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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DOW ATKINSON,

Defendant and Appellant.

D060340

(Super. Ct. No. SCE306532)

APPEAL from a judgment of the Superior Court of San Diego County, Gary Bubis, Judge. Affirmed.

Michael Dow Atkinson appeals a judgment following a jury verdict finding him guilty of evading a police officer while driving recklessly, three other offenses involving driving a vehicle, and being under the influence of a controlled substance. On appeal, Atkinson contends his convictions of the four offenses involving driving a vehicle must be reversed because the evidence is insufficient to support a finding that he drove the vehicle.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2010, Atkinson began dating Catherine Cardiel. He lived at his grandmother's home in La Mesa. He regularly visited Cardiel at her home at 151 Lakeview Avenue in Spring Valley. Cardiel lived there with her mother, two daughters, and Felicia De Christian, a roommate. In November 2010, Atkinson was engaged to Cardiel. When Cardiel drove from Atkinson's home to hers, she would take Highway 125, exit onto Jamacha, turn left on Elkelton, and turn right on Lakeview Avenue. Her mother owned a red 2006 Ford Mustang with the license plate number 6NNC328. However, Cardiel made the Mustang's car payments and was its primary driver. Although she allowed her mother, father, sister, aunt, roommate, and some friends to drive the car, Cardiel did not allow Atkinson to drive it because his license was suspended.

At about 10:00 p.m. on November 27, 2010, Cardiel drove her Mustang to the La Mesa home of Atkinson's friend to give Atkinson her car and keys so that he could go out with his friend. She handed Atkinson her car keys, which included an ignition key and a car remote, waited until he handed the keys to his friend, and then got a ride home in her roommate's car.

At about 3:30 a.m. on November 28, 2010, California Highway Patrol Officer Michael Bennett was in his patrol car with his partner Officer Fisk on Highway 125 in Lemon Grove. Bennett saw a red Mustang with the license plate number 6NNC328, traveling at a speed of about 85 miles per hour in a 65-mile-per-hour zone. Bennett

activated his patrol car's lights to initiate a traffic stop, which, in turn, activated a video camera mounted by his rearview mirror.¹ The Mustang slowed to 65 miles per hour, moved to the far right lane, and left the freeway on the exit before the Jamacha Road exit to Cardiel's house. Using the patrol car's public address system, Fisk instructed the driver of the Mustang to slow down and pull over to the right. As the two vehicles slowed down at the end of the off-ramp, the Mustang suddenly accelerated, crossed the intersection, and re-entered Highway 125. Bennett resumed his pursuit and, despite going about 95 miles per hour, he did not keep up with the Mustang. The Mustang left Highway 125 at the next off-ramp, Jamacha Road, turned left, and then turned left again. It was traveling 60 miles per hour in a 25-mile-per-hour zone. During most curves in the road, the Mustang drove on the wrong side of the road. The Mustang turned right onto Lakeview Avenue and then turned left onto Camino Lago Vista. At that point, Bennett lost sight of the Mustang.

The dispatcher informed Bennett and Fisk that the Mustang was registered to an owner residing at 151 Lakeview Avenue. Bennett drove to that address, but did not see the Mustang. Multiple officers arrived to assist Bennett and Fisk, received a description of the Mustang, and drove in different directions looking for the car. Officer Daniel Ralph drove down Corte Pellejo and found the red Mustang parked, four feet from the curb, at the end of the cul-de-sac near a wooden fence. Its doors were unlocked, its engine was warm, and there were no keys inside. On the other side of the fence, there

¹ At trial, a video recording from that camera was shown to the jury.

was a yard to a home located on Lakeview Avenue. The Mustang was parked about 100 to 150 feet from Cardiel's home at 151 Lakeview Avenue.

Officer Adam Griffiths was at the corner of Camino Lago Vista and Lakeview Avenue, and heard rustling noises in the bushes. Looking over a fence, Griffiths saw a man jump up, run, and jump over another fence. Griffiths pursued him, jumping over the fence and running through the backyards of homes located on Lakeview Avenue. However, Griffiths lost sight of the man.

Christopher Cannon, a neighborhood resident, approached Bennett in his patrol car and informed him he had seen a man, wearing dark clothing and carrying a dark backpack, jump over a brick or block fence near Corte Pellejo and then walk quickly into the backyard of a house on Lakeview Avenue.

Meanwhile, Bennett heard on the radio that an officer at the north side of 151 Lakeview Avenue saw a man attempt to jump over a fence and head toward him, but turned around and headed back toward the backyard of 151 Lakeview Avenue. Bennett, standing in front of 151 Lakeview Avenue, saw a white male, wearing a black shirt, run toward him from the backyard of 151 Lakeview Avenue. When the man saw Bennett, he turned around and ran back into the backyard. Officer Joshua Rodriguez entered the yard to intercept the man. Bennett also entered the backyard. In the backyard, Bennett and Rodriguez found Atkinson, wearing a black shirt and blue jeans, lying on the ground

underneath a children's play structure and covering his face with his arms.² Atkinson was taken into custody. He was breathing heavily, sweating profusely, and smelled of alcohol. Bennett searched Atkinson and found in his right front pocket a key ring with a Ford vehicle key, a house key, and a car alarm remote.

Having heard the sirens and seen a patrol car outside her house, Cardiel woke up her parents and sat with them in the living room. Hearing someone unlock the front door, Cardiel went to the door thinking it was Atkinson because he had a house key.³ Bennett and Griffiths opened the front security screen door using the house key they had taken off the key ring found on Atkinson. After determining that the key worked, they knocked on the door. Cardiel opened the door and spoke to the officers. She told the officers that at 10:00 p.m. she had driven her Mustang to Jolt 'N Joes in La Mesa, gave her keys to Atkinson and his friend, and then got a ride home.⁴ The officers showed her a key ring

² During the pursuit, officers did not see anyone other than Atkinson and Cannon in the area.

³ At trial, Cardiel testified that she "assumed it was [Atkinson] coming home because . . . someone was unlocking the door." She further testified that earlier in the evening she had given him a key ring with the house key, a car key to the Mustang that no longer worked, and a car remote that worked.

⁴ Cardiel told the officers that although the title to the Mustang was in her mother's name, she (Cardiel) drove it.

with just the car key and car remote on it and asked her if that was her only set. She replied, "No." She stated she had another set of keys to the Mustang in the house.⁵

The officers searched the house based on another incident that evening, which later turned out to be unrelated. Inside next to a sliding glass door, the officers found a black backpack with the word "Tribal" written on it. The officers estimated the black backpack was about seven to eight feet away from where they found Atkinson hiding outside. Cardiel confirmed Atkinson owned a black backpack with the word "Tribal" written on it.

While Bennett and Griffiths were at the house, Officers Ryan Harrison and Artemio Castillo used the car keys found on Atkinson to open the Mustang's trunk. Harrison gave the car keys to a tow truck operator who used the keys to start the Mustang and drive it onto his flatbed tow truck.

At 4:58 a.m. on November 28, 2010, Atkinson's blood was drawn and later tested, showing he had a blood alcohol content of 0.16 percent and tested positive for cocaine.⁶ Atkinson would have been under the influence of both alcohol and cocaine for purposes of driving at 3:31 a.m.

⁵ At trial, Cardiel testified she told the officers her other set of keys to the Mustang was probably in her purse. She further testified there were three key rings with car keys on them. The first set had a working car key, car remote, and house key. The second set had only a working car key and a car remote. The third set had a nonworking car key, a working car remote, and a house key. The first set was hers and the second set was her mother's.

⁶ His blood contained 29 nanograms per milliliter of cocaine and 313 nanograms per milliliter of a cocaine metabolite.

An amended information charged Atkinson with (1) evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a))⁷ (count 1); (2) driving under the influence of drugs with two prior convictions (§ 23152, subd. (a)) (count 2); (3) driving while having a blood alcohol level of 0.08 percent or more (§ 23152, subd. (b)) (count 3); (4) being under the influence of cocaine (Health & Saf. Code, § 11550, subd. (a)) (count 4); and (5) driving when his driving privilege had been suspended for driving under the influence (§ 14601.2, subd. (a)) (count 5). The information further alleged with respect to counts 2 and 3 that Atkinson had been convicted of two violations of section 23152, subdivision (b), within 10 years of the instant charged offenses.

At trial, the prosecution presented evidence substantially as described above. In his defense, Atkinson presented the testimony of Robin Keator, Cardiel's mother. Keator testified that police found a black backpack in her daughter's room. She also testified that the sliding glass door of her house was 41 feet away from the children's play structure, and the sliding glass door was locked at the time of the incident. She testified she had never seen Atkinson drive the Mustang or any other car. Because at the end of summer her car keys were stolen, she had new keys made for the Mustang. She got two new keys and kept one old key on a ring with a car remote and house key. The new keys only changed the sensors in the ignition so that the old keys would still operate the door locks.

Keator testified that after Atkinson's arrest, she and Cardiel went to the tow yard to retrieve the Mustang. The tow yard worker was unable to start it with the keys he had.

⁷ All statutory references are to the Vehicle Code unless otherwise specified.

Cardiel then took the set of keys she had in her purse and used them to start the Mustang. They then drove the Mustang home.

On cross-examination, Keator admitted the receipt for the new car key stated that she purchased only one car key and not two keys. She testified that since the incident she never got the house key back and had only one working key to the Mustang. She admitted she had not changed either the house's locks or the Mustang's ignition lock since the incident.

Emerald Gaussoin testified for Atkinson, stating she was at Jolt 'N Joe's on November 27, 2010, and saw Atkinson playing pool with a friend. The friend had a darker complexion and black hair and was wearing a dark-hooded pullover sweatshirt. Between 1:30 a.m. and 1:45 a.m., a red car pulled up in the parking lot. Atkinson got out of the car's passenger side, gave her a hug and his telephone number, and told her he was going to his girlfriend's house. Atkinson's friend was driving the car. On cross-examination, Gaussoin testified Atkinson did not appear to be drunk or on cocaine at 1:30 a.m. She admitted she did not know where Atkinson went after he left at 1:30 a.m.

De Christian, Cardiel's roommate, also testified for Atkinson. At 2:30 a.m. on November 28, 2010, she was awakened by music and talking outside her window. Atkinson was sitting outside on the patio listening to music and talking on the phone. She heard him outside for one hour. At 3:30 a.m., police officers entered the backyard and told Atkinson to get down on the ground. De Christian testified that Atkinson had not been lying down or trying to hide under the children's play structure.

Atkinson testified in his own defense. On November 27, 2010, he and his friend, "Turbo" Tommy, planned to hang out together. Turbo and his girlfriend picked Atkinson up at Cardiel's house in the girlfriend's car.⁸ When Atkinson and Turbo's ride home fell through, Atkinson called Cardiel and asked her if Turbo could borrow her Mustang to give him a ride home. Cardiel agreed and arrived at Turbo's Spring Valley home in her Mustang with De Christian following behind in her car.⁹ Cardiel handed the car keys to Atkinson, who then gave them to Turbo. Atkinson and Turbo went straight to Jolt 'N Joe's. They stayed there until "last call" at about 1:45 a.m. Turbo drove Atkinson directly home (i.e., the Lakeview Avenue house), dropped him off, and then drove away in the Mustang. At about 2:00 a.m., Atkinson went in the backyard and waited for Turbo to return with the car.¹⁰ He sat in a chair next to the children's play structure and smoked a cigarette. Atkinson testified that at the time he had a key ring with the house key, car remote, and nonworking car key, which key ring Cardiel had given to him earlier in the evening (i.e., about 7:30 or 8:00 p.m.) so he could get back in the house. Atkinson saw flashlights and looked on the side of the house to see what was happening. Police entered

⁸ Although Atkinson did not expressly so testify, it can be reasonably inferred from his testimony that Turbo's girlfriend then dropped Atkinson and Turbo off at Jolt 'N Joe's.

⁹ We note the inconsistency of the testimony regarding the location of the home of Atkinson's friend. Cardiel testified it was in La Mesa, but Atkinson testified it was in Spring Valley.

¹⁰ Atkinson testified that Turbo planned to wait at Atkinson's home until Turbo's girlfriend (Amanda) could pick him up at about 3:30 or 4:00 a.m.

the backyard and told him to get on his hands and knees. He complied. Although he had been lying down next to the play structure, he was not hiding. After the officers arrested him for a high speed chase, they took the set of keys out of his pocket, which set included the nonworking car key.

In rebuttal, the prosecution recalled Bennett, who testified that at about 4:25 a.m. on November 28, 2010, after Atkinson's arrest, Atkinson told him he was not driving the car during the pursuit, but was instead sitting in the right front passenger's seat. Atkinson told him he had just met the car's driver that night at Jolt 'N Joe's and did not know his name. Atkinson also stated that he did not know who owned the car involved in the pursuit. Also, when Cardiel came out to identify him while he was inside the patrol car, he denied that she was his girlfriend and denied knowing her.

The jury found Atkinson guilty on counts 1, 2, 3, and 4. After he waived a jury trial on count 5, the trial court found Atkinson guilty on that count. Atkinson admitted the truth of the alleged prison prior convictions. The trial court sentenced Atkinson to the upper term of three years for his conviction on count 1 and struck the punishment for the prison prior conviction allegation. For his convictions on the remaining counts (all of which were misdemeanors), the trial court denied probation and gave Atkinson credit for time served. Atkinson timely filed a notice of appeal.

DISCUSSION

I

Substantial Evidence Standard of Review

When an appellant challenges a criminal conviction based on a claim of insufficiency of the evidence, "the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, 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. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

The substantial evidence standard of review involves two steps. "First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that our 'power' begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. . . . [Citation.] '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal

significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value' [Citation.] The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633, fns. omitted.) "[T]he power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

The standard of review is the same in cases in which the prosecution relied primarily on circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932.) In applying the substantial evidence standard of review to cases primarily involving circumstantial evidence, *Bean* stated: "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a

contrary finding does not warrant a reversal of the judgment." ' ' " (*Id.* at pp. 932-933.)

"Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." (*People v. Pierce* (1979) 24 Cal.3d 199, 210.)

II

Substantial Evidence to Support a Finding That Atkinson Was the Driver

Atkinson contends his convictions on counts 1, 2, 3, and 5 must be reversed because the evidence is insufficient to support a finding that he drove the Mustang during the pursuit. He argues the circumstantial evidence supporting a finding he was the driver can be explained to support a contrary finding and shows, at most, he was a passenger in the car.

Without restating all of the material evidence admitted to show Atkinson's guilt on the four counts involving driving the car, we discuss the most incriminating evidence the jury presumably found compelling in its consideration of this case. The evidence showed that a few hours before the pursuit, Cardiel drove her Mustang to Turbo's house and handed Atkinson a set of keys with a working key for the Mustang. Although Cardiel and Atkinson testified he (Atkinson) immediately handed the keys to Turbo so that he could drive the Mustang, the jury could have disbelieved that testimony and reasonably found Atkinson instead kept the car keys and drove the Mustang himself. Or, alternatively, the jury could have believed Atkinson turned over the keys to Turbo to drive the Mustang, but at some point thereafter Atkinson became the driver of the

Mustang and was, in fact, its driver during the pursuit. For example, the jury may have reasonably inferred, by the absence of persons (other than Atkinson and Cannon) in the Lakeview Avenue area immediately after the pursuit, that Atkinson, not Turbo, was the driver of the Mustang during the pursuit. Based on the evidence admitted at trial, the jury could reasonably infer that Turbo may have been dropped off somewhere else (e.g., at his Spring Valley home) before the pursuit began and that Atkinson drove, and was alone in, the Mustang during the pursuit.

Furthermore, the proximity of the Mustang to Atkinson after the pursuit was highly incriminating. His fiancée, Cardiel, lived on Lakeview Avenue, directly behind the Corte Pellejo cul-de-sac where the Mustang was found. Atkinson regularly visited Cardiel's home on Lakeview Avenue. The jury could reasonably infer from that evidence that Atkinson was familiar with Lakeview Avenue and the immediate vicinity, including Corte Pellejo and its close proximity to Cardiel's home. By the absence of any evidence showing Turbo was present in the area immediately after the pursuit or any evidence that Turbo was familiar with Corte Pellejo and the area around Cardiel's home, the jury could also reasonably infer Turbo did not park the Mustang on Corte Pellejo after the pursuit and therefore was not its driver during the pursuit.

Furthermore, Cannon, a neighborhood resident, informed Bennett he saw a man, wearing dark clothing and carrying a dark backpack, jump a fence near Corte Pellejo and then walk quickly into the backyard of a house on Lakeview Avenue. That general description was consistent with Atkinson's appearance. On his apprehension, Atkinson

was wearing a black shirt and blue jeans. Also, officers found a backpack with the word "Tribal" on it just inside the sliding glass door of Cardiel's home. Cardiel confirmed Atkinson owned a black backpack with the word "Tribal" written on it.

Griffiths saw a man jump up, run, and jump over a fence in the backyards of homes located on Lakeview Avenue. Bennett, standing in front of 151 Lakeview Avenue, also saw a white male, wearing a black shirt, run toward him from the backyard of 151 Lakeview Avenue. When the man saw Bennett, he turned around and ran back into the backyard. In the backyard, Bennett and Rodriguez found Atkinson hiding underneath a children's play structure. He was breathing heavily and sweating profusely. This evidence supported a reasonable inference that not only was Atkinson the man eyewitnesses saw jumping over fences, but also that he was the driver of the Mustang parked on Corte Pellejo that had been involved in the pursuit. Also, his apparent flight from the scene and the officers, followed by his hiding under the play structure, supported a reasonable inference by the jury that he knew he was guilty and was attempting to avoid apprehension.

Furthermore, after he was taken into custody, Atkinson was searched and a set of keys was found in his right front pocket. That set of keys included a Ford car key, a car remote, and a house key. The Ford car key was then used by officers to search the trunk of the Mustang and by the tow truck driver to start the Mustang and drive it onto the flatbed tow truck. Based on the whole record, we conclude the jury was *not* required to believe the defense testimony that Atkinson did not have a working car key, but instead

had a nonworking key. The jury could reasonably, and presumably did, find incredible the testimonies of Atkinson, Cardiel, and Keator that would have supported a contrary inference (i.e., that Atkinson had only a nonworking car key).

Finally, the jury could reasonably find that Atkinson lied to police in responding to questions and his lies showed a consciousness of guilt. The jury could also reasonably infer from Atkinson's statement to Bennett at about 4:25 a.m. on November 28, 2010, that he was not driving the car during the pursuit, but was instead sitting in the right front passenger's seat during the pursuit, that Atkinson was *inside the Mustang* and not in Cardiel's backyard during the pursuit as he testified at trial. Although the jury could believe his statement he was inside the Mustang, it could disbelieve his statement he was only a passenger and not its driver because immediately after the pursuit only one person was seen fleeing Corte Pellejo (i.e., Atkinson), where the Mustang was parked. Therefore, the jury could reasonably find there was no other person (e.g., Turbo) in the Mustang during the pursuit.

We conclude the above evidence, as well as other evidence admitted at trial, constitutes substantial evidence to support the finding by the jury that Atkinson was, in fact, the driver of the Mustang during the pursuit. Although most of the evidence relied on by the prosecution was circumstantial, the jury could draw reasonable inferences from that evidence to conclude Atkinson was the driver. Furthermore, it was the jury's function, and not ours, to weigh the evidence and determine the credibility of the witnesses' testimony. (*People v. Pierce, supra*, 24 Cal.3d at pp. 210-211; *People v.*

Young, supra, 34 Cal.4th at p. 1181.) To the extent Atkinson argues there is substantial evidence to support a finding he was not the Mustang's driver and/or that the prosecution's circumstantial evidence can be explained to support a finding he was not the driver, he misconstrues and/or misapplies the substantial evidence standard of review. None of the cases cited by Atkinson are factually apposite to this case or persuade us to reach a contrary conclusion. (See, e.g., *People v. Flores* (1943) 58 Cal.App.2d 764; *People v. Draper* (1945) 69 Cal.App.2d 781; *People v. Bamber* (1968) 264 Cal.App.2d 625.) We conclude there is substantial evidence to support Atkinson's convictions on counts 1, 2, 3, and 5.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.