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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.

EDGAR LOZANO IBARRA,

Defendant and Appellant.

G048605

(Super. Ct. No. 12NF2392)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Edgar Lozano Ibarra of aggravated assault on a peace officer (Pen. Code, § 245, subd. (c); all statutory references are to the Penal Code unless noted), and throwing a substance at a vehicle (Veh. Code, § 23110, subd. (a)). Ibarra contends the trial court prejudicially erred by admitting two photographic exhibits. For the reasons expressed below, we affirm.

I

FACTS AND PROCEDURAL HISTORY

Brea Police Sergeant Steve Thompson testified that on the evening of July 24, 2012, his department received a request for assistance in quelling civil unrest in the City of Anaheim. Shortly after 8:30 p.m., Thompson and his partner drove a marked, black and white Chevrolet Tahoe along Anaheim Boulevard. As they approached the intersection with Elm Street, people along the sidewalk began throwing objects that struck their vehicle. As Thompson made a U-turn he heard a loud impact to the rear of the Tahoe. The object, not produced at trial, broke the rear window. Thompson did not see who threw the object.

In the hours leading up to the incident, Thompson encountered a multitude of angry and aggressive protesters. One protester stood out, a Hispanic male in his late 20's or early 30's wearing a red shirt and jeans. Thompson saw this person approximately five times at different locations where crowds had gathered. At trial, Thompson identified Ibarra as the red-shirted person in several photographs (exhibits 8-11). One of these photographs (exhibit 9) showed Ibarra kicking at a police vehicle as it drove through an intersection.

Fountain Valley Police Officer Marco Avila stood with several officers at a gas station on the west side of Anaheim Boulevard just north of where Thompson made his U-turn at Elm Street. Around 8:40 p.m., he heard sirens and thumping noises as rocks struck the police vehicles. Avila observed Ibarra emerge from behind a parked car on the east side of the street and throw a grapefruit-sized rock at the rear window of

Thompson's Tahoe after it completed a U-turn, shattering the window. Ibarra stood in the roadway six feet behind the SUV. Ibarra then crouched down and ducked behind the hood of a parked car. When he popped back up and saw Avila, he began to walk away quickly, but then raised his hands, sat down on the ground, and submitted to arrest. When apprehended, Ibarra was wearing a white tank top and stonewashed blue jeans. Avila identified Ibarra as the person in exhibit 8.

Anaheim Police Officer Ben Starke testified tensions between the police and residents of several neighborhoods were high in the days leading up to July 24, 2012, because of two recent officer-involved shootings. Starke saw Ibarra several times on the day of the protest. Ibarra, standing outside the city council meeting at one point, was the "loudest person, the most agitated person . . . walking up and down the [police scrimmage or skirmish] line, getting in our faces, pointing at us, yelling and screaming, telling other people they don't have to take it. Just trying to agitate, get the crowd going. Just constant non-stop screaming." Later, as officers moved to arrest a person who broke a board over an officer's head, Ibarra "proceeded to follow us and continue ranting and raving, taunting us to shoot him, yelling and screaming." Ibarra "stood out so much" that the officers were "all talking about him – 'there goes red shirt.'"

Following a trial in May 2013, the jury convicted Ibarra as noted above. On June 14, 2013, the trial court imposed a three-year prison term for assault on a peace officer, but suspended execution of sentence and placed Ibarra on probation.

II

DISCUSSION

Admission of Photographic Exhibits 9 and 10

During a break in the testimony of the first witness, Sergeant Thompson, the prosecutor advised the trial court he had reviewed news clips on YouTube the night before and discovered video showing Ibarra, dressed in blue jeans and a red t-shirt, protesting, arguing with police officers, and kicking at a police vehicle as it drove by. He

sought to admit still photos drawn from these videos to prove identity, motive, and intent. The photographs were marked as exhibits 8 through 11. Defense counsel argued the prosecution could not authenticate exhibit 9 because no witness would testify they saw Ibarra kick at a car, and asserted introducing the photo “opens up a whole can of worms” because the photo did not depict whether the person’s foot made contact with the vehicle. The trial court concluded based on the prosecution’s offer of proof the photographs appeared relevant if the prosecutor established the foundation to admit them.

Thompson testified he participated in the police caravan depicted in exhibit 9 and the exhibit presented an accurate depiction of the vehicles driving through the intersection. Thompson also testified exhibit 10 presented an accurate depiction of the scene outside the city hall the same day, and the police SUV pictured was the same vehicle Ibarra struck when he threw the rock. He also explained the red-shirted individual in the photographs appeared to be the same protestor he had observed throughout the day aggressively confronting police officers. Both exhibits depicted scenes from the day of the protests. Starke, who was present at city hall the afternoon of the protests, testified he saw Ibarra aggressively confronting police officers while wearing a red shirt, and confirmed exhibit 10 was an accurate depiction of Ibarra that day, stating “[t]hat is exactly where I saw him.” Avila identified Ibarra in other photos from the day of the protests wearing a red shirt.

Ibarra contends the prosecution failed to provide the foundational testimony necessary to authenticate exhibits 9 and 10, and the evidence contained inadmissible hearsay. We review claims regarding a trial court’s ruling on the admissibility of evidence for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 203, 207; *People v. Lucas* (1995) 12 Cal.4th 415, 466.) We may not disturb the trial court’s ruling “except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v.*

Rodriguez (1999) 20 Cal.4th 1, 9-10.) We conclude the trial court did not err in admitting the evidence.

Preliminarily, Ibarra did not object when the trial court later admitted the exhibits at the close of the prosecution's case. The Attorney General persuasively argues Ibarra forfeited his claims. (Evid. Code, § 353; *People v. Riccardi* (2012) 54 Cal.4th 758, 814, fn. 27 [where court makes *in limine* ruling to admit evidence party seeking exclusion must object at the time the evidence is offered into evidence to preserve issue for appeal].) Although Ibarra objected to the exhibits earlier, the trial court had yet to rule on their admissibility, stating only that the exhibits were relevant and admissible "assuming that an appropriate foundation can be laid." Ibarra did not object to admission on any ground after the officers testified and the prosecution moved the exhibits into evidence.

Ibarra's claims also fail on the merits. The Supreme Court recently explained in *People v. Goldsmith* (2014) 59 Cal.4th 258 (*Goldsmith*), photographs and video recordings are writings (Evid. Code, § 250), which the trial court may admit into evidence if relevant and properly authenticated. (Evid. Code, §§ 350, 1401.) Authentication is defined as "the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is" or "the establishment of such facts by any other means provided by law." (§ 1400; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1434-1435 (*Valdez*) [foundation requires sufficient evidence for a trier of fact to find the writing is what it purports to be, i.e., genuine for the purpose offered].) A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 952; *People v. Cheary* (1957) 48 Cal.2d 301, 311-312.) The foundation need not be shown by the person taking the photograph or by a person who witnessed the event being recorded. (*People v. Mehaffey* (1948) 32 Cal.2d 535, 554-555; *People v. Doggett* (1948) 83 Cal.App.2d 405, 409-410; 2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 7, pp. 154-156.) The prosecution may establish the foundation

through witness testimony or circumstantial evidence. (*Valdez, supra*, 201 Cal.App.4th at p. 1435; *People v. Chism* (2014) 58 Cal.4th 1266, 1303 [photograph may be authenticated by “testimony of anyone who knows that the picture correctly depicts what it purports to represent”].) “As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document’s weight as evidence, not its admissibility.” (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321 (*Jazayeri*).)

Here, the prosecution established the necessary foundation for exhibits 9 and 10 when the officers testified they were present when the events depicted in the photos occurred and the photos accurately depicted locations and events on the day of the protests. No evidence suggested the video was “doctored.” As noted, the fact “conflicting inferences can be drawn regarding authenticity goes to the document’s weight as evidence, not its admissibility.” (*Jazayeri, supra*, 174 Cal.App.4th at p. 321; *Valdez, supra*, 201 Cal.App.4th at p. 1437 [“proponent’s threshold authentication burden for admissibility is *not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic”].)

Ibarra also suggests the exhibits constituted or contained statements subject to the hearsay rule and admission violated his Sixth Amendment confrontational rights. Ibarra did not make these claims in the trial court and thus forfeited them. (Evid. Code, § 353; *People v. Chism*, 58 Cal.4th at p. 1326.) In any event, *Goldsmith* rejected identical claims concerning red light camera photos: “The [] photographs and video introduced here as substantive evidence of defendant’s infraction are not statements of a person as defined by the Evidence Code. ([Evid. Code,] §§ 175, 225.) Therefore, they do not constitute hearsay as statutorily defined. ([Evid. Code,] § 1200, subd. (a).)” (*Goldsmith, supra*, 59 Cal.4th at p. 274.) Likewise, the determination “the [photo] evidence is not

hearsay necessarily requires the rejection of defendant's confrontation claims.”

(*Goldsmith, supra*, at p. 275; *People v. Lopez* (2012) 55 Cal.4th 569, 583.)

Finally, Ibarra contends the trial court abused its discretion under Evidence Code section 352 by admitting exhibit 9. Again, Ibarra did not make a section 352 objection in the trial court and thus forfeited the claim. (Evid. Code, § 353; *Chism, supra*, 58 Cal.4th at p. 1326.) Ibarra asserts exhibit 9 “was simply another avenue for the prosecutor to prejudice the jury by showing appellant was angry.” But these photos, including exhibit 9, corroborate the testimony of several officers identifying Ibarra at the scene and therefore are probative on the issue of identity. We cannot say the trial court abused its discretion in determining the probative value of the photo was not substantially outweighed by the probability its admission would create a substantial danger of undue prejudice, confuse the issues, or of mislead the jury. (Evid. Code, § 352; *People v. Waidla* (2000) 22 Cal.4th 690, 724 [evidence is substantially more prejudicial than probative only where it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome].)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.