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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.

JEFFREY BUBAN-ZARATE,

Defendant and Appellant.

E054695

(Super.Ct.No. SWF10002095)

OPINION

APPEAL from the Superior Court of Riverside County. Mark Mandio, Judge.

Affirmed in part; reversed in part with directions.

Maureen M. Bodo, 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, Melissa Mandel, Meredith S. White, James D. Dutton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jeffrey Buban-Zarate appeals from judgment entered following jury convictions for first degree burglary (Pen. Code, ¹ § 459; count 1) and theft of a firearm (§ 487, subd. (d)(2); counts 2, 3, and 4). The trial court sentenced defendant to six years in prison. Defendant contends on appeal that there was insufficient evidence to support his convictions, the trial court failed to instruct the jury properly on how to evaluate the forensic experts' opinion testimony, and the trial court miscalculated defendant's presentence credits.

We reject defendant's contentions but reverse defendant's convictions on counts 3 and 4 under the *Bailey* doctrine, which provides that a defendant may not be convicted of more than one count of theft where multiple takings are committed against a single victim with one intention, one general impulse, and one plan. (*People v. Bailey* (1961) 55 Cal.2d 514, 519.) Here, defendant was improperly convicted of three counts of stealing guns (counts 2, 3, and 4), whereas he could only be convicted of a single theft offense, since there was no evidence or findings that defendant had a separate intention and plan, as to stealing each of the three guns. The judgment is therefore affirmed as to counts 1 and 2, and reversed as to counts 3 and 4.

¹ Unless otherwise noted, all statutory references are to the Penal Code.

II

FACTS

While Leticia Loya and Alfred Loya were away from their home during the afternoon of July 28, 2010, defendant and a companion broke into the Loyas' home through a sliding glass door. Alfred Loya came home around 1:45 p.m. and discovered his home had been ransacked. Many of the Loyas' valuables were missing, including electronic equipment and three guns. Alfred Loya noticed the sliding glass door and screen door into the kitchen were wide open. The lock on the sliding glass door was broken and the bottom of the screen door was torn. The side garage door also had pry marks on it. During the burglary, Rosa Roman, who lived across the street from the Loyas, noticed two men enter and leave the Loyas' home, carrying a stereo or DVD player and a safe, and put the items in a gray car.

Community Service Officer Craig Speers investigated the burglary and lifted a palmprint from the sliding glass door. A fingerprint examiner with the Riverside County Sheriff's Department performed a fingerprint analysis and determined that the palmprint matched defendant's palmprint. Another expert verified the match.

During the trial, the prosecution presented evidence that in 2004, defendant stole items from a home where he was performing remodeling work. Defendant admitted he stole the items and pled guilty to felony grand theft in 2004. Defendant also admitted pleading guilty to vehicle theft in 2005.

Defendant testified in his own defense. He denied he knew the Loyas or that he broke into their home.

III

SUFFICIENCY OF EVIDENCE

Defendant contends there was insufficient evidence to support his convictions for burglary and gun possession, because his convictions were based solely on a palmprint found on the Loyas' glass sliding door. Defendant argues the palmprint evidence was insufficient because it was not scientifically reliable. In addition, there was a lack of eyewitness identification and the stolen items were not found in defendant's possession.

A. Forfeiture

By not raising his objections to the palmprint evidence in the trial court, defendant forfeited his arguments that the palmprint evidence was not scientifically reliable and the forensic experts were unqualified to testify. (*People v. Clark* (1993) 5 Cal.4th 950, 1018.)

B. Palmprint Evidence

Since the palmprint evidence was admissible, there was sufficient evidence to support defendant's burglary and gun possession convictions. When reviewing the sufficiency of evidence in cases where the conviction is premised on fingerprint or palmprint evidence, this court must "determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.] The standard of appellate review is the same in cases in which the People rely primarily 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 be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.] 'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.' [Citation.]" (*People v. Bean* (1988) 46 Cal.3d 919, 932-933 (*Bean*).

Defendant argues that the only evidence linking him to the burglary was the presence of his palmprint on the glass sliding door of the Loyas' home and such evidence was not sufficient to identify him as the perpetrator. Fingerprint evidence is, however, "the strongest evidence of identity, and is ordinarily sufficient alone to identify the defendant." (*People v. Gardner* (1969) 71 Cal.2d 843, 849 (*Gardner*); see also *People v. Andrews* (1989) 49 Cal.3d 200, 211, quoting *People v. Johnson* (1988) 47 Cal.3d 576, 601 and *Gardner*.) Palmprint evidence is likewise sufficient alone to identify defendant. (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1588 (*Figueroa*); *Andrews*, at p. 211.) Moreover, "[t]he jury is entitled to draw its own inferences as to how the defendant's prints came to be on the [object] and when . . . and to weigh the evidence and opinion of the fingerprint experts." (*Gardner*, at p. 849.)

In *Figueroa, supra*, 2 Cal.App.4th at page 1588, a burglary conviction was sustained on evidence that Figueroa had been inside the burgled apartment prior to the burglary, but had not gone into the part of the kitchen where his palmprints were found on the window after the burglary; there was no evidence Figueroa was present between

the last time the windows were cleaned and the burglary; and there was no evidence that he would have had any reason to place his hand on the window exterior except to gain surreptitious entry into the apartment. (See also *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1246-1247 [burglary conviction sustained where the evidence disclosed that Preciado left his fingerprint on a wristwatch box found in a burgled condominium, the owner did not know him, and the box - which held a watch the victim received as a gift 18 months earlier - had never left his home]; *People v. Bailes* (1982) 129 Cal.App.3d 265, 282 [defendant's thumbprint on bathroom window screen identified as point of entry into the burglarized home sufficient for jury reasonably to infer defendant committed the burglary].)

Applying the appropriate standard of review to the present case, we conclude there was sufficient evidence identifying defendant as the perpetrator of the burglary and gun theft crimes. Alfred Loya testified that when he returned home on the day of the burglary and entered his home, he discovered the sliding glass door and screen door wide open; the sliding door appeared to have been pried open and the door lock was broken; and the screen door was torn at the bottom. Officer Speers testified that he lifted a fresh palmprint from the sliding glass door and submitted it to California Identification System (Cal.-ID), an automated system maintained by the Department of Justice (DOJ) for retaining fingerprint files and identifying latent fingerprints. (§ 11112.1.) Cal-ID notified Speers that the palmprint belonged to defendant.

Patricia Campos, the fingerprint examiner, testified she analyzed the palmprint, ran it through the Automated Fingerprint Identification System (AFIS), and found 52

characteristics of the palmprint matched defendant's left-hand palmprint taken after his arrest. Cal-ID only requires a minimum of eight similar characteristics for a match. Cal-ID fingerprint examiner, Jayshree Sakaria, confirmed the match. The Loyas testified they did not know defendant and had never met or seen him before the trial. Defendant also testified he did not know the Loyas. There therefore would not have been any reason for defendant to have been at the Loyas' home, touching the glass slider door prior to the burglary.

Defendant argues the identification evidence is insufficient because it is unreliable. However, the jury was entitled to weigh the evidence and the opinions given by the experts. (*Gardner, supra*, 71 Cal.2d at p. 849.) Even if this court disagrees with the jury's findings, reversal would not be proper because the evidence was sufficient to reasonably justify the trier of fact's findings. (*Bean, supra*, 46 Cal.3d at pp. 932-933.) We conclude there was sufficient evidence because the jury could reasonably infer from the palmprint on the glass slider door that defendant burglarized the Loyas' home by breaking into their home through the glass slider door.

IV

INSTRUCTIONAL ERROR

Defendant contends the trial court erred in not instructing the jury that the fingerprint examiners' testimony was opinion, not fact. We disagree there was error. The trial court instructed the jury with CALCRIM No. 332, that the jury must consider expert opinion, but is not required to accept it as true or correct. The jury was also told it should follow the instructions about believability of witnesses in general and consider

“the expert’s knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion.” The trial court further instructed the jury that it must decide whether information relied upon by the expert was true, and disregard opinion that the jury found unbelievable, unreasonable, or unsupported by the evidence. CALCRIM No. 332 sufficiently explained to the jury that the forensic experts’ testimony was opinion evidence, not fact, and that the jury was not required to accept it as true or correct.

We also reject defendant’s argument that the language in CALCRIM No. 332, instructing the jury that it “must” consider expert opinion, gave the impression of judicial support for such expert opinion, rather than judicial neutrality. After instructing the jury that it “must consider the opinions,” the instruction states, “but you are not required to accept it as true or correct. The meaning and importance of any opinion are for you to decide. . . . You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.” Rather than conveying judicial support for the experts’ opinions, CALCRIM No. 332 informed the jury it should independently examine the basis for the expert opinion and decide whether it was unbelievable, unreasonable, or unsupported by the evidence.

CALCRIM No. 332 adequately and properly instructed the jury on evaluating the forensic experts’ opinion testimony. Any need to clarify further or amplify that the expert testimony constituted opinion, as opposed to fact, was not necessary and was forfeited by defendant not requesting a clarifying instruction. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236.)

V

PRESENTENCE CREDITS

Defendant asserts that he is entitled to 466 days of presentence credits under the version of section 4019 in effect at the time of the charged crimes. We conclude there was no error in calculating defendant's presentence credits.

At sentencing, the parties agreed that defendant's actual in-custody time was 233 days. The prosecutor believed defendant was entitled to 50 percent conduct credits (116 days) for a total of 349 days. Defendant's attorney argued that because defendant was sentenced to state prison, he was entitled to day-for-day credits, amounting to 466 credits. The trial court agreed with the prosecutor and awarded 349 days.

The version of section 4019 in effect on the date of the charged offense, July 28, 2010, provided that "four days will be deemed to have been served for every two days spent in actual custody." (§ 4019, subd. (f).) Former section 4019, however, also provided that a defendant with a current conviction for a serious felony, was only eligible to earn six days credit for every four days served. (§ 4019, subd. (f).) Since defendant was convicted of serious felonies (burglary and grand theft of a firearm), the trial court properly awarded defendant credit for 233 actual days and 116 conduct credits, for a total of 349 days credit.

VI

IMPROPER MULTIPLE THEFT CONVICTIONS

Defendant was convicted of one first degree burglary count (count 1) and three counts of theft of a firearm (§ 487, subd. (d)(2); counts 2, 3, and 4). Defendant allegedly

stole three guns from the victims' home on July 28, 2010. Defendant broke into the victims' home around 12:50 p.m. A neighbor noticed him carrying a stereo or DVD player out to a gray car. Defendant returned to the victims' home around 2:00 p.m. and was seen carrying a gun safe from the victims' home out to the gray car. Even though there was some evidence to support a finding of separate intents and plans, as to the two separate entries into the victims' home, the trial court stayed sentencing on the gun theft counts under section 654, finding the burglary and gun thefts were part of a single overarching scheme of stealing from the victim. As a consequence, the trial court sentenced defendant to the upper term of six years on the burglary conviction, and stayed the sentences on each of the three gun-theft convictions (counts 2-4).

Although the parties do not raise the objection, this court is obligated to correct the improper multiple theft convictions (counts 2, 3, and 4). “‘When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals.’ [Citation.]” (*People v. Ortega* (1998) 19 Cal.4th 686, 699, overruled on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1232; see also *People v. Bailey*, *supra*, 55 Cal.2d at p. 519, and § 954.)

There is insufficient evidence to support a finding that defendant committed each of the gun thefts with a separate intent and plan, or even on separate occasions. It is clear from the record that for this reason, the trial court stayed sentencing on the theft convictions under section 654, finding that the burglary at around 1:00 p.m. and second entry at around 2:00 p.m. were part of the same intent and scheme. Because the trial

court found that defendant harbored one intent for both entries, the trial court would have inevitably also found there was also one intent and plan to steal each of the three guns. Accordingly, we conclude that under the *Bailey* doctrine (*People v. Bailey, supra*, 55 Cal.2d at p. 519), defendant was improperly convicted for theft of each of the three guns. Defendant should have only been convicted of one count of theft of a firearm. Therefore defendant's convictions for counts 3 and 4 must be reversed.

VII

DISPOSITION

The judgment is affirmed as to counts 1 and 2, and reversed as to counts 3 and 4 based on the *Bailey* doctrine (*People v. Bailey, supra*, 55 Cal.2d at p. 519). The sentence remains unchanged as to counts 1 and 2, with imposition of the upper term of six years as to count 1 for first degree burglary, and the sentence on count 2 stayed under section 654. The superior court is ordered to issue a modified abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

McKINSTER

J.