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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.

ROBERT CANDE RODRIGUEZ, JR., and
VICTOR ESTEBAN ALVARADO

Defendants and Appellants.

G045482

(Super. Ct. No. 09SF1113)

O P I N I O N

Appeals from judgments of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant Robert Cande Rodriguez, Jr.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant Victor Esteban Alvarado.

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

* * *

Defendants Robert Rodriguez, Jr., and Esteban Alvarado were convicted of two counts of first degree robbery in concert and first degree burglary relating to a home invasion robbery at a residence in San Juan Capistrano. Rodriguez asserts he was improperly sentenced to the upper term on one of the robbery counts, an argument which we wholeheartedly reject. Alvarado filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and our review of the record reveals no error. We therefore affirm both defendants' convictions.

I FACTS

Vickie and David K. lived in a gated community in San Juan Capistrano. On the evening of December 6, 2009, at about 9:20, Vickie was downstairs watching television, and David was upstairs in the master bedroom. Vickie heard the front door open and thought it might be their teenage son. She turned around and saw a man wearing a mask pointing a gun. The man with the gun had a heavy build and was wearing a black ski mask and baggy clothing as well as gloves. He told Vickie that they knew she had money and they wanted it.

She saw that two other men were with him, all of them coming toward her. One of these two was wearing a white hockey mask made from plastic, and a black hooded sweatshirt with the hood over the mask. He had a thin build. The third man, who also had a thin build, was not wearing a mask. He wore black-rimmed glasses and a black hooded sweatshirt.

Responding to the intruders' demand, Vickie said the money was upstairs. She walked around the couch, and the man pointed the gun at her head. Vickie started walking up the stairs, with the three men following. When she was halfway up the stairs, her husband came to the top of the stairway and asked what was going on. She said the men were robbing them and wanted money.

The man with the gun took her husband into the bedroom. The man with the hockey mask began ransacking the other rooms, while the man with the glasses kept her at the top of the stairs. In the bedroom, the man with the gun took some watches and a box of jewelry. He asked where David's money clip was, and he said it must be downstairs. The men with the hockey mask and the glasses took David downstairs, while the gunman remained with Vickie. She tried to pull off the man's mask, and he tried to kick her. Vickie and the gunman then went downstairs.

David located his money clip and gave the cash to the gunman. One of the men ordered David and Vickie to lie on the floor face down, and their hands were taped. After a moment, finding themselves alone but hearing footsteps upstairs, the couple ran out the back door to their neighbor's house. They were able to see a man running out their front door and down the street.

The police were called and Sheriff's Deputy Joseph Kantar arrived on the scene a minute or two after receiving the call from dispatch. The gated community had only one entrance/exit point, and he waited there. After about a minute, a black pickup truck pulled up to the gate. Kantar got out of his patrol car and started walking toward the truck. The driver then started to make a U-turn. Kantar walked up to window and asked the driver, eventually identified as Zachariah Todd Thompson, if he was lost. Thompson appeared extremely nervous and had a black ski mask rolled up on his head. When asked why he was there, Thompson told Kantar he was picking up some friends. Kantar also noticed black gloves and other black clothing, including what appeared to be another black ski mask, on the passenger seat.¹ At that point, Kantar drew his weapon, told Thompson to turn off the truck, and called for assistance.

Once Sergeant Areso arrived on the scene, Thompson was taken out of the truck. In the truck bed, Kantar saw a number of sports memorabilia items, later identified

¹ Alvarado and Rodriguez's DNA were later found on the items found in the truck. The possibility of contamination, however, could not be ruled out.

as belonging to the victims. He also found a live round of ammunition and duct tape, as well as a California ID card belonging to Eric McLoughlin, and a wallet containing Rodriguez's driver's license.

Thompson's cell phone, also found in the truck, kept ringing. He was receiving "incoming calls nonstop" from people identified on the phone as Eric and Robert. Kantar gave the displayed numbers to dispatch and asked them to track the numbers using an emergency ping. That procedure allows cellular phone companies to locate a phone's position using cell phone towers. Meanwhile, a search of the nearby area with a canine unit located a pair of gloves and a dark sweatshirt.

Alvarado and Rodriguez's vehicle was located nearby and pulled over at approximately 4:10 the next morning in San Juan Capistrano. Rodriguez was wearing glasses at the time of the stop, which Vickie later identified, although she could not identify a suspect from a photo array. Later that morning, McLoughlin was found about a half-mile away from the victims' house.

A search was conducted on the home Alvarado shared with Christina Soto² in Lake Elsinore, but nothing of particular value was found. Soto, with some reluctance, spoke to Scott McLeod, an investigator with the sheriff's department. According to McLeod, her story developed during the conversation, and some of the interview was taped and played for the jury. (Some of it also conflicted with her later trial testimony.)

Soto eventually told McLeod that McLoughlin had picked up Alvarado on the night of the robbery around 8:00 p.m. Alvarado then called her about 10:00 or 11:00 p.m. and told her to pick him up. She drove from Lake Elsinore to San Juan Capistrano, where she picked him up at a construction site, which turned out to be about a mile from the victims' home. He came "running out of the construction area" and when she asked what was going on, he said the police were after him for robbery. Alvarado talked to

² Soto and Alvarado were apparently married by the time of trial, but to distinguish her from one of the defendants, we refer to her as Soto.

both McLoughlin and Rodriguez on his cell phone, eventually returning to the construction site to pick up Rodriguez. They waited for McLoughlin, but he never arrived. After they left the area, McLoughlin sent a text message to Alvarado saying “Don’t leave me I haven’t gotten caught.” When they arrived home, Alvarado changed his clothes and left with Rodriguez to find McLoughlin.

Cell phone records were introduced at trial which show numerous calls to and from defendants and Soto on December 6 and 7. At 10:30 p.m. on the 6th, there is a text from to Soto from Alvarado giving her directions on where to pick him up. As Soto reported to McLeod, there was also a text from McLoughlin to Alvarado at 2:17 a.m. on the 7th which read: “I haven’t gotten caught. Don’t leave me.” There were several texts from Soto to Alvarado in the early morning hours asking what was going on.

At trial, Rodriguez’s mother testified that Thompson was her son’s best friend and McLoughlin was her nephew, although she did not know Alvarado. She also testified that Rodriguez, at six feet tall and over 300 pounds, could not have fit into the back of Thompson’s truck because of his size.

Both defendants were charged with two counts of first degree robbery in concert (Pen. Code,³ §§ 211, 212.5, subd. (a), 213, subd. (a)(1)(A)), counts one and two) and one count of first degree burglary. (§§ 459, 460, subd. (a).) It was alleged that as to all three counts, both defendants had been armed with a firearm (§ 12022, subd. (a)(1).) The complaint also alleged Alvarado had personally used a firearm (§ 12022.53, subd. (b)). The complaint also alleged Alvarado had been convicted of two prior strike convictions (§§ 667, subds. (d), (e)(2)(A) and 1170.12, subds. (b), (C)(2)(A)), one prior serious conviction (§ 667, subd. (a)(1)) and a prior prison term (§ 667.5, subd. (b)).

The jury found both defendants guilty on all three counts, but found the personal use of a firearm enhancement against Alvarado to be not true. The jury found

³ Subsequent statutory references are to the Penal Code.

the arming enhancements true. Alvarado subsequently admitted the truth of the prior offense allegations.

At sentencing, the court sentenced Rodriguez to 12 years and four months in prison, which consisted of the upper term of nine years on count one, a consecutive two-year term on count two, and one year and four months on the firearm enhancements. All other punishment was stayed. A number of fines and fees were imposed, and credit was awarded for time served.

As to Alvarado, the court partly granted a *Romero* motion, striking one prior offense for sentencing purposes. He was sentenced to the upper term of nine years on count one, doubled to 18 years. On count two, the court imposed one-third the midterm, doubled, of four years. Sentence on count three was stayed. He was sentenced to one year, four months for the two weapon enhancements. A total of six years was imposed for the prior prison term enhancements, resulting in a sentence of 29 years four months. A number of fines and fees were imposed, and credit was awarded for time served.

II

DISCUSSION

Defendant Rodriguez

The sole error Rodriguez asserts is the trial court's decision to sentence him to the upper term of nine years for robbery. He asserts the reasons the court expressed at sentencing were both an improper dual use of facts and unsupported by the evidence. He also argues that despite counsel's failure to object, the issue was preserved for review, or in the alternative, constituted ineffective assistance of counsel. Even assuming the issue was preserved, this argument lacks merit.

The trial court begins the sentencing process with the presumption that the middle term is the appropriate one to impose. "The midterm is statutorily presumed to be the appropriate term unless there are circumstances in aggravation or mitigation of the

crime. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 420(a).)” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583.) Further, the court may not rely on a fact that constitutes an element of the crime (or an imposed enhancement) to justify an upper term sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 350.)

The sentencing court, however, has ““wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in “qualitative as well as quantitative terms” [citation]” (*People v. Avalos, supra*, at p. 1582.) Indeed, a trial court may impose an upper term based upon *one* aggravating factor (*People v. Black* (2007) 41 Cal.4th 799, 813), without stating its reasons for “entirely disregard[ing] mitigating factors.” (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813.)

At sentencing, the only fact the trial court found in mitigation was that Rodriguez had no prior record. The court found three factors in aggravation: the manner in which the crime was executed indicated planning; Rodriguez held a position of leadership, as he was the one who knew the community’s gate code; and the defendants engaged in violent conduct, indicating they were a danger to society. The court explained: “With the exception of the infliction of great bodily injury, it is hard to imagine a more aggravating case. The defendants were armed, covered their faces with masks, burst into the home of an unsuspecting husband and wife in the evening hours and forced them to produce their cash and jewelry at gunpoint, bound them face down on the floor. The danger to both the occupants and the perpetrators is clearly self-evident.”

As noted above, a single aggravating factor is sufficient to justify an upper term sentence. (*People v. Black, supra*, 41 Cal.4th at p. 813.) The “violent conduct” factor upon which the court relied is one of the enumerated aggravating factors listed in California Rules of Court, rule 4.421(b), specifically, “violent conduct that indicates a serious danger to society.” Rodriguez argues that such conduct is inherent in the crimes

of robbery and burglary, and therefore using it to justify the upper term constitutes an improper dual use of facts. He does not, however, cite any authority for this proposition.

Section 211 describes robbery as “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.” The “force” necessary to complete a robbery need only be enough beyond that necessary to steal the property had no resistance been offered. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1259.) Here, the level of violence used was considerably more. At the very minimum, Rodriguez and his accomplices forced the victims to lie on the ground, and bound their wrists with tape. Given that this level of violence far exceeded the minimum level of force necessary to complete a robbery, the trial court’s reliance on this factor did not constitute a dual use of facts.

Rodriguez also argues there was no evidence that he would be a danger to society upon release, because he had no criminal history. Perhaps unsurprisingly, he offers no citation to authority for this vaguely absurd argument. The statutory scheme does not automatically exempt first-time offenders from the possibility of upper-term sentences. Further, the facts surrounding this crime constitute more than sufficient evidence of Rodriguez’s dangerousness. Because a single aggravating factor justifies the upper term, we need not consider Rodriguez’s remaining points.

Defendant Alvarado

Alvarado filed a notice of appeal, and we appointed counsel to represent him. Counsel filed a brief which set forth the facts of the case. Counsel did not argue against the client, but advised the court no issues were found to argue on Alvarado’s behalf. We examine the entire record ourselves to see if any arguable issue is present. (*People v. Wende, supra*, 25 Cal.3d at p. 438.)

The facts are stated in some detail above. We must view the evidence in the light most favorable to the judgment, drawing all reasonable deductions from the evidence in the judgment's favor. We must accept all assessments of credibility as made by the trier of fact, then determine if substantial evidence exists to support each element of the offense. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate "that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

There is more than sufficient evidence to find Alvarado guilty of both robbery and burglary. In brief, his DNA was found on items in Thompson's truck, which also contained items stolen in the robbery. Thompson and Rodriguez were best friends, and Alvarado was arrested with Rodriguez less than 12 hours after the robbery in the same neighborhood. Further, the text message from McLoughlin to Alvarado, asking Alvarado not to leave him and stating he hadn't been caught, implicates him in the robbery and burglary. There was more than substantial evidence from which the jury could convict.

Counsel requested we address two other issues. The first is whether the foundation for the cell phone records and other data extracted from the cell phones was sufficient. We conclude that it was. Evidence Code sections 1552 and 1553 establish evidentiary presumptions that printed representations of computer information and digital photographs and video are accurate representations of what they purport to represent. (Evid. Code, §§ 1552, 1553.) The party opposing such evidence has the burden of producing evidence to cast doubt on the accuracy of such information, and no such evidence was introduced here. (See generally *People v. Daugherty* (2011) 199 Cal.App.4th Supp. 1.)

The second issue is whether the court should have given the jury an instruction, sua sponte, that Soto's testimony should be viewed with caution because she could have been charged as an accomplice. Even in the highly unlikely event she could

have been viewed as a possible accomplice,⁴ there was no chance that any reasonable jury would have relied on her testimony alone to convict Alvarado. (See CALCRIM Nos. 334, 335.) Ample additional evidence was introduced at trial. Thus, no instruction was required.

Alvarado was given 30 days to file written argument on his own behalf. That period has passed, and we have received no communication from him. Our review of the record reveals no other arguable issues, including evidentiary or instructional errors, or sentencing irregularities.

III

DISPOSITION

The judgments against both defendants are affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.

⁴ The trial court rejected this notion at trial, indicating that it did not see any potential criminal liability for Soto.