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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH WALKER,

Defendant and Appellant.

B233404

(Los Angeles County Super. Ct.
No. BA377783)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Eric E. Reynolds and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joseph Walker was found guilty by jury of first degree burglary in violation of Penal Code section 459.¹ Defendant was sentenced to the low term of two years in state prison.

In his timely appeal from the judgment, defendant argues (1) the accuracy of an out-of-court identification of defendant was not sufficient to constitute substantial evidence after a witness failed to make an in-court identification, (2) the trial court abused its discretion by denying probation on the ground that defendant continued to assert his innocence after conviction, and (3) the \$10 crime prevention fee imposed under section 1202.5 must be reversed because of an absence of evidence of an ability to pay. We affirm.

FACTS

Jorge Gonzalez returned to his home on West 56th Street around 9:00 a.m. on October 29, 2010. As he opened the door, Gonzalez saw three men inside his home without permission, wearing gloves on their hands, and taking property from the residence. As Gonzalez put the key into the door, the men began to scatter. Gonzalez called for assistance to his brother and a friend who were in front of his house in a truck. Defendant exited the house through a kitchen window with Gonzalez's son's laptop computer in his hands. Defendant dropped the computer and a cell phone.

Defendant fled from the scene in a black Lincoln Continental. Gonzalez notified the police, who arrived three hours later. He gave officers the cell phone defendant dropped at the house. The officers showed Gonzalez a photo of defendant on the cell phone, which Gonzalez identified as one of the burglars.

Officer Miguel Gutierrez assisted in the investigation of the burglary. The cell phone dropped at the scene had a contact for a person identified as "mama." The number for "mama" led to a residence on 64th Street. Officer Gutierrez determined that

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

defendant lived at the 64th Street location, obtained his photograph, and placed it in a photo lineup, which he showed to Gonzalez one day after the burglary. Gonzalez pointed to defendant's photograph and said, "This is the person." He made the identification within seconds and without hesitation. Defendant was arrested at home on 64th Street. A search of his residence did not lead to discovery of property taken in the Gonzalez burglary.

Eric Wahlberg is a police surveillance specialist for the Los Angeles Police Department. Pictures on the phone dated back to 2009. The last call on the phone was on the morning of October 29, 2010, and was made to a contact identified as "mama."

Officer Easley De Larkin assisted in the investigation. He was present when Gonzalez identified defendant's photograph from the six-pack photo lineup on October 30. Gonzalez made the identification "within a second or two" of seeing the lineup card. Defendant's photograph in the lineup did not come from the cell phone dropped at the scene of the burglary. During the investigation, Gonzalez told Officer De Larkin that he recognized defendant as someone who had grown up with his now-deceased son.² The officer saw Gonzalez identify defendant, without hesitation, at the preliminary hearing. By the first trial setting, Gonzalez was reluctant to testify, complaining about the amount of work he missed while coming to court. He said he was no longer sure of his identification of defendant. One photo on the cell phone, taken on October 23, 2010, depicted three knives, a screwdriver, and another object with an unusual handle, which Officer De Larkin identified as burglar tools.

Defendant's mother, Trenice McIntyre, testified defendant lost his phone and never found it. Someone called on October 29 at 10:00 a.m., stating they had found the phone and were calling the police. McIntyre told a defense investigator defendant lost the phone on Halloween. Defendant was with his mother, planning for a funeral, on October 29.

² Gonzalez made a similar statement to the officer who first responded to the burglary call. By the time of trial, Gonzalez denied he recognized defendant from the connection to his son.

Defense

Dr. Michael Eisen, holder of a Ph.D. in psychology, testified to factors relevant to the accuracy of eyewitness identification. It is possible that a photographic identification could be influenced by a witness having previously seen another photograph of the same person. Witnesses may assume the police have a suspect in a lineup, which increases the likelihood of someone being identified. Witnesses can and do make correct identifications, but they also do make mistakes.

Defendant denied participation in the burglary. He was home with his mother on October 29, which was the day she told him his grandfather had died. He had lost his cell phone on the way to school on October 27, but he never attempted to recover it. The shoe left at the burglary scene was not his, nor was it his size. The picture from his phone that Gonzalez identified was of defendant's cousin.

DISCUSSION

I

Defendant argues there is insufficient evidence to support his conviction because of Gonzalez's failure to make an unequivocal identification at trial. More specifically, defendant contends there is no substantial evidence to demonstrate that the out-of-court identifications made by Gonzalez were accurate, citing *People v. Cuevas* (1995) 12 Cal.4th 252 (*Cuevas*).

A. Standard of Review

“In reviewing the sufficiency of the evidence to support a conviction, we determine “whether from the evidence, including all reasonable inferences to be drawn

therefrom, there is any substantial evidence of the existence of each element of the offense charged.”” (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13, quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022.) Under such standard, we review the facts adduced at trial in the light most favorable to the judgment, drawing all inferences in support of the judgment to determine whether there is substantial direct or circumstantial evidence the defendant committed the charged crime. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury’s conclusions. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)” (*People v. Misa* (2006) 140 Cal.App.4th 837, 842.)

Where the prosecution relies only on an out-of-court identification to prove identity, we individually assess “the circumstances of the out-of-court identification to determine whether it is sufficient to support a criminal conviction” (*Cuevas, supra*, 12 Cal.4th at pp. 271-272.) In determining the sufficiency of the evidence, we “take into account the many varied circumstances that may attend an out-of-court identification and affect its probative value. These circumstances include, for example: (1) the identifying witness’s prior familiarity with the defendant; (2) the witness’s opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness has a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and any accompanying description of the crime. (See also CALJIC No. 2.92 (5th ed. 1988) [listing factors relevant to reliability of eyewitness identification].) Evidence of these circumstances can bolster the probative value of the out-of-court identification by corroborating both that the witness actually made the out-of-court identification (e.g., testimony by the police officer or other person to whom the statement was made) and that the identification was reliable (e.g., evidence that the witness was present at the scene of the crime and in a position to observe the perpetrator, evidence that the witness had a prior familiarity with the defendant, or evidence that the witness had no self-serving motive to implicate the defendant).” (*Cuevas, supra*, at p. 267.)

B. Analysis

Defendant's challenge to the sufficiency of the evidence is without merit. This is not a case in which identification was based only on an out-of-court identification. The record consists of both direct and circumstantial evidence of identification, which easily satisfies the substantial evidence standard of review.

As the trial court noted at the time of sentencing, the record contains abundant evidence of identification. Defendant was caught in the act of the burglary. He left the residence through a window and dropped his cell phone at the scene. Defendant lived in the neighborhood of the burglary. Defendant presented a dubious explanation for how he lost his phone and no cogent reason for why he made no effort to recover it. Gonzalez identified a photo of defendant from the cell phone on the day of the burglary. He made an unequivocal photo identification of defendant the day following the burglary. Gonzalez made another identification of defendant at the preliminary hearing. He confirmed that identification to an officer outside of court. At trial, he testified that defendant looked like one of the burglars, although he was not positive. The record contains evidence that Gonzalez recognized defendant as someone who grew up around his deceased son. Gonzalez had no apparent motive to misidentify defendant as one of the burglars. To the extent Gonzalez was equivocal about his identification of defendant at trial, the jury could easily infer that equivocation was the result of being fed up with the repeated interruptions to his work and personal life resulting from the case.

II

Defendant's second contention is that the trial court abused its discretion in denying probation on the ground that defendant continued to assert his innocence after conviction of first degree residential burglary. Defendant reasons that case law prohibits a finding of lack of remorse based on a defendant's failure to confess after conviction.

A. Standard of Review

“The grant or denial of probation is within the trial court’s discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.)” (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282 (*Aubrey*).) “All defendants are eligible for probation, in the discretion of the sentencing court (*People v. Phillips* (1977) 76 Cal.App.3d 207, 213), unless a statute provides otherwise. Some statutes provide ineligibility is mandatory, while others provide a defendant is ineligible except in unusual cases where the interests of justice would best be served. (E.g., compare § 1203, subd. (k) with § 1203, subd. (e).) Section 462, subdivision (a) contains a *discretionary* prohibition against probation for defendants who are convicted of residential burglary: ‘Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of a burglary of an inhabited dwelling house’” (*Aubrey, supra*, at p. 282.)

California Rules of Court, rule 4.413 sets forth the circumstances in which the presumption against probation is overcome. The trial court examines the record to determine if the case is substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and “the defendant has no recent record of committing similar crimes or crimes of violence[.]” (Cal. Rules of Court, rule 4.413(c)(1)(A).) The court also determines if there is a basis for reducing a defendant’s culpability if the offense was committed under provocation, coercion or duress, the defendant has a mental health issue, or the defendant is “youthful or aged, and has no significant record of prior criminal offenses.” (*Id.*, rule 4.413(c)(2).)

“If a court determines the presumption against probation is overcome, it evaluates whether or not to grant probation pursuant to California Rules of Court, rule 4.414.” (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*).) Suitability for probation does not overcome a statutory presumption against probation, the scope of “unusual cases” and “interests of justice” are narrowly construed, and California Rules of Court,

rule 4.413 applies only where the crime is out of the ordinary or there is reduced “moral blameworthiness.” (*Stuart, supra*, at p. 178; *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1229.)

Among the factors a trial court shall consider affecting the decision to grant or deny probation include the following: “(a) . . . [¶] (5) The degree of monetary loss to the victim; [¶] (6) Whether the defendant was an active or a passive participant; [¶] (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur[.]” (Cal. Rules of Court, rule 4.414.) In addition, as to the defendant, the court shall consider “[w]hether the defendant is remorseful[.]” (*Id.*, rule 4.414(b)(7).)

B. Argument and the Ruling of the Trial Court

The trial court indicated it read and considered the People’s sentencing memorandum and the probation report. The People requested the midterm of four years in state prison, while the probation report recommended probation based on defendant’s age and lack of criminal record. The court’s tentative decision was to deny probation and impose the low term of two years, taking into account defendant’s lack of record and youthful age. The court noted that defendant did not accept responsibility for his actions and testified in a manner contrary to the physical evidence. The court allowed the parties to argue before making a final ruling.

Defense counsel argued at length in favor of a grant of probation. The trial court pointed out the presumption against probation for residential burglary. Defense counsel requested the court to find this to be an unusual case and noted the prosecution had made a probationary offer to settle the case before trial. Defendant addressed the court, stating he had no criminal record, he cooperated in the arrest, and had not been in trouble while in custody. He would not admit guilt but did accept responsibility for the situation, stating that people can be mistaken as to identification.

The trial court directed the People to address the issue of whether to grant probation. The prosecutor relied on section 462's presumption against probation. While defendant was "a bright young man," he was not accepting responsibility for the burglary he committed. The victim lost his property and did not get it back. The prosecutor stated that defendant was involved in "a prior police altercation a month earlier" without further explanation.

The trial court allowed defense counsel to respond. She stated it is very unusual for a defendant with no criminal record to be convicted of a serious felony. Defense counsel then expressed the opinion the evidence was insufficient to support the conviction. The court replied, "There was more than sufficient evidence for the jury."

Expressly applying the factors set forth in California Rules of Court, rule 4.413, the trial court found the case to be more serious than the typical burglary, because multiple people were involved and a substantial amount of property was taken. The court recognized that defendant is young and has no significant record, but those facts were insufficient to justify overcoming the statutory presumption against probation.

The trial court further concluded that even if the presumption against probation were overcome, probation was not appropriate under the criteria of California Rules of Court, rule 4.414. The court reviewed the factors in support of and against probation, ultimately concluding "the strongest factor that weighs against probation is the lack of remorse. It is clear to the court he committed the offense; that the cell phone did not just land by fortuity in that location; that it wasn't left there by somebody who had taken it from him or picked it up off the street. That is not reasonable, that is unbelievable. It is believable to the court that the defendant committed the offense. He is entitled to present a defense. I am not holding it against him. What I am indicating is that he's not showing any remorse."

C. Analysis

The trial court did not abuse its discretion in denying probation. It is undisputed that probation was presumptively unavailable to defendant. The court created a thorough record establishing familiarity with the controlling criteria. Applying California Rules of Court, rule 4.413, the court reasonably concluded the case was a serious burglary due to the number of perpetrators and the loss to the victim in excess of \$5,000. There is substantial evidence to support these findings, which provide a reasonable basis for the court's conclusion that the presumption against probation was not overcome by defendant. Defendant's lack of remorse was not stated as a factor in this decision. His contention that the court abused its discretion by relying on the absence of remorse as a basis to deny probation is therefore incorrect.

The trial court did rely on a lack of remorse in its alternative ruling that even if defendant were considered for probation, he was not an appropriate candidate. This was proper, as lack of remorse is one of the criteria affecting probation under California Rules of Court, rule 4.414(b)(7).

Defendant relies on *People v. Coleman* (1969) 71 Cal.2d 1159, 1168 (*Coleman*), overruled on other grounds in *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 966, footnote 6, to support his contention. *Coleman* was a death penalty case in which the prosecutor argued on the issue of penalty the defendant's refusal to admit his guilt demonstrated his lack of remorse. *Coleman* held the argument was improper: "The jury may properly consider the defendant's remorse or lack thereof in fixing the penalty. Evidence on that issue is therefore admissible, and counsel may comment thereon. It does not follow, however, that every inference bearing on the question of remorse may be urged upon the jury by counsel. It is fundamentally unfair to urge, as was done here, that a defendant's failure to confess his guilt after he has been found guilty demonstrates his lack of remorse and that therefore such failure should be considered as a ground for imposing the death penalty. Even after he has been found guilty, a defendant is under no obligation to confess, and he has a right to urge his possible innocence to the jury as a

factor in mitigation of penalty. [Citation.] A defendant would be placed in an intolerable dilemma if his failure to confess following conviction could be urged at the trial on the issue of penalty as evidence of lack of remorse. To silence such argument, a defendant who had denied his guilt at the trial on the issue of guilt would have to admit or commit perjury at the trial on the issue of penalty, and he could do neither without in effect forfeiting his right to urge the trial court on motion for new trial to reweigh the evidence on the issue of guilt. We conclude that any argument that failure to confess should be deemed evidence of lack of remorse is not permissible.” (*Coleman, supra*, at pp. 1168-1169.)

As our Supreme Court has subsequently observed, presence of absence of remorse is universally recognized as relevant to a jury’s determination of punishment. (*People v. Frye* (1998) 18 Cal.4th 894, 1019-1020; *People v. Marshall* (1996) 13 Cal.4th 799, 855.) California Rules of Court, rule 4.414 embodies that principle. In determining that defendant was not suitable for probation, the trial court properly considered defendant’s preposterous insistence that he was the victim of circumstances in the face of compelling proof of guilt. Defendant did lack remorse for his conduct in this case. No abuse of discretion is shown in this alternative ruling of the trial court.

III

Defendant’s final argument is that the \$10 crime prevention fee imposed under section 1202.5 must be reversed because the trial court made no finding of ability to pay and the record contains no evidence of ability to pay. The premise of the argument is faulty. At sentencing, the court stated, “Based on ability to pay, including future earnings capacity,” it was imposing several fines and fees, including “a crime-prevention fine of \$10 plus penalty assessments.” The necessary finding was made by the court.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.