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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS MORALES GALLEGOS,

Defendant and Appellant.

G044739

(Super. Ct. No. 09CF2364)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William L. Evans, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Juan Carlos Morales Gallegos appeals his conviction for second degree robbery with a personal use gun enhancement, arguing there was insufficient evidence he was the person who robbed the victim. We conclude the evidence was sufficient to uphold the conviction and therefore affirm.

I

FACTS

We present the facts in the light most favorable to the judgment in accord with established principles of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

On September 21, 2009, at approximately 11:30 p.m., Fabian Saldana and a friend were walking to the friend's home. A red Suburban approached them. Saldana's friend ran. Saldana started to run, but the vehicle's driver, whom he later identified as defendant, caught up, pointed a gun at him, and demanded that Saldana give him whatever was in his pockets. A second person, in the front passenger seat, also pointed a gun at Saldana. When Saldana emptied his pockets, some items, including his wallet, fell to the ground. Defendant took his phone, returned to the driver's seat, and left. Saldana retrieved his wallet, then went to a nearby home to call police.

Saldana told the 911 dispatcher that he was "mugged." He said there were three Hispanic men and that "both of them" had guns. He said the first man with a gun was wearing a white muscle shirt with jeans, and described the gun as a revolver. (At trial, he testified that he could not tell if the shirt was white or gray.) Saldana told the dispatcher that the second man with a gun, in a passenger seat, was bald and wearing a black shirt. He also reported the direction the Suburban was driving when it left.

Santa Ana Police Sergeant Don Humphrey responded to the call and found the red Suburban nearby. The vehicle was stopped. The only person in the car was defendant, sitting in the driver's seat. Officer David Enriquez also arrived at the scene. He saw that Humphrey had detained the driver, whom he identified as the defendant at

trial. Defendant was wearing a short gray shirt that was cut off at the sleeves and jeans. A search of the Suburban yielded a loaded silver revolver and additional ammunition. Later testing revealed no latent fingerprints; the examiner also found no evidence that any effort had been made to erase fingerprints. Enriquez also found a cell phone, later identified by Saldana as his.

While Humphrey and Enriquez detained defendant, Officer Duane Greaver drove Saldana to the location where the Suburban was stopped. Before arriving, Greaver gave Saldana a field identification admonishment: “You are being shown a person in an effort to identify the suspect in this — involved in this case. Should you see the suspect in this case, we would like you to point that person — to that person.”

As soon as Greaver pulled up behind another patrol car, Saldana saw defendant sitting in the backseat, and told Greaver that he recognized the back of defendant’s head, and defendant was the person who had robbed Saldana. Saldana also identified the revolver as the gun that defendant had used to rob him. At trial, Saldana testified he recognized the back of defendant’s head because he saw it clearly when defendant returned to the Suburban after stealing his phone. He remembered defendant’s hair and the shape of his head. He also saw defendant’s face.

In October 2009, the Orange County District Attorney file an amended information alleging three counts, only one of which is relevant here — count one, which alleged robbery (Pen. Code, §§ 211, 212.5, subd. (c))¹ and an enhancement alleging the personal use of a firearm (§ 12022.53, subd. (b).) The remaining counts related to methamphetamine found on defendant’s person when he was booked into jail. At the conclusion of trial, defendant was found guilty of second degree robbery as to count one, and the enhancement was found true. Defendant was sentenced to two years for the

¹ Subsequent statutory references are to the Penal Code.

robbery and a consecutive sentence of 10 years for the personal use enhancement, with sentence on the remaining counts either concurrent or stayed.

II

DISCUSSION

Defendant argues a single issue on appeal, specifically, that the evidence was insufficient to sustain the conviction on count one or the enhancement. “Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.] By this process we endeavor to determine whether “*any* rational trier of fact” could have been persuaded of the defendant’s guilt. [Citations.]” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Substantial evidence is evidence which is “credible and of solid value.” (*People v. Cochran* (2002) 103 Cal.App.4th 8, 12-13.) “As with other facts, the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent ‘without resorting to inferences or deductions.’ [Citations.]” (*People v. Cudjo* (1993) 6 Cal.4th 585, 608-609.) Such instances of demonstrable falsity are “rare.” (*Id.* at p. 609.) The same standard of review applies to the enhancement. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) Section 12022.53, subdivision (b) provides for an enhanced sentence if the defendant personally used a firearm during the commission of a robbery. The only question raised here is whether there was sufficient evidence that defendant was actually the person who committed the robbery and used the gun.

Defendant argues that Saldana’s identification was tainted by the “highly suggestive pre-trial identification.” He also admits, however, the admissibility of the

identification was not challenged below, and contends he is not arguing it now. Rather, he states the identification fails to provide evidence of “solid value” sufficient to meet the substantial evidence test. Indeed, a claim regarding the admissibility of the identification would be forfeited on appeal for failure to raise it below. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1250.)

Had defendant raised the issue in the trial court, however, we would find no error in admitting the field identification. “A pretrial identification procedure violates a defendant’s due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification. The defendant bears the burden of proving unfairness as a ‘demonstrable reality,’ not just speculation. [Citations.]” (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819.) Defendant has not done so.

An identification procedure only violates due process if it is impermissibly suggestive. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) A “‘single person showup’ is not inherently unfair.” [Citation.]” (*Id.* at p. 413, fn. omitted.) Defendant points to the fact that Saldana was given an admonition that did not state he was not obligated to identify anyone. But that is not a required part of the admonition. Show-ups have been held to be permissible where the record was “devoid of any indication that police told the victim anything to suggest the people she would be viewing were in fact her attackers.” (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.) Nor does the fact that Saldana identified defendant from the rear render the procedure as impermissibly suggestive. The record demonstrates that Saldana was indeed admonished and therefore there was nothing constitutionally defective about the identification procedure. Had defendant objected to the admissibility of the identification at trial, the court would have properly rejected his argument.

Because defendant is not arguing that the field identification was inadmissible, it is only one part of the evidence presented at trial. When the field identification is taken together with the other facts, there is sufficient evidence to uphold

defendant's conviction.² Defendant also points to discrepancies between Saldana's trial testimony and his actual appearance. Saldana testified that defendant did not have a beard, and agreed he had a "clean face," while defendant's booking photo reflected a slight mustache and goatee. Saldana said defendant was about the same height as he was, five feet nine inches tall, but he was five feet seven inches. He was wearing a white shirt rather than a grey one.

The import of such discrepancies, however, is a question for the trier of fact. "The testimony of a robbery victim, if believed by the trier of facts, is sufficient of itself to warrant a conviction, and no corroborative evidence is required. [Citations.]" (*In re Corey* (1964) 230 Cal.App.2d 813, 826.) We cannot conclude that the discrepancies between Saldana's description and defendant's appearance were so significant as to render Saldana's testimony inherently unbelievable. "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony. . . the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses and are for the observation and consideration of the trier of fact, whose determination will stand unless the testimony is inherently incredible." (*Id.* at pp. 825-826)

In addition to the fact that Saldana identified defendant both in court and in the field, the jury was able to consider that defendant was located very shortly after Saldana called 911 in precisely the type of vehicle Saldana described. Defendant was wearing a sleeveless shirt and jeans, and both a gun of the type Saldana described and his cell phone were found in the vehicle. When taken together with Saldana's identification,

² Defendant also points to the lack of physical evidence relating to the gun itself, e.g., the lack of fingerprints or evidence the fingerprints had been removed. But this does not render the evidence that *was* produced insufficient. Nor does the fact that defendant's companions were no longer in the vehicle when police arrived.

there was sufficient evidence for the jury to find that defendant had committed the robbery and personally used a firearm.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.