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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARK CONS, Defendant and Appellant.	B230178 (Los Angeles County Super. Ct. No. GA076591)

APPEAL from a judgment of the Superior Court of Los Angeles County, Candace Beason, Judge. Modify and affirm.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Susan Sullivan Pithey and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Mark Cons appeals from a judgment after a jury convicted him of 11 counts of second degree robbery. (Pen. Code, § 211.)[1] He argues the trial court abused its discretion in denying his request to present evidence of third-party culpability and that the three counts based on a robbery of a Taco Bell restaurant were not supported by substantial evidence. We disagree and affirm the judgment, modifying some of the fees and fines.

FACTUAL AND PROCEDURAL SUMMARY

The robberies occurred within a span of two months in 2009 in the Rosemead-San Gabriel area of Los Angeles County. We review them chronologically.

The first of two robberies of the Chevron gas station located at Hellman and Del Mar Avenue took place on March 16, 2009 (count 2). It was caught on camera. The robber was described as a six-foot-tall man dressed in a green hooded sweatshirt with a front pocket, white sweatpants, and white tennis shoes. He wore black gloves and a black mask. He held a black gun in his right hand and demanded the money in the cash register. He appeared nervous, fidgeted, and threatened to shoot a customer if he moved. When the cashier handed him the money, the robber asked if this was all, and she showed him the empty drawer. He then asked for cigarettes and, after the cashier gave him a few boxes, left through a door leading toward the Pizza Hut restaurant located at Del Mar Avenue and Garvey.

That restaurant was robbed next (counts 4 and 8). The robber was described as a man six to six foot two inches tall, who wore a hooded green sweatshirt with a front pocket, black gloves, off-white sweatpants and tennis shoes. One employee later identified the robber's clothes and build as similar to those captured in a still photograph of the second Chevron gas station robbery. The other employee saw the robber's face before he pulled down his facemask. She picked defendant out of a photographic lineup based on his jaw line, but was not completely sure because on the photograph defendant

[1] Statutory references are to the Penal Code unless otherwise indicated.

had a moustache, and she did not remember the robber having one. The robber pointed a black gun at the two employees, demanded all the money they had, then jumped over the counter, repeated the demand, and threatened to shoot one of them if the other one moved. He took the cash out of the cash register himself, asked if that was all, then jumped back over the counter, and left.

The Taco Bell restaurant located on Valley Boulevard in Rosemead was robbed on March 21 (counts 11-13). The robbery was caught on camera. The shift manager described the robber as a man of medium build, wearing a green sweatshirt with a hood, blue jeans, white tennis shoes, black gloves, and a black mask. The surveillance video captured the robber entering the restaurant and walking into the employee area behind the front counter holding a black gun in his right hand. He gathered two other employees and brought them to the area behind the counter. He then demanded that the shift manager open the drive-thru cash register and give him the money, telling her to hurry up. Once the register was opened, he took the cash out of the drawer with his left hand while holding the gun in his right. He then took cash from the front register as well and left after the shift manager told him that a third cash register was not in use.

The next day, March 22, the first in a series of three robberies of Armando's restaurant on Del Mar Avenue and Valley Boulevard took place (count 5). The robber was a man described as five feet, nine inches tall, and wearing all black: a hooded sweatshirt, pants, gloves, and a mask. He held a black gun in his right hand, demanded money from the register, took the cash that was handed to him, and left.

On March 29, the Mobil gas station at 730 East Las Tunas Drive in San Gabriel was robbed by a man described as 5 feet 10 or 11 inches tall, wearing a faded black hooded sweatshirt, black pants, a belt with a buckle, gloves, and a yellow bandana over his face (count 14). The robbery was caught on camera. The cashier later identified a pair of designer jeans and a belt buckle among clothes retrieved from defendant's house. The robber held a black nine millimeter gun in his right hand and demanded money. When the cashier began handing him cash, the robber demanded the cash register drawer and took the cash himself. He also took some cigarettes.

Que's Bar & Grill on Valley Boulevard in Rosemead was robbed on April 5 (count 15). The bartender described the robber as 5 feet 10 inches tall, 20 to 30 years old, and wearing a dark sweater with a hood, a ski mask, dark pants, dark shoes and dark gloves. She described the gun as silver. The robber went behind the counter and demanded that the bartender open the cash register. He then took cash out.

The second robbery of the Chevron gas station took place on April 12 (count 3). Like the first, it was caught on video, but this time the outside surveillance camera captured the robber's face before he pulled the mask over it. A detective who investigated the robbery and who had had prior contacts with defendant recognized his body shape, narrow face, and distinctive jaw line, but did not perceive a moustache on the video. The robber was wearing white sweatpants and a green hooded sweatshirt, black gloves, dark glasses, and a baseball cap with a horse head logo on it. He demanded money, and when the cashier handed it to him, he grabbed it with his left hand.

On April 13, a detective took a still photograph from the surveillance video of the Chevron gas station robber to Sonia Aviles, a waitress at Armando's who had witnessed the first robbery there. Aviles recognized the cap the robber was wearing as having been worn by a customer who had eaten at the restaurant that day and who had looked around the restaurant while eating.

The second robbery at Armando's took place on the following day, April 14 (count 6). After that robbery, Aviles identified defendant from a photographic six pack. She was of the opinion that the customer she saw eating at the restaurant was the person who had robbed it twice. She mentioned that both the customer and the individual involved in the second robbery walked with a limp. A security guard at Hawaii Market, located across Del Mar Avenue from Armando's, had escorted defendant from the market earlier during the day on April 14. He then saw defendant running through an alley near Armando's around the time of the second robbery at that restaurant. He picked defendant's photograph from a six pack.

Two detectives conducted surveillance of defendant on April 17. They saw him coming and going from his house on Palm Avenue, one block east of Hawaii Market,

using a taxicab to get to different establishments up and down Valley Boulevard and walking around in the area. He wore a teal cap with a reddish horse head logo on it. He walked with a limp and acted as if he suspected that he was being followed.

The last robbery at Armando's occurred on April 20 (count 7). Aviles recognized the robber, his voice, and the gun he held from the previous two robberies. The robber again wore a mask and gloves; he also wore a black hooded sweatshirt with a design on the back.

On April 23, defendant was arrested and his house was searched. The police retrieved a Santa Anita Racetrack baseball cap with a horse head logo on it, white sweatpants, black designer jeans with a belt, several pairs of gloves, and sunglasses. At the time of his arrest, defendant had a moustache.

Defendant was originally charged in two separate cases, which were later consolidated. A firearm enhancement was alleged as to 13 of the 15 counts with which defendant was charged. A prior serious felony conviction and a prior prison term also were alleged. Counts 1, 9, and 10 were dismissed before the case was submitted to the jury. The court denied the defense's request to introduce evidence of third-party culpability. At trial, the defense elicited evidence that in 2007 the Santa Anita Racetrack had given fans 25,000 promotional caps like the one found in defendant's house. Defense counsel argued that defendant had been misidentified.

The jury convicted defendant of 11 of the remaining 12 counts but deadlocked on count 15 (the robbery of Que's Bar & Grill). It found true the firearm allegations on all 11 counts.[2] Defendant waived jury trial on the priors, and the court found them true.

Defendant was sentenced to 55 years and four months in prison: 20 years for the base count 2, comprised of the upper term of five years doubled to 10 years for the strike prior with a consecutive 10 years for the firearm enhancement; 30 years and four months altogether for counts 3, 5, 6, 7, 8, 11, and 14 to run consecutively to count 2, comprised

[2] The information did not allege a firearm enhancement as to count 14, but the verdict form did. Defendant does not raise lack of notice of this enhancement as an issue on appeal.

of one year (one-third of the mid-term of three years) plus three years and four months (one-third the 10-year firearm enhancement) for a total of four years and four months on each of these counts; and an additional five-year enhancement under section 667, subdivision (a)(1). Defendant received concurrent terms of three years with a consecutive 10-year firearm enhancement for counts 4, 12, and 13. He was given credit of 685 days, including 89 days of conduct credit. The court also imposed various fees and fines.

This timely appeal followed.

DISCUSSION

I

Defendant contends that the trial court abused its discretion and deprived him of the right to present a defense by denying his request to introduce evidence that the robberies could have been committed by his girlfriend's father.

Third-party culpability evidence is admissible if it is "'capable of raising a reasonable doubt of defendant's guilt.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 372, quoting *People v. Hall* (1986) 41 Cal.3d 826, 833.) "'[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.'" (*Ibid*.) In addition, evidence that produces speculative inferences is irrelevant, and a threshold evidentiary ruling to exclude it does not invade the province of the jury. (*Id.* at p. 373.) We review the exclusion of such evidence for abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th 547, 558.)

Defense counsel's request was supported by an investigator's report of an interview with defendant's girlfriend, Thaisse Glave. She reportedly stated that her father committed many robberies in the 10 years he lived with her and defendant, and she remembered several times during the years when he would run into the house, lock the door, and look out of the window at police cars driving down the street with lights and

sirens on. He would then take wads of cash out of his pocket. Glave also told the investigator that her father had access to defendant's clothes and looked similar to defendant in height and build. The court concluded that the investigative report did not specifically connect any of these events to the time of the robberies. The court denied the request without prejudice to renewing it if additional evidence became available or Glave agreed to testify and expanded on her statement.

At an Evidence Code section 402 hearing later on the same day, Glave testified that her father, William Poplin, lived with her and defendant when he was out of prison, including the period between February and April 2009. Poplin borrowed defendant's clothes, and he had a Santa Anita Racetrack baseball cap with a horse on it. Poplin was taller than defendant, but the two looked alike and had been mistaken for each other in the past. Glave invoked her Fifth Amendment right against self-incrimination as to questions having to do with the period during which the charged robberies occurred, and the court declared her unavailable. Poplin also invoked his right against self-incrimination.

The defense offered no direct or circumstantial evidence linking Poplin to the actual commission of any of the charged robberies. Glave's testimony that Poplin was a criminal and her hearsay statement to the investigator that Poplin committed many robberies over the years was temporally unspecific and thus amounted to inadmissible character evidence. (See *People v. Lewis, supra*, 26 Cal.4th at p. 373.) Poplin's presence in the San Gabriel area at the time of the robberies was evidence he had opportunity to commit them, but evidence of mere opportunity was insufficient to create reasonable doubt. (See *id.* at p. 372.)

Glave's allegation that Poplin resembled defendant and had access to his clothes produced only a remote and speculative connection to the robberies. There was no evidence that Poplin wore any of the clothes worn in the robberies, with the possible exception of the Santa Anita Racetrack cap, which he allegedly owned. The cap was caught on film in the second Chevron gas station robbery. But in that robbery and in other instances when defendant was identified as the person wearing the baseball cap (as

a customer at Armando's or a person under surveillance), his face was visible, and his identification was not based solely on the cap or on his general build.

The allegation that Poplin and defendant resembled each other was vague, and Glave described Poplin very broadly as "tall and skinny." The only identified facial similarity with defendant was that each had a moustache. Yet the identification of defendant at trial was not based on his having a moustache at the time of the robberies. In fact, defendant argued he could not be the robber because the robber apparently did not have a moustache, and defendant had one at the time of his arrest.

We conclude that defendant failed to offer "'direct or circumstantial evidence linking the third person to the actual perpetration of the crime'" sufficient to raise a reasonable doubt about defendant's guilt. (*People v. Lewis, supra,* 26 Cal.4th at p. 372.) The trial court did not abuse its discretion in excluding the third-party culpability evidence.

II

Defendant challenges the sufficiency of the evidence in support of counts 11 through 13, all of which are based on the Taco Bell robbery. He argues that the testimony and surveillance video established "the most generic of robbers: a person wearing generic jeans, a dark hoodie, a mask, and gloves."

"[W]e review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) "'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 reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]' [Citation.]" (*Id.* at pp. 792-793.)

Thus, we may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis whatever is there substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

We conclude that there is substantial evidence to support defendant's conviction of the Taco Bell robbery. The surveillance film and the shift manager's testimony established that the Taco Bell robber wore a dark green hooded sweatshirt. The robber in the Chevron gas station robberies, both caught on film, also wore a dark green hooded sweatshirt. Defendant does not challenge the sufficiency of the evidence implicating him in the Chevron gas station robberies. The jury could view the extensive surveillance footage of these three robberies and conclude that the same dark green hooded sweatshirt with a front pocket was worn in all three robberies. From the video recording of these three robberies, as well as the recording of the Mobil gas station robbery, the jury could conclude that the robber's build, posture, gait, gestures, and his tendency to grab the cash with his left hand, were sufficiently similar as to implicate defendant in all three robberies. That the jury could also have reached a contrary conclusion based on this evidence does not require reversal of defendant's conviction of counts 11 through 13. (See *People v. Stanley*, *supra*, 10 Cal.4th at p. 792.)

III

On the record, the trial court imposed "a $40 security fee per count, a $30 criminal conviction fee, and a $10 theft fee each per count. So that's a total of $80 per count." The minute order indicates that the court imposed for each count a $40 court security fee under section 1465.8, subdivision (a)(1); a $30 criminal conviction fee under Government Code section 70373; and a $10 crime prevention fund fine under section 1202.5 with a $28 penalty assessment. The abstract of judgment in turn lists a $560 court security fee, a $420 criminal conviction fee, and a $532 fine under section 1202.5.

The parties agree that the amount of these fees and fines is excessive. Section 1202.5, subdivision (a) states: "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211 . . . , the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." The $10 crime

prevention fine is to be imposed only once per case. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) Thus, the fine imposed in this case should be reduced from $532 to $10.[3]

The total amount of the court security and criminal conviction fees on the abstract of judgment appears to have been erroneously computed by multiplying the base amount of these fees 14 times, even though defendant was only convicted of 11 counts. The abstract of judgment must be amended to correct this clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

[3] *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1532, held that the $10 fine is subject to additional penalty assessments based on a defendant's ability to pay. Here, the trial court did not indicate on the record that it intended to impose any penalty assessments, but the minute order added $28 in such assessments on the $10 fine for each count, and the $532 listed on the abstract of judgment indicates that the amount of the fine was computed by erroneously multiplying $38 by 14 counts. The court's oral pronouncement, rather than its entry in the minute order and abstract of judgment, constitutes the judgment. (*People v. Blackman* (1963) 223 Cal.App.2d 303, 307.) On appeal, the Attorney General agrees that the amount of the fine should be reduced to $10. Neither side addresses the issue whether any mandatory penalty assessments should have been imposed on the fine, and we do not consider this issue.

DISPOSITION

The judgment is affirmed with the modification that a single $10 fine under section 1202.5 must be imposed. The abstract of judgment must be corrected to reflect this modification and to reduce the amounts of fees to $440 under section 1465.8 and $330 under Government Code section 70373.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.