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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DEWAYNE L. FREEMAN,

Defendant and Appellant.

D058984

(Super. Ct. No. SCD222066)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

A jury found Dewayne Freeman guilty of two counts of robbery and one count of attempted robbery. The jury also found true that Freeman was armed with a handgun during the commission of the crimes. Freeman admitted one serious felony prior conviction and one strike prior conviction. The court sentenced Freeman to prison for 12 years.

On appeal, Freeman challenges the sufficiency of the evidence corroborating an accomplice's testimony implicating him in the crimes. We reject this contention and affirm.

## OVERVIEW

The charged crimes occurred when two men and two women robbed three young men at gunpoint in a dark alley. Three of the perpetrators were identified and their cases were disposed of separately from Freeman's case. At Freeman's trial, the main disputed issue was the identity of the fourth perpetrator. To establish Freeman was the fourth perpetrator, the prosecution relied primarily on an accomplice's testimony that Freeman was one of the four individuals who committed the crime. But the prosecution also presented independent corroborating evidence of Freeman's involvement in the crime, including a shirt with Freeman's DNA found near the scene of the crime. The jury was given instructions that it should view the accomplice's testimony with "care and caution," and that it "may not convict the defendant" unless it finds independent evidence connecting the defendant to the commission of the crime. The jury found Freeman guilty on all charged robbery counts.

Freeman's sole appellate contention is that there was insufficient evidence for the jury to find the accomplice's testimony was sufficiently corroborated. Drawing all inferences in favor of the prosecution, we conclude the evidence was sufficient to support the jury's finding.

## FACTUAL SUMMARY

### *Prosecution Case*

On the night of June 29, 2008, Andrew Raffinan was driving on El Cajon Boulevard with his friends Ace Ortega and Jarome Paas. Ortega was sitting in the front passenger seat and Paas was sitting in the back. While waiting at a stoplight, a car with two women, Victoria Santos and Kristine Boulanger, stopped next to them. Santos (who was driving) and Boulanger got the men's attention and asked if they wanted to "party" or "hang out." The women told Raffinan to follow them to their apartment because they needed to get something. The women's back seat windows were dark, and the men did not see anyone else in the vehicle.

Raffinan followed Santos into a dark alleyway, and then stopped his vehicle when Santos pulled into a carport. Santos and Boulanger got out of the car and walked toward nearby apartments, telling the young men they were going to get their wallets. Immediately after, Corey Cooper and Freeman came out of the shadows from the area of the parked cars; Cooper was armed with a shotgun and Freeman was armed with what appeared to be a handgun. Both men are African-American; Cooper is noticeably larger than Freeman.

Cooper pointed his shotgun at the car and told the three young men to roll down their windows and open their doors. Cooper then walked to the front passenger side and put the shotgun to Ortega's head and demanded that Ortega give him his wallet, which he did. Boulanger and Santos then reappeared from the apartments; Santos was carrying a revolver. Santos got into the driver's side back seat of the car and hit Raffinan on his

right cheek with the revolver, demanding (and obtaining) his wallet. She also pointed her gun at Paas's head and demanded Raffinan give her the car keys. Freeman stood at the driver's side back door. Cooper began "smacking" Ortega in the head with the shotgun, and then did the same to Paas in the backseat. None of the victims could describe Freeman's actions other than stating he was standing with a gun at the driver's side of the car. Cooper and Santos were telling the young men to take off their clothes.

While this was occurring, another car unexpectedly pulled into the alleyway, and the assailants fled on foot. A neighbor called 911.

Officer Jorge Carranza was dispatched to the robberies. As he approached the crime scene he saw a woman (Santos) run across the street and hide between two parked cars. Officer Carranza detained Santos a block away from the crime scene. On the ground under the front end of a nearby vehicle, Officer Carranza found a loaded silver revolver. The revolver contained DNA from Santos, Cooper, and an unknown third individual.

During the investigation at the scene, two boys approached an officer and said that a Black male attempted to get into their house, which was located around the corner. As the officer followed the boys to the back of their house, he located a witness who said he was approached by a Black male about 10 minutes earlier asking if he saw a female running through the alley.

Another officer searching the area found a long-sleeved black button-up shirt near the driveway of the house next door to the two boys' house. The shirt was sized "[t]riple XL." DNA evidence on the shirt showed that Freeman was the "predominant"

contributor, while Cooper was a minor contributor. According to the prosecution's DNA expert, a "predominant DNA" finding means that the DNA is "more intense than the rest of the DNA in the sample." The expert acknowledged that the DNA could have been deposited on the shirt at any time, even weeks or months before the robberies.

The police also found Ortega's wallet in an area close to the shirt in the backyard of the same house. Two houses south, police found two shotgun shells that appeared to match those found in Santos's car. One of the shotgun shells found in the backyard contained Cooper's DNA. On a retaining wall near the alley, officers located a victim's credit and debit cards.

Back at the scene, the officers found and searched Santos's car parked in the carport. During the search, the officers found a white hat on the back seat of the car. The hat contained DNA from both Cooper and Freeman. An unused shotgun shell was found on the passenger side back seat. An empty duffel bag was found under the front end of a car parked next to Santos's car.

None of the victims were able to identify Freeman in a photographic line-up conducted several months later. At trial, Paas testified that Cooper wore a "grey hoodie jacket" in the "hip hop style." Raffinan testified that Cooper wore a "sweater" and Ortega could not remember what Cooper wore during the robbery. Paas testified that the second male wore a "baggie" and "big" T-shirt, and "big" pants. Raffinan said the second male was Black, but could not remember what he wore. Ortega could not provide a specific description of the second male, but saw that he was holding a handgun. The victims testified that Cooper was "bigger" than the other male robber.

*Testimony of Kristine Boulanger — Accomplice Testimony*

Boulanger testified that on the afternoon of June 29, 2008, Santos, Cooper, and Freeman picked her up at her house and they went to a motel room where they drank and smoked marijuana for a few hours.<sup>1</sup> Boulanger described Cooper as a "big guy," and Freeman as a "small guy." Before leaving the motel, Freeman and Cooper went to the trunk of Santos's car and changed clothes. Freeman put on a black long-sleeved button-up shirt. Boulanger did not know who owned the black shirt. After leaving the motel room, Santos drove the group up and down El Cajon Boulevard. Boulanger was in the front passenger seat, with Cooper and Freeman slouching down in the back seat. When they were stopped at a red light, a car full of men or "teenagers" (the victims) stopped next to them. Santos rolled down the passenger side window and asked the victims if they wanted to "'party.'" Santos told Raffinan to follow her, and he did.

Santos and the victims parked in an alleyway by an apartment complex. Santos told the victims to wait, and that she would be right back. Boulanger went with her. Boulanger said when she got out of the car, Cooper and Freeman were still slouching down in the back seat of the car and could not be seen from outside the car. When Boulanger and Santos returned to the alley, Cooper and Freeman had guns and were robbing the victims in the car. Cooper and Freeman were at the passenger side of the car, and Santos ran up to the driver's side of the car.

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<sup>1</sup> Boulanger was identified as a suspect when her identification card was found in the trunk of Santos's car. Boulanger's DNA was also found on some tested items from the crime scene. After receiving the DNA report, a police detective arrested Boulanger and showed her photographs of three possible suspects including Freeman and Cooper.

All three were armed with weapons: Santos had a silver revolver, Cooper had a shotgun, and Boulanger believed Freeman had a handgun. Boulanger said she did not actually see Freeman's gun, but assumed he had one because he was pointing something at the car. She heard the robbers yelling "Turn off the car. Give me the keys. Open the door," and "Give me your wallet." Boulanger testified that she then "ran away."

### *Defense Case*

Freeman did not testify. During closing arguments, Freeman's counsel argued that the prosecution did not meet its burden to establish Freeman was the unidentified perpetrator at the robberies, asserting that Boulanger's testimony was not credible because she had an incentive to lie and there was no evidence to corroborate Boulanger's testimony other than Freeman's DNA on the black shirt. Defense counsel further argued it was equally likely that Boulanger's former boyfriend, Kenneth Hill, committed the crimes because the evidence showed Hill was a larger man, there were photographs of him in the trunk of Santos's car, and Boulanger had a long-term relationship with Hill and was thus protecting him. Defense counsel also argued the jury should disregard the DNA evidence because both Cooper's and Freeman's DNA were found on the black shirt located near the crime scene and Freeman's DNA "could have been on that shirt for weeks."

### *Jury Instructions and Verdict*

Pursuant to a defense request, the court instructed the jury on third-party culpability, stating that "evidence indicating someone else other than the defendant was the fourth person who committed the crimes charged, may be considered by you." The

jury was also given numerous instructions on the proper evaluation of witness testimony. These instructions included the admonition that "If you find that a witness has committed a crime or other misconduct, you may consider that fact in evaluating the credibility of the witness's testimony." The jury was also specifically instructed that "[it] may not" convict Freeman of the charged crimes "based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if: One, the accomplice's testimony is supported by other evidence that you believe; two, the support[ing] evidence is independent of the accomplice's testimony; and, three, the support[ing] evidence tends to connect the defendant to the commission of the crimes."

During deliberations, the jury asked the court for a readback of witness testimony, including Paas's testimony "regarding [the] hoodie sweat shirt" and "regarding position of perpetrators." In response, the court instructed the court reporter to read back all of Paas's testimony. At the conclusion of the deliberations, the jury found Freeman guilty of all charged robbery counts and that he was armed with a firearm during the offenses.

## DISCUSSION

Freeman contends his conviction must be reversed because the evidence was insufficient to corroborate Boulanger's accomplice testimony as required by Penal Code section 1111.

### I. *Legal Principles*

A conviction cannot be based solely on accomplice testimony without sufficient corroboration that "tend[s] to connect the defendant with the commission of the offense." (Pen. Code, § 1111.) Evidence that sufficiently corroborates an accomplice's testimony

"must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime[,] but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged. . . ." (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) The evidence necessary to corroborate accomplice testimony need only be slight, such that it would be entitled to little consideration standing alone. (*People v. Sanders* (1995) 11 Cal.4th 475, 534-535.) It is enough that the corroborative evidence tends to connect defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth. (*Id.* at p. 535.) Corroborative evidence may be entirely circumstantial. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.)

When reviewing the issue of corroboration of accomplice testimony, a court must eliminate the accomplice's testimony from its consideration, and examine the remaining evidence to determine whether there is evidence connecting the defendant to the crime. (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.) "If the sum total of all of the evidence (other than the accomplice's testimony), connects the defendant to the commission of the offense the requirements of Penal Code section 1111 are satisfied." (*People v. Manson* (1977) 71 Cal.App.3d 1, 36.)

We apply a highly deferential standard in reviewing the jury's finding of corroborating evidence. "[U]nless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably *tend* to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal." [Citation.]' [Citation.]" (*People v.*

*Garcia* (2001) 89 Cal.App.4th 1321, 1329-1330; accord *People v. McDermott* (2002) 28 Cal.4th 946, 986.)

## II. *Analysis*

Applying these legal principles, we conclude the jury had a reasonable basis to find the corroborating evidence connected Freeman to the robberies.

Apart from Boulanger's testimony, the evidence established that two males and two females committed the robberies, and there was no dispute as to the identity of the three other perpetrators: Cooper and the two females (Boulanger and Santos). Although the victims were unable to identify the second male perpetrator, their testimony established that this second male had approached the vehicle with Cooper from an area near Santos's car and the second male was standing by the driver's side of the car with a gun in his hand. The victims' testimony also established that this second person was a Black male who was smaller than Cooper. Freeman is a Black male who is noticeably smaller than Cooper. One victim also testified that Freeman was wearing a baggy T-shirt and baggy pants.

When the robbery was interrupted, all four perpetrators ran away. Only one suspect (Santos) was caught by police officers at the scene. However, there was a trail of evidence leading from the scene of the crime to a nearby neighborhood. Shortly after the crimes, two boys approached the officers stating a Black male had attempted to get into their house. Another witness said that a Black male ran by and asked if he had seen a female running. Next door to the boys' house, officers found the triple extra-large button-up shirt. The predominant DNA on this shirt was Freeman's DNA, with Cooper's DNA

being a minor contributor. Additionally, police officers found a white hat with Freeman's DNA in Santos's vehicle that the victims had followed to the alleyway. Boulanger's mother had testified that there were two males in the backseat of Santos's car in the hours before the crime was committed.

The jury had a reasonable basis to find that this evidence provided sufficient corroboration for the accomplice testimony. The evidence showed that the perpetrator matched Freeman's general description (a Black male who was smaller than Cooper) and a shirt with Freeman's DNA was found abandoned close to the scene with Freeman's DNA as the predominant contributor. Although the shirt also contained Cooper's DNA as a minor contributor, the evidence supported that Cooper was not wearing this shirt, and instead was wearing a large grey hoodie at the time of the robberies. Additionally, the size of the black shirt (triple XL) matched the victim's description that the second perpetrator was wearing "baggy" clothing that could have been borrowed from the much larger Cooper.

Freeman argues there was insufficient independent corroboration because the prosecutor relied solely on the DNA found on the black shirt. Freeman's argument improperly focuses on the DNA evidence in isolation rather than on an evaluation of the evidence in the context of the entire circumstances of the crime. Viewed in light of the whole record, the evidence shows that various items used in or obtained from the robbery, including the large shirt with Freeman's DNA, were found on a trail leading away from the scene of the crime. Moments earlier, the second perpetrator was seen

wearing a large "baggy" shirt and the other male perpetrator (Cooper) was wearing a completely different type of upper-body covering (a grey hoodie).

This evidence provided the "slight" corroboration necessary to permit the jury to consider the accomplice's testimony. Although the evidence independently linking Freeman to the crime was admittedly slim, the necessary corroborating evidence ""may be slight and entitled to little consideration when standing alone." [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 563.) "It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight." (*People v. Rice* (1938) 29 Cal.App.2d 614, 619; accord, *People v. Miller* (2000) 81 Cal.App.4th 1427, 1442.)

In this regard, Freeman's reliance on *People v. Robinson* (1964) 61 Cal.2d 373 is unpersuasive. In *Robinson*, the defendant's fingerprints were found in a car owned by his cousin; both were charged with a first degree murder crime. The murder occurred inside a country club, and the car with the defendant's fingerprint was found in a nearby parking lot. There was additional evidence that the defendant, on the night of the incident, was in the car with his cousin to go out to dinner and to see a friend, and they thereafter parted ways. (*Id.* at pp. 398-399.) It was undisputed that the defendant had numerous opportunities to place his fingerprints on the vehicle under circumstances that were unconnected to the crime. (*Id.* at p. 399.) The prosecutor nonetheless argued that the presence of the defendant's fingerprints in the car corroborated an accomplice's testimony that the defendant participated in the crime inside the country club. (*Id.* at p. 398.)

The California Supreme Court rejected this argument, reasoning that the fingerprints "merely placed [the defendant] in the car at some time prior to the time the car was discovered" and thus were insufficient to connect the defendant to the crime. *People v. Robinson, supra*, 61 Cal.2d at pp. 399-400.) The court emphasized that to "hold that the presence of those prints connects [the defendant] with the commission of the crime is tantamount to saying that the fingerprints of any relative of a person known to have committed a crime, found on the automobile of such person, tend to connect the relative with the crime, even though it is known that the relative has had the opportunity to be in and out of that car on various occasions other than during the commission of the crime. Such a theory is unsound. Certainly association with a criminal is not to be equated with connection with the crime." (*Id.* at p. 399.)

Here, unlike *Robinson*, the corroboration evidence was not merely Freeman's association with the other perpetrators of the crime. The evidence showed that a male of his general description wearing a baggy shirt was at the crime scene; this male ran away from the crime scene when a vehicle came through the alley; and police officers found the very large shirt with Freeman's DNA close to the scene with other items related to the crime that were discarded. This evidence is more than merely a fingerprint connecting the defendant with an accomplice.

Freeman's reliance on *People v. Martinez* (1982) 132 Cal.App.3d 119 and *People v. Valardi* (1966) 240 Cal.App.2d 98 is also misplaced. In *Valardi*, the only evidence implicating the defendant was a statement by the accomplice's wife that the accomplice told her the defendant committed the crime. (*Valardi, supra*, at p. 98.) As this court

concluded, "[a]n accomplice's testimony is no better coming from another's mouth than coming from his own. If it were, the accomplice could broadcast his testimony to the world before trial and then call anyone who heard it to corroborate it in court." (*Ibid.*) In *Martinez*, the Attorney General conceded that there was "no evidence" other than the accomplice testimony connecting the defendant with the commission of the charged robberies. (*Martinez, supra*, at pp. 132-133.)

Freeman alternatively contends the corroborating evidence was insufficient because it did not specifically connect him to the elements of aiding and abetting, which was the prosecutor's theory of Freeman's liability at trial. To prove a defendant aided and abetted the commission of an offense, the prosecution must show the defendant acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560, italics omitted.)

The victims' testimony established that the fourth perpetrator aided and abetted the offense because this individual approached the vehicle with the primary perpetrator (Cooper); he stood next to the driver's side of the car holding a gun; and he ran away with the others when a car unexpectedly pulled into the alley. Citing *People v. Lloyd* (1967) 253 Cal.App.2d 236, Freeman argues that evidence of mere presence at the scene is insufficient to establish the necessary corroboration for his participation as an aider and abettor.

In *Lloyd*, the defendant was convicted of unlawful marijuana possession. (*People v. Lloyd, supra*, 253 Cal.App.2d at p. 239.) The drugs were found in a public place near

where the defendant was standing, but there was no evidence of his dominion and control other than a statement of an accomplice. (*Id.* at p. 242.) The court reversed the conviction, finding the defendant's presence near the drugs was insufficient independent corroboration to establish the dominion and control element. (*Ibid.*) This case is different because the charged crimes are robberies, rather than drug possession. The evidence of the second perpetrator's actions at the scene (holding a gun and standing by the vehicle), together with the independent evidence of Freeman's identity, was sufficient corroboration to show he aided and abetted the robbery crimes. If the evidence links the defendant to the crime, it is not necessary that the corroborative evidence is sufficient in itself to establish every element of the offense charged. (*People v. Maldonado* (1999) 72 Cal.App.4th 588, 598.)

Freeman's focus on evidence that casts doubt on the prosecution's case is also unavailing. For example, Freeman discusses the inconsistencies among the victims' descriptions of the perpetrators and the fact that one victim testified that the fourth perpetrator was wearing a large baggy *T-shirt* (rather than a *button-down shirt*). Freeman also argues the fact that Cooper's DNA was also found on the button-down shirt diminishes the evidentiary value of the shirt.

Based on the conflicts in the evidence, the jury could have found the prosecution did not meet its proof burden with respect to the corroborating evidence and/or could have refused to credit the accomplice's testimony. However, the issue here is whether — viewing the evidence in the light most favorable to the prosecution — there was enough

evidence for the jury to reach its factual conclusions. Under the deferential appellate review standard, we conclude there was.

DISPOSITION

Judgment affirmed.

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HALLER, Acting P. J.

WE CONCUR:

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AARON, J.

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IRION, J.