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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.

LEVON HYMES IV,

Defendant and Appellant.

E062669

(Super.Ct.No. RIF1200124)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner,
Judge. Affirmed.

Levon Hymes IV, in pro. per.; and John L. Dodd, under appointment by the Court
of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury found defendant and appellant Levon Hymes IV guilty of one count of
attempted robbery (Pen. Code, §§ 664/211; count 1);¹ four counts of robbery (§ 211;

¹ All future statutory references are to the Penal Code unless otherwise stated.

counts 2, 4, 5, & 6); and one count of misdemeanor assault (§ 240; count 3).² In a bifurcated proceeding, the trial court found true defendant had suffered one prior prison term (§ 667.5, subd. (b)). Defendant was sentenced to a total term of 10 years in state prison.³ Defendant appeals from the judgment. We find no error and will affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Count 1*

On September 13, 2011, at around 2:30 p.m., Galileo Trocio picked up his seven-year-old son from elementary school in Perris, California. As Trocio was walking back to his car, he noticed two African-American men following him. One of the men said something Trocio could not understand, and Trocio ignored him. When the man again said something, Trocio turned around. At that point, the man quickly pulled on Trocio's chain necklace, causing the lock on the necklace to break and Trocio's shirt to rip. The man and his cohort then fled, jumping over a nearby wall.

Around 4:00 p.m., Riverside County Sheriff's Department Deputy Jess Kiebach interviewed Trocio telephonically. Trocio described the suspect as a black male with a

² The jury found not true the personal use of a firearm (§ 12022.53, subd. (b)) enhancement attached to count 6.

³ Pursuant to the court's minute order dated January 9, 2015, defendant was sentenced to "State Prison" for a term of nine years six months and to "Riverside County Jail" for a term of 180 days.

dark complexion; 18 to 25 years old; 5'11" to 6' tall; weighing between 230 to 250 pounds; having black, short, curly hair; and wearing red basketball style shorts and a plain, white short-sleeved T-shirt. Trocio indicated that he could identify the suspect if he saw him again.

Seven days later on September 20, 2011, Riverside County Sheriff's Department Deputy Ruben Martinez showed Trocio a six-pack photographic lineup. At that time, Trocio identified defendant as the suspect. However, three years later, at the time of trial, Trocio could not identify defendant.

B. *Counts 2 and 3*

On September 13, 2011, at around 10:50 p.m., Wendy Flores, her brother Carlos Flores, and Carlos's wife were walking on Perris Boulevard when Wendy, who was wearing a gold chain necklace, heard footsteps behind them. Someone then grabbed Wendy's neck and pulled off her necklace. After Wendy yelled, Carlos began chasing the male suspect. When Carlos neared the man, the man turned around and elbowed Carlos in his face, causing him to fall to the ground. The man reached for his waistband and "said something about packing a cap." The man then fled.

Riverside County Sheriff's Department Deputy Martin Luna interviewed Wendy and Carlos. Wendy appeared upset and scared by the incident and said she had been robbed. Carlos appeared "normal" and stated that he did not see the suspect's face and would not be able to recognize him if he saw him again. Carlos described the suspect as

a black male; 25 to 30 years old; heavysset; 6' tall; wearing a white bandana on his head, a sleeveless shirt, and blue jean shorts. Wendy gave a similar description.

Seven days later on September 20, 2011, Deputy Martinez conducted a follow-up interview with Wendy and Carlos. When Deputy Martinez showed Carlos a six-pack photographic lineup, Carlos without difficulty identified defendant as the suspect. At trial, Carlos confirmed that he had identified defendant as the suspect during the photographic lineup and stated that defendant looked similar to the man who had robbed Wendy but Carlos was not 100 percent certain. Carlos clarified that he was 80 percent certain that defendant was the suspect who had robbed his sister and took her gold necklace.

C. *Count 4*

On September 17, 2011, at around 1:50 p.m., Antonia Macias was washing clothes at a laundromat on Perris Boulevard when she saw a black male enter the laundromat. Macias believed the man was “not acting normal” and looked “suspicious.” Less than a minute later, Macias heard a noise and saw the man yanking a woman’s chain necklace from behind her. Macias began screaming for help, and the man took off running.

Riverside County Sheriff’s Department Detective Tony Pelato interviewed Macias and the victim. A forensic technician made a sketch of the suspect based on Macias’s recollection. Macias described the suspect as 5’6” to 5’7” and weighing 140 to 150 pounds.

On September 21, 2011, Deputy Martinez conducted a follow-up interview with Macias, and showed her a six-pack photographic lineup. Macias identified defendant as the suspect.

D. *Count 5*

On September 19, 2011, at around 12:30 p.m., Eduardo Gonzalez was walking through the main entrance of the apartment complex he lived at when two “dark-skinned” men approached him. One of the men pushed him; and as he was falling, the other man grabbed the chain necklace he was wearing from the front and took it. The two men then got into a green two-door car.

Riverside County Sheriff’s Department Deputy Leeondre Radford arrived at the scene and interviewed Gonzalez. Gonzalez stated that he had been robbed. He explained that while walking, he saw a green 1990’s model Camaro pull into a driveway in front of him, after which two black males exited the vehicle and started walking in his direction. He further stated that one of the males pushed him down to the ground and ripped his gold necklace from his neck; and that he chased after the man, but both men ran and fled in the same green Camaro they had arrived in. Gonzalez also said that the Camaro had parked down the street after the two black males had exited it and that the Camaro had some type of security sticker on the back of it. Gonzalez described one of the suspects as about 5’10” but was unable to state the suspect’s weight.

A surveillance camera captured video footage of a green 1990’s model Camaro entering the driveway of the apartment complex driven by a female named Kimberly

Macias. When Deputy Radford showed Gonzalez the green Camaro and Kimberly Macias for an infield show-up identification, Gonzalez did not recognize Kimberly Macias but stated that was the vehicle involved in the incident.

On September 20, 2011, Deputy Martinez conducted a follow-up interview with Gonzalez and showed him a six-pack photographic lineup. Gonzalez identified defendant as the person who had pulled his necklace from his neck, and stated “ ‘Oh, yeah. That’s him. I’m sure about that.’ ” Deputy Martinez also spoke with the apartment complex manager, who stated a green Camaro had been involved in the robbery, and the apartment complex landscaper, who stated that he had seen a green Camaro with the words “ ‘Private Security’ ” on the bumper arrive at the apartment complex. The landscaper further noted that he had seen two black males exit the vehicle “looking down, walking in a direction as if their purpose was to go towards the direction that the victim was traveling.” About four weeks prior, the same green Camaro had been stopped by an officer pursuant to a traffic stop while defendant had been driving it.

On approximately September 22, 2011, Deputy Martinez went to defendant’s residence and observed in the driveway of the residence a green Camaro bearing a bumper sticker that read “ ‘Private Security.’ ” After learning the vehicle belonged to defendant, Deputy Martinez took the vehicle into custody. Prior to being taken in, pursuant to protocol, the deputy searched the vehicle. The deputy found a blank check in defendant’s name, as well as a business card for the officer who had stopped defendant a few weeks prior. Deputy Martinez did not find defendant at his residence.

E. *Count 6*

On December 12, 2011, at around 8:30 p.m., Clifford Mansker was stopped at a McDonald's in Moreno Valley. As Mansker got back in his car, a darker complexioned man walked over to his car and motioned for Mansker to roll down his window. Mansker rolled down his window and the man asked Mansker if he had a cigarette. Another man then jumped in the passenger seat of the car, put a gun to Mansker's abdomen, and told him to put his hands on the steering wheel. The other man also pulled out a gun. The two men then went through Mansker's pockets and socks, taking \$35, his cellular telephone, and his identification. In a panic, Mansker drove off, hitting a McDonald's delivery truck.

Riverside County Sheriff's Department Detective Eric Holland responded to a hit-and-run call and found the suspect vehicle, owned by Mansker, parked nearby. Detective Holland interviewed Mansker, who reported being robbed at gunpoint, and the reason why he fled the scene. Mansker described the suspect who jumped in the passenger seat of his car as a "black male adult," 19 to 22 years old, with medium black skin, dark hair, a mustache and chin hair, no gloves; wearing a gray hooded sweatshirt with a red jacket over the sweatshirt and light blue skinny jeans; and being armed with a semiautomatic black pistol.

Detective Holland also interviewed a McDonald's employee who said she had witnessed the incident. The employee reported that as she was standing outside the business near the rear side door, she saw a silver vehicle with four passengers pull into

the parking lot, after which all four of them got out of the car while it was still in gear, causing the car to roll forward and hit the delivery truck. She stated that she did not see anybody with a gun and it appeared they were horsing around.

At trial, Mansker testified that defendant does not look like the man who jumped into the passenger seat of his vehicle, and affirmed, “Honestly, sir, he looks completely different.”

F. *Events Following the Incidents*

On December 10, 2011, defendant was admitted into the Riverside County Regional Medical Center in Moreno Valley after suffering from a gunshot wound to his head.

At 11:15 a.m., on December 12, 2011, detectives arrived at the hospital to question defendant regarding the shooting. However, hospital staff could not locate defendant in his hospital room. Defendant was last seen in the hospital by nursing staff that morning at 9:15 a.m.

On November 7, 2012, defendant was seen arriving at his residence in a vehicle, and later getting back into the vehicle. Officers followed the vehicle and conducted a vehicle stop. Deputy Martinez arrived at the scene and saw defendant running through an apartment complex. Defendant eventually stopped, and was arrested and searched. The officers found a wallet and keys on defendant’s person. The wallet contained Mansker’s driver’s license.

At the police station, Deputy Martinez interviewed defendant. Defendant confirmed the wallet belonged to him and that Mansker's identification card was not his. In response to Deputy Martinez's question of how Mansker's identification card ended up in his wallet, defendant stated, "I don't know" Defendant denied knowing Mansker and denied stealing Mansker's identification card.

Deputy Martinez interviewed Mansker and showed him a six-pack photographic lineup. Mansker identified defendant as the suspect who jumped into his car. During that photo identification, Mansker stated, " 'I can't forget that day. I know it was him.' " Mansker also said that the wallet found on defendant was not his, but the identification card bearing his name was.

G. *Defense*

The McDonald's employee testified on behalf of the defense. She stated that, while inventorying delivered goods outside McDonald's on the night of December 12, 2011, she saw a silver car hit the McDonald's delivery truck. She also observed two people get out of the back seat of a car, and run in the opposite direction. She did not see anyone approach the silver car with a gun.

On August 29, 2014, following trial, a jury found defendant guilty of one count of attempted robbery (§§ 664/211; count 1); four counts of robbery (§ 211; counts 2, 4, 5, & 6); and one count of misdemeanor assault (§ 240), as a lesser included offense of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) as alleged in

count 3. The jury found not true the personal use of a firearm (§ 12022.53, subd. (b)) enhancement attached to count 6.

In a bifurcated proceeding, on January 9, 2015, the trial court found true that defendant had suffered one prior prison term (§ 667.5, subd. (b)). Defendant was thereafter sentenced to a total term of 10 years with credit of 986 days for time served as follows: the upper term of five years on count 2, two consecutive terms of six months on counts 1 and 3, three consecutive terms of one year on counts 4, 5, and 6, plus a consecutive term of one year for the prior prison term enhancement.

On January 9, 2015, defendant filed a timely notice of appeal.

II

DISCUSSION

After defendant appealed, upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court conduct an independent review of the record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. In his one and one-half page letter brief, defendant challenges the sufficiency of the evidence, noting the victims were not able to identify him and that he did not fit the description of the suspect as described by the victims and reported to the

police.⁴ Defendant also challenges the photographic lineup, claiming his picture was not matched with like suspects, the picture was old, and the picture was completely different from other suspects in the lineup. We reject these contentions.

On appeal, the test of legal sufficiency is whether there is substantial evidence to support the conviction. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Evidence that meets this standard satisfies constitutional due process and reliability concerns. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156.) While we must determine that the supporting evidence is reasonable, inherently credible, and of solid value, we must also review the evidence in the light most favorable to the prosecution, and must presume every fact that the jury could reasonably have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn.1.)

Issues of witness credibility are for the jury's determination. (*People v. Boyer*, *supra*, 38 Cal.4th at p. 480; *People v. Jones* (1990) 51 Cal.3d 294, 314.) Absent evidence that the testimony is physically impossible or inherently improbable, the testimony of a single witness may be sufficient to prove the defendant's identity as the perpetrator of a crime, even when there is a significant amount of countervailing evidence. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

⁴ The probation report filed on January 9, 2015, indicates that defendant is a 28-year-old black male, 5'1", and weighing 200 pounds.

Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate. (*People v. Allen, supra*, 165 Cal.App.3d 616.) The same is true for uncertainties or discrepancies in witnesses' testimony. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1259.) Confusion, or lack of clarity and positiveness in a witness's identification testimony goes to the weight, not the admissibility of the testimony. (*People v. Rist* (1976) 16 Cal.3d 211, 216, superseded by statute on other grounds as stated in *People v. Collins* (1986) 42 Cal.3d 378, 393.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*People v. Lewis* (2001) 26 Cal.4th 334, 361.)

Here, the witnesses testified credibly about the incidents, and their testimonies were corroborated by independent evidence such as defendant's car being at the scene of some of the incidents and defendant being in possession of one of the victim's identification cards. In addition, the victims and witnesses gave similar descriptions of the suspect and the victims picked out defendant's picture in photographic lineups. The fact the victims could not positively identify defendant three years after the crimes were committed at the time of trial do not render the victims' photographic identifications unreliable, as that was a question for the jury to decide. (*People v. Walker* (1957) 154 Cal.App.2d 143, 148.) Further, while the victims gave varying descriptions of the suspect, this fact does not lead to the inevitable conclusion that defendant was wrongfully

identified. Defendant’s trial counsel ably pointed out the discrepancies in the identification. It was for the jury to decide if defendant was properly identified as the perpetrator. Having done so, we are not free to second guess its finding because we neither reweigh the evidence nor reevaluate the credibility of witnesses. (*People v. Jennings* (2010) 50 Cal.4th 616, 638; see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

We also reject defendant’s purported assertion that the photographic lineups prepared and shown to the victims were unduly suggestive. Defendant failed to object to the photographic lineups at trial. That failure results in a forfeiture of the issue on appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the entire record for potential error and find no arguable error that would result in a disposition more favorable to defendant.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.