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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER WILLIAM CALKINS,

Defendant and Appellant.

E053616

(Super.Ct.No. FSB903647)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant perpetrated three crimes that involved strikingly similar modus operandi. In each of these offenses, the victims believed they were going to a location to

have a date with a girl they met on the Internet. When they arrived, defendant approached the victims armed with a shotgun. During one heist, defendant absconded with the victim's wallet and cellular telephone; in another defendant shot at the victim when he tried to drive away; and in another incident, the shotgun discharged when the victim and defendant struggled over it.

Defendant was convicted of robbery, attempted robbery, assault with a deadly weapon and firearm, and shooting at an occupied vehicle.

Defendant claims on appeal that the evidence was insufficient to support three of his convictions because the evidence consisted only of circumstantial evidence of similar modus operandi.

We affirm the judgment.

I

PROCEDURAL BACKGROUND

In a second trial,¹ defendant was found guilty by a jury of two counts of second degree robbery (Pen. Code, § 211)² (counts 1 & 5); one count of attempted second degree robbery (§§ 664/211) (count 2); shooting at an occupied vehicle (§ 246) (count 3); assault with a firearm (§ 245, subd. (a)(2)) (counts 4 & 6); and assault with a deadly weapon, to wit, broken glass (§ 245, subd. (a)(1)) (count 7). It was also found true as to counts 1, 2,

¹ In a prior trial, the jury could not reach a verdict and a mistrial was declared.

² All further statutory references are to the Penal Code unless otherwise indicated.

and 5 that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b); that he personally and intentionally discharged a shotgun within the meaning of section 12022.53, subdivision (c) on count 2; that he personally caused great bodily injury on counts 2, 3, 4, 5, 6, and 7 (§ 12022.7, subd. (a)); and that he personally used a firearm on counts 4 and 6 (§ 12022.5, subd. (a)).

Defendant was sentenced to state prison for a total term of 34 years 8 months.

II

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

1. *July 26, 2009, incident*

Juan Silva met Christina Aquino on the Internet. Prior to July 26, 2009, he and Christina had “spen[t] time” together. On July 26, Christina set up another date and told Silva to pick her up at 2505 Kendall Way in San Bernardino. Silva went to the location around 11:00 p.m. He texted Christina that he had arrived and got out of his car. As soon as Silva got out of his car, he was approached by defendant, who was dressed in baggy jeans and a dark hooded sweater or “hoodie.” Silva could not tell if defendant had long hair pulled back in a ponytail because the hood covered his hair. Despite the hood of the sweater being over defendant’s head, Silva could see his face.

Defendant put a shotgun in Silva’s face. The shotgun touched Silva’s right cheek. Defendant demanded that Silva give him his wallet and cellular telephone. Silva also gave defendant a portable gaming device that he had in his car.

Defendant then told Silva to get in his car and drive away. Silva complied. He was afraid and did not know where a police station was located in San Bernardino. He drove home to Victorville and then called the police. Silva reported the incident over the phone to someone at the San Bernardino Police Department and described his assailant as a Hispanic male, about 23 years of age and 210 pounds. He thought the assailant had a shaved head.

San Bernardino Police Sergeant Brian Harris prepared several six-pack photographic lineups that were shown to Silva. Silva was admonished prior to viewing them that he did not have to choose someone. He chose defendant's photograph. He also identified Christina from a photographic lineup.³ After he was robbed, Silva never heard from Christina again. Even that night, Christina never texted him to find out what had happened to him. Silva identified a shotgun in court as the one that was put in his face (exhibit 35).

2. *August 8, 2009, incident*

Ricardo Carrillo had met a woman by the name of Christina on an Internet site prior to August 8, 2009. On August 8, 2009, Christina told Carrillo to come to 2505 Kendall Way in San Bernardino so they could barbecue and watch movies. When Carrillo arrived around 10:30 p.m., he called Christina and told her that he was there. She told him that she was not fully dressed and to wait outside. Carrillo sat in his truck.

³ Silva previously viewed a six-pack photographic lineup and could not identify defendant. However, the photograph of defendant in that lineup was taken when he was several years younger.

While he was waiting, a man came to the driver's side window of the truck and banged on it with a shotgun. He told Carrillo (in Spanish) to roll down the window.

The man wore a black sweater with a hood on it that was pulled up over his head. Rather than roll down his window, Carrillo crouched down in his seat and began driving away. As Carrillo drove, the man fired two shots at the truck. One of the bullets hit the driver's side windshield. Another bullet hit the driver's side door. Carrillo drove off quickly and stopped at a nearby store.

Carrillo called the police on his way to the store, and they were waiting for him at the store when he arrived. Carrillo was bleeding from his neck and had glass "all over [his] side." A shotgun cap was found inside Carrillo's truck. Carrillo was taken to the hospital, where he was treated for numerous cuts from the glass. At the time of trial, Carrillo still had glass fragments and shotgun pellets in his skin. He never again heard from Christina. He described the shooter as a Hispanic male but only because he spoke Spanish to him. It was too dark to see his face.

Carrillo first stated that exhibit 35 was not the shotgun used to bang on his window. Carrillo explained that the bottom part of the shotgun, the grip, was different. Carrillo admitted that he was assuming the grip on the shotgun he saw that night was wood, but he was not absolutely sure. Carrillo also indicated that the shotgun grip that was at his window was more "triangular." He could not accurately see the color of the shotgun through his tinted windows.

Two shotgun shells were found at the Kendall Way location. The shotgun shells were Federal brand ammunition.

3. *August 10, 2009, incident*

Richard Cordova met a girl named Christina in an Internet chat room. Cordova and Christina agreed to meet. Christina first sent Cordova a text message to meet her at a residential address in San Bernardino but then changed the address to an apartment complex in San Bernardino. Christina set up a meeting time for 10:00 p.m., which Cordova thought was late for a first date. Christina had not given him a specific apartment number to go to.

When Cordova arrived at the apartment complex, he texted Christina. She directed him to park in a red zone in front of the apartment; he ended up parking on a side street near the complex. Cordova sat in his car and drank two or three beers. Cordova then walked to the front gate of the apartment complex. He carried a backpack, a 12-pack of beer, and two cellular telephones. When he walked to the gate, defendant was near the gate wearing black sweats and a black hooded sweatshirt.

Cordova heard the cocking of a shotgun, and defendant grabbed him by his shirt. Defendant grabbed the backpack and took the cellular telephone Cordova had clipped to his waist and Cordova's keys and threw them to the ground. Defendant then asked for Cordova's wallet. Cordova feared for his life and grabbed for the shotgun. Cordova pulled on the trigger to try to jam the shotgun with a shell but it did not work. He then

pulled on the trigger two times in order to try to get help. He was able to wrestle the shotgun to the ground and lay on top of it.

Defendant grabbed the 12-pack of beer and smashed them on the ground. He “pushed” broken glass into Cordova’s head. He also hit Cordova over the head with a beer bottle. He then punched Cordova on both sides of his face. Cordova was able to get up off the ground. He fell again and cut his forearm on the glass from the broken bottles, requiring seven staples. In addition, he cut his shin, which required three staples, and he had to have seven staples for the cut on his head.

At some point, defendant ran off. Cordova ran toward the apartment complex with the shotgun. Security at the apartment complex came to help him.

When the police arrived, Cordova was in pain and disoriented. He made a brief statement to officers at the apartment complex. He described defendant as Hispanic, around 21 years of age, approximately five feet seven inches tall with short dark hair. Cordova was kept over night at the hospital and was taking painkillers. At the hospital, he described defendant as 21 to 25 years of age, five feet seven to five feet nine inches tall, weighing between 190 and 200 pounds. Christina never contacted Cordova again.

Two shotgun shells and an end cap from the shotgun shell were found at the scene where Cordova and defendant struggled over the shotgun. The shotgun shells were Federal brand. There was broken glass in the area.

Cordova was shown several photographic lineups. On a final lineup shown to him, he identified defendant. In previous photographic lineups, he was unable to identify

anyone. Cordova indicated that the night of the incident, defendant's hair was shorter than in the photographs. Cordova was taking Vicodin for pain at the time of the lineups. He identified exhibit 35 as the shotgun he took from defendant.

4. *Further investigation*

The shotgun shells found at the Carrillo and Cordova scenes were compared. They all were Federal brand ammunition. They all had identical markings and were the same type of ammunition.

The serial number on the recovered shotgun had been removed. It was a 12-gauge shotgun, and all of the ammunition recovered was for a 12-gauge shotgun. The gun was never test fired to match the shotgun shells.

Detective Harris contacted Nancy Ranyak-Henry on October 14, 2009. Ranyak-Henry advised him that she let defendant stay with her in May 2009 because he needed a place to live. She told Detective Harris that a woman named Christina Aquino would come and stay with defendant at the house. Ranyak-Henry eventually asked defendant to leave. She told Detective Harris that approximately one week prior to the detective contacting her, defendant had called her. He advised her that he had been arrested for committing multiple robberies and wanted her to be his alibi. Defendant told her he needed an alibi for July 26, August 8, and August 10. She told defendant she did not want to be involved and wanted nothing to do with him. She also told Detective Harris that defendant had called her in June 2009 asking if she wanted to buy a shotgun.

At trial, Ranyak-Henry denied she ever spoke with Detective Harris. She denied that defendant ever asked her to be his alibi or asked her to buy a shotgun from him. She claimed to have brain damage. She denied knowing Christina Aquino. Detective Harris entered the courtroom, and she denied she had ever seen him before.

Ranyak-Henry's testimony at a prior hearing was read to the jury. She recalled talking to an officer in October 2009 but could not recall his name. Defendant had asked her about the three dates, not because of an alibi, but so he could put it on his time sheet to show he was taking care of her at that time. Defendant took care of her because she had brain damage. She did recall defendant mentioning he knew someone who wanted to sell a shotgun.

Detective Harris indicated that defendant's hair was much shorter at the time he was arrested than it was at trial. Defendant was approximately six feet tall.

B. *Defense*

Silva had described his assailant to another San Bernardino police officer as approximately five feet ten inches tall, 210 pounds, clean shaven, and with a shaved head or short hair. Silva stated immediately after the robbery that he would not be able to identify the suspect if he saw him again.

III

SUFFICIENT EVIDENCE OF ROBBERY

Defendant contends that the evidence was insufficient to prove that he perpetrated the robbery against Carrillo, the charges in counts 2, 3, and 4. He claims that the only

evidence linking defendant to the crime was the same modus operandi as the Silva and Cordova robberies, and this was insufficient to support the verdict.

“Our task is clear. ‘On appeal we 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 -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] “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 reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” [Citation.]’ [Citations.] The conviction shall stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’ (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

“Defendant’s hurdle to secure a reversal is just as high even when the prosecution’s case depends on circumstantial evidence.” (*People v. Akins* (1997) 56 Cal.App.4th 331, 336 [Fourth Dist., Div. Two].) A similar modus operandi in separate

crimes can provide sufficient circumstantial evidence to support a conviction. (*Id.* at p. 337.)

Here, in the first robbery, Silva met Christina Aquino over the Internet and she directed him to a home on Kendall Way. Once there, Silva was approached by defendant, whom he clearly identified both from a six-pack photographic lineup and in court, who held a shotgun to his face. Defendant was wearing a dark hooded sweater and took Silva's money and wallet.

In the third robbery against Cordova, where defendant was again identified as the perpetrator, Cordova met a girl named Christina over the Internet who directed him to an apartment complex within a short distance of the Kendall Way house. One can reasonably surmise that Christina and defendant were nervous about committing another robbery at the Kendall Way address. Once there, Cordova was approached by defendant, who again was wearing a black hooded sweatshirt and was armed with a shotgun. After the encounter, Federal brand shotgun shells were found at the scene.

Defendant was not identified by Carrillo, the victim in counts 2, 3, and 4. However, the modus operandi was almost identical to the other robberies. Carrillo was at the Kendall Way address to meet Christina, whom he had met over the Internet. Once he arrived, Carrillo was approached by a Hispanic male in a black hooded sweater armed with a shotgun. Carrillo drove off, but not before he was shot at two times. The shotgun shells found after the incident with Carrillo were identical to the ones that were later

found at the Cordova scene. Although Carrillo could not identify the shotgun, he explained he could not see the entire shotgun and that it was dark.

In addition to the similarity of the crimes, the jury could reasonably rely upon Detective Harris's testimony that Ranyak-Henry told him that defendant had been with Christina around the time the crimes were committed. Further, the jury could also believe that defendant contacted Ranyak-Henry and asked her to provide him an alibi for all three dates that the offenses were committed. This clearly showed defendant's consciousness of guilt.⁴

When viewing the circumstantial evidence tying defendant to the Carrillo robbery in the light most favorable to the People, it is clear that the jury reasonably could have concluded that defendant was the perpetrator of all three offenses, including the attempted robbery, shooting at an occupied vehicle, and assault with a firearm against Carrillo.

Defendant refers to Evidence Code section 1101, subdivision (b)⁵ to support his claim that the three incidents were not similar enough to show his identity. However,

⁴ The jury was instructed with CALCRIM No. 371 as follows: "If the defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

⁵ Evidence Code section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime . . . or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

that section has no applicability here. The modus operandi here was relevant to show circumstantial evidence to support that defendant committed all of the offenses. We reject defendant's claim. The verdict is supported by substantial evidence.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.