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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

FIDENCIO HERNANDEZ,

Defendant and Appellant.

B234888

(Los Angeles County
Super. Ct. No. BA367243)

APPEAL from the judgment of the Superior Court of Los Angeles County.

Carol H. Rehm, Jr., Judge. Affirmed.

Murray A. Rosenberg, 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, Assistant Attorney General, Stephanie D. Miyoshi and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

SUMMARY

Defendant Fidencio Hernandez was convicted of possession of cocaine base in case No. BA353604. He was placed on Proposition 36 probation,¹ requiring him to obey all laws, among other conditions. On January 8, 2010, defendant's probation was revoked and reinstated after he admitted a violation, and his Proposition 36 program was terminated. On February 23, 2010, defendant was charged by information with the crime at issue in this appeal, second degree robbery (Pen. Code, § 211), with gang allegations (§ 186.22, subd. (b)(1)(C)). Defendant's probation was again revoked, and the matter was set for a probation violation hearing to follow this case, with the evidence from this case to be considered for the probation violation. The jury found defendant guilty of robbery, and deadlocked on the gang allegations. The gang allegations were dismissed under section 1385 after the trial court declared a mistrial. Defendant was sentenced to the upper term of five years, and found to be in violation of his probation. His probation was revoked, reinstated, and terminated.

On appeal, defendant contends that insufficient evidence supports his robbery conviction and resulting probation violation, reasoning the testimony of the two key witnesses was "inherently improbable" due to the inconsistencies between their testimony at trial and their previous statements to police. We find no merit in defendant's contentions, and therefore affirm.

FACTS

On the afternoon of January 22, 2010, Los Angeles Police Officer Paul Rodriguez was on patrol when he and his partner were flagged down by G.F., who worked at a 98-cent store on the corner of First and Clarence Streets in Los Angeles. G.F. told the officers that at approximately 10:00 a.m. that day, defendant attempted to leave the store without paying for some items. G.F. told defendant he had to pay, and defendant responded, "You are not the boss of me, I run these streets, I can take whatever I want,"

¹ Proposition 36 entitles certain nonviolent drug offenders to probation and drug treatment instead of incarceration. (Pen. Code, § 1210.1, subd. (a).)

and took the goods without paying. G.F. did not want to file a police report but requested additional patrols in the area.

Officer Rodriguez later told Officer Rodolfo Pardo, a member of the Community Law Enforcement and Recovery unit (a subdivision of the gang unit), about the incident so that he could “check it out and do extra patrol[s] over there.” At approximately 5:45 p.m., Officer Pardo and his partner, Officer Lazaro Ortega, went to the 98-cent store to investigate further. Officer Pardo interviewed G.F., who told Officer Pardo that he recognized defendant, who had come in the store before and taken things without paying for them. That morning, defendant came in the store with three other males, and started “stuffing his pockets with merchandise.” When G.F. told defendant that he had to pay for the items, defendant responded that he could take what he wanted, punched G.F. in the left eye, and left the store without paying. Officer Pardo saw a bruise under G.F.’s left eye.

Officer Pardo also interviewed G.F.’s coworker, L.G. She saw G.F. ask defendant to pay for some merchandise. She could not overhear what was then said, but defendant appeared “very angry.” She saw defendant punch G.F. in the eye and leave the store without paying. L.G. identified defendant in a field show-up that same evening.

When defendant was arrested, he admitted he had been in the store, telling officers, “I didn’t take anything, I took some socks but he told me to put them back, so I did.”

G.F.’s and L.G.’s trial testimony differed from their earlier statements to police. G.F. testified that defendant did not punch him, but only pushed him after G.F. confronted him about paying for some merchandise. The bruise near G.F.’s eye happened the day before at a party. G.F. denied flagging down the police, telling police defendant hit him, or that he requested additional patrols of the area. G.F. did not call the police because he was afraid of getting beaten up by gang members, believing defendant was a member of a local gang.

L.G. testified that she had seen defendant take items from the store without paying about 10 times before. She denied being at work during the January 22 incident,

claiming she did not come to work until later that day. However, approximately two days before the January 22 incident, L.G. saw G.F. confront defendant about paying for some items. The two argued, and defendant took a swing at G.F., but did not hit him. During her police interview, L.G. was describing the incident that occurred two days earlier. She “didn’t want to come to court and . . . didn’t want to get into trouble.” The store is in a bad neighborhood, where “things can happen to you,” and after the robbery, two unknown women came to the store looking for her.

Gang expert, Officer Sergio Salas, testified that gang members enhance their reputation by creating fear and intimidation in the community, and that people are therefore hesitant to report crimes to police. Victims who do report crimes are often initially truthful, but later change their stories out of fear of retaliation. Defendant was a self-admitted member of The Mob Crew gang, whose territory includes the neighborhood where the 98-cent store is located.

DISCUSSION

Defendant contends that inconsistencies between the testimony and out-of-court statements of G.F. and L.G. render the evidence “untrustworthy” and “inherently implausible,” and therefore insufficient to support his robbery conviction and probation violation. “In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that 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. Bolin* (1998) 18 Cal.4th 297, 331.) “The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.” (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Therefore, the reviewing court’s “opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment.” (*People v. Hill* (1998) 17 Cal.4th 800, 849.) Reversal is only warranted when it clearly appears “‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin, supra*, at p. 331.)

We defer to the trier of fact's evaluation of credibility. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) Neither conflicts in the evidence nor suspicious testimony justify the reversal of a judgment, because it is the exclusive province of the trier of fact to determine the credibility of witnesses and the truth or falsity of the facts testified to. (*People v. Huston* (1943) 21 Cal.2d 690, 693, overruled on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 352.) An exception to this rule is when the witness's statements are inherently improbable. To be inherently improbable, the falsity of the statements "must be apparent without resorting to inferences or deductions. [Citations.]" [Citation.]" (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 409.)

Defendant contends there was no credible evidence he "was a perpetrator of any robbery." It is undisputed that either of G.F.'s versions of events (that he was pushed or hit when he confronted defendant about paying for goods), as well as the testimony of the officers as to what G.F. and L.G. reported on the day of the incident, satisfied the essential elements of defendant's robbery conviction. (See Pen. Code, § 211 ["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"]; *People v. Gomez* (2008) 43 Cal.4th 249, 254.) There is also little doubt that defendant was the perpetrator. L.G. identified defendant in a field show-up, and both G.F. and L.G. identified him in court as the person who either hit or pushed G.F., and took items from the store without paying. Instead, defendant asks this court to *disregard* this testimony, because of various inconsistencies, including L.G.'s recantation of her statement to police that she was present during the January 22 incident. However, we may not reweigh the evidence or substitute our own assessment of the witnesses' credibility for the determination made by the jury. (*People v. Snow, supra*, 30 Cal.4th at p. 66; *People v. Huston, supra*, 21 Cal.2d at p. 693.) We may reverse the conviction only if we were to find the testimony was impossible or inherently improbable. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030.)

Although there may have been conflicts in the evidence, they were insufficient to render the evidence inherently improbable. The jury was able to observe G.F., L.G., and

Officers Pardo, Rodriguez, and Ortega, assess their demeanor and determine if their testimony was credible. Moreover, there was evidence explaining the inconsistencies in the testimony. Officer Salas testified that witnesses often change their stories out of fear of gang retaliation. Both L.G. and G.F. admitted they were reluctant to testify, and that they did not want any trouble. There was evidence that the 98-cent store was in gang territory, and that defendant was a gang member. In rendering its verdict, the jury determined that any inconsistencies in G.F.'s and L.G.'s testimony and statements to police were trivial, or were explained by their fear of gang retaliation.

Because the evidence was sufficient to sustain the conviction, it was plainly adequate to support the probation violation of the condition that defendant obey all laws, which has a lower standard of proof. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441 [A probation violation must be proven by a preponderance of the evidence].)

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.