to lie "face first" on the couch. The men "hog-tied" Blum's legs and hands with a phone cord. The man in the sweatshirt sat on a coffee table next to the couch and held a gun to Blum's face. The man told Blum not to look at him or his companion. Blum turned his head, but still was able to see the man in the leather jacket use Blum's laundry basket to collect items of Blum's property. Blum caught glimpses of the men when they asked him the location of his property. The men remained in Blum's home for about 15 or 20 minutes before leaving.

After the men left, Blum untied himself. Because the men had taken his cell phone and ripped the land line phone cord from the wall, Blum went to his mother's house nearby to call the police. Blum then went home where he met several police officers. Blum went through his home and determined that various electronic equipment, including two Apple Mac computers, and other property was missing.

On January 28, 2008, United States Secret Service Special Agent Wade Watkins participated in a search of a house in Sylmar. There were nine to 10 occupants in the house when the Secret Service agents entered. Special Agent Watkins found a black backpack on a small cart in one of the "back bedrooms." The special agent believed that bedroom might have been designated "bedroom number three" on a sketch of the premises, but was not sure. Defendant was lying on a bed in the bedroom. He was either asleep or had just awakened due to the activity of the search. The cart was a few feet from the bed on which defendant was lying. Inside the backpack were a birth certificate and social security card in defendant's name and a loaded .357-caliber magnum revolver. Special Agent Watkins estimated that the handgun's barrel was about an inch to an inch and a half long. Special Agent Watkins testified that he searched the bedroom in which he found defendant. Special Agent Watkins did not believe that he found a laptop in the room.

In a separate bedroom, Secret Service Special Agent Benjamin McArthur found a second firearm under a pillow. Gregorio Garcia and an unidentified woman were lying on the bed where Special Agent McArthur found the second firearm. Blum's Apple Mac laptop computer was found during the search. Case Agent Steven Bumgardner prepared a certified inventory of evidence sheet for the laptop. The inventory sheet stated that the laptop was found in bedroom number three.

On June 2, 2008, Los Angeles Police Department Detective Mark O'Donnell showed Blum three six-pack photographic lineups. Blum selected photograph number 5

from one of the lineups.² In the comments section on the lineup, Blum wrote, “Photo number five looks like one of the guys who robbed me. He looks like the bigger of the two suspects. His skin tone and facial hair was what stood out to me.” Defendant’s photograph was in the photographic lineup. Blum was unable to identify anyone at the preliminary hearing and could not identify defendant at trial. Blum testified that he was not “sure” that the person he identified from the photographic lineup was the person who robbed him. Apparently referring to his photographic identification, Blum testified that had he been “sure,” he “would have said, ‘That is the person that robbed me,’ as opposed to, ‘He looks like the person that robbed me.’”

About six months after the burglary, the Secret Service called Blum and asked if a computer had been stolen from him. Blum stated that a laptop computer and other property had been stolen. Blum stated that the Secret Service should contact the detective in charge of his case. The detective later contacted Blum and told him that the Secret Service had his computer. The Secret Service maintained possession of the laptop computer for over a year for, Blum believed, evidentiary purposes. When the computer was returned to Blum, he determined that it was a computer that had been taken on January 24, 2008.

DISCUSSION

I. Admission Of The Inventory Sheet

Defendant contends that the trial court erred when it admitted the inventory sheet that showed that the laptop computer was found in bedroom number three because the statement on the inventory sheet was hearsay and admission of the inventory sheet violated his Sixth Amendment right to confrontation as set forth in *Crawford v. Washington, supra*, 541 U.S. 36 and his Fifth and Fourteenth Amendment due process

² Based on a review of the People’s exhibits numbers 9, 11, and 13, it appears that one of defendant’s booking photographs was used as photograph number 5 in the photographic lineup.

rights. We hold that even if the trial court erred in admitting the inventory sheet, any such error was not prejudicial.³

“Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.” (*People v. Partida* (2005) 37 Cal.4th 428, 439, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Reed* (1996) 13 Cal.4th 217, 230–231 [applying the *Watson* test to the admission of hearsay evidence].) “Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824]. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [89 L.Ed.2d 674, 106 S.Ct. 1431].) ‘Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.’ [Citation.] The harmless error inquiry asks: ‘Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?’ (*Neder v. United States* (1999) 527 U.S. 1, 18 [144 L.Ed.2d 35, 119 S.Ct. 1827].)” (*People v. Geier* (2007) 41 Cal.4th 555, 608, overruled on another point in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [174 L.Ed.2d 314, 129 S.Ct. 2527].) Likewise, due process violations are reviewed for prejudice under the harmless beyond a reasonable doubt standard in *Chapman v. California*, *supra*, 386 U.S. at page 24. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229, citing *People v. Boyette* (2002) 29 Cal.4th 381, 428.)

Defendant contends that the admission of the inventory sheet was prejudicial because it was the only evidence that Blum’s laptop computer and defendant were found in the same room. Defendant argues that “[w]ithout the hearsay statement that the laptop was ‘found in bdrm 3’, the bedroom where [defendant] was found sleeping, the evidence was insufficient to prove beyond a reasonable doubt that [defendant] was one of the

³ Because we hold that any error was not prejudicial, we need not address defendant’s ineffective assistance of counsel claim.

robbers.” Even though the inventory sheet stated that the laptop was found in bedroom number three and the prosecutor argued to the jury that defendant and the laptop were found in the same room, defendant overstates the importance of the inventory sheet.

Without considering the inventory sheet, the evidence before the jury showed that four days after the robbery Special Agent Watkins found defendant lying on a bed in a bedroom at the Sylmar residence. Near the bed was a black backpack that contained a .357 revolver that matched the description of one of the guns used in the robbery. The backpack also contained a birth certificate and social security card in defendant’s name. Blum’s laptop was found in the house. Some five months after the robbery, Blum was shown three six-pack photographic lineups and identified defendant from one of the lineups. Although he was not “sure” of his identification (and he was unable to identify defendant at the preliminary hearing or at trial), Blum wrote of defendant’s photograph, “Photo number five looks like one of the guys who robbed me. He looks like the bigger of the two suspects. His skin tone and facial hair was what stood out to me.” Such evidence sufficiently supported defendant’s convictions.

In addition, while the inventory sheet stated that the laptop was found in bedroom number three, Special Agent Watkins did not testify that he found defendant in bedroom number three. Instead, he testified that he found defendant in the same bedroom in which he found the black backpack. He testified that he found the black backpack in one of the “back bedrooms” and that that bedroom “might” have been bedroom number three, but he was not “sure.” More important, Special Agent Watkins testified that he searched the bedroom in which he found defendant and that he did not believe that he found a laptop in that bedroom. Case Agent Bumgardner testified that Blum’s laptop computer was recovered from the house in which defendant was found. Under the circumstances, no reasonable juror would have reached a different verdict if the inventory sheet had been excluded. Accordingly, any state law error in the admission of the inventory sheet was harmless under *People v. Watson, supra*, 46 Cal.2d 818 and any federal constitutional error was harmless under *Chapman v. California, supra*, 386 U.S. 18.

II. The Section 12022.5, Subdivision (a) Sentence Enhancements

We asked the parties to submit letter briefs addressing whether the trial court erred in imposing a four-year firearm use enhancement pursuant to section 12022.5, subdivision (a) as to defendant's conviction for possession of a firearm by a felon, and whether the abstract of judgment must be modified to reflect section 12022.5, subdivision (a) sentence enhancements as to defendant's convictions for burglary, false imprisonment by violence, and assault with a firearm. The parties agree that the trial court erred and that the abstract of judgment fails to reflect accurately the jury's section 12022.5, subdivision (a) findings and the trial court's sentence.

The trial court orally imposed a four-year firearm use sentence enhancement pursuant to section 12022.5, subdivision (a) as to defendant's conviction for possession of a firearm by a felon, but the jury made no such finding. We order that four-year sentence enhancement stricken.

The jury returned firearm use findings pursuant to section 12022.5, subdivision (a) with respect to defendant's convictions for burglary, false imprisonment by violence, and assault with a firearm, and the trial court imposed a four-year sentence enhancement, stayed under section 654, as to each conviction, but the abstract of judgment does not reflect those sentence enhancements. We order the abstract of judgment be modified to reflect those stayed sentence enhancements.

DISPOSITION

We order the four-year section 12022.5, subdivision (a) sentence enhancement stricken as to defendant's conviction for possession of a firearm by a felon. We order the abstract of judgment modified to reflect section 12022.5, subdivision (a) sentence enhancements as to defendant's convictions for burglary, false imprisonment by violence, and assault with a firearm. We otherwise affirm the judgment.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.