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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOAQUIN ESTEBAN URENA, Defendant and Appellant.	B278715 (Los Angeles County Super. Ct. No. BA437356)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed with directions.

Correen Ferrentino, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Joaquin Esteban Urena (Urena) guilty of multiple counts of robbery and found true gun enhancements. Urena contends that his convictions must be reversed because there was insufficient evidence to identify him as one of the robbers. We disagree with this contention. However, we remand the matter for reconsideration of Urena's sentence under Senate Bill No. 620 (2017–2018 Reg. Sess.). We otherwise affirm the judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND

I. The robberies

Urena and codefendant Alfredo Perez, who is not a party to this appeal, were charged and jointly tried by separate juries for armed robberies. The victims were unable to identify Urena or Perez because the robbers disguised themselves. As we now detail, the prosecution instead relied on distinctive clothing, phone records, and DNA evidence to link Urena to these crimes.

A. *The first taco stand robbery*

Maria Lozano and her husband Jose Trejo ran a taco stand on 8th Street in Los Angeles. On June 11, 2015, at approximately 10:40 p.m., two Latino men robbed them at gunpoint, taking Trejo's wallet and $400 to $500 from Lozano. Both men disguised themselves with baseball caps and bandanas. One man, armed with a handgun, wore a gray and red San Francisco 49ers cap and a black and white bandana with a skull on it. The other man, armed with a shotgun, wore a black and gray Raiders cap and a dark bandana.

The man wearing the 49ers hat also took a wallet belonging to Efrain Enriquez, who was buying food at the stand.[1]

After taking the money and wallets, the men ran to a white Chevy Astro van with a ladder on its roof and "a cone sticking down." The last three numbers of the license plate were 383.

B. *The second taco stand robbery*

The same evening, at approximately 10:45 p.m., Luis Alberto Lemus[2] and Sayra Ordonez were working at another taco stand at 4283 Union Pacific in Los Angeles when a white van with a ladder on its roof parked nearby. A dark-skinned man wearing a round hat and a sleeveless shirt stayed in the van while two other men got out. One of the men who exited the van looked Latino and wore a bandana decorated with "water drops" or "bean grains" and a gray hat. Holding a gun, this man demanded money from Lemus. The second man wore a 49ers cap, a bandana, and carried a shotgun. They took $200 from Ordonez.

C. *The investigation*

Deputy Sheriff Fernando Galvan was on patrol in the early morning hours of June 12, 2015. The deputy spotted a white van with a ladder on its roof and a parking cone in a parking lot near a taco stand, which was within three to five miles of where the robberies occurred. The deputy watched the van for about 15 to

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[1] Enriquez had $47 in his wallet.

[2] Lemus is also referred to as Diaz in the record and in the briefs.

20 minutes and then conducted a traffic stop.[3] Only Alfredo Perez, wearing a white sleeveless shirt, was in the van.[4] He had $85 in his pocket. Four cell phones, a 49ers hat, a Raiders hat, bandanas, $358, and a round straw hat were in the van. The bandanas were "wet as if someone had perspired on them." The money was folded in the way Ordonez said she customarily folded money. No weapons were in the van.

One cell phone was registered to an Adrian Perez. Someone used this phone to call a phone associated with Urena on the day of the robberies. The contact label attached to Urena's number was "49er." The phone registered to Urena made several calls to Adrian Perez.

Urena wore a 49ers hat in a photograph on his Facebook page. A bandana identical to the one officers recovered from the van was depicted in another photograph. The bandana had a large skull and "2003" on it.

A DNA sample from the 49ers cap contained a mixture of two contributors, but Urena was the major contributor. The DNA sample from one side of the bandana with a skull graphic had a mixture of three contributor profiles, and Urena was the major contributor. The random match probability estimates for the cap and the bandana were one in 40 quintillion that the DNA belonged to Urena. The black and white bandana without a skull graphic had a mixture of three contributors, and the major profile

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[3] During the time Deputy Galvan was watching the van, he did not see anyone get out of it.

[4] Lemus could not identify Alfredo Perez, but he did identify the van.

matched Alfredo Perez, but Urena was excluded from the mixture overall.

II. Procedural background

On July 26, 2016, a jury found Urena guilty of five counts of second degree robbery. (Pen. Code, § 211.)[5] As to all counts, the jury also found true principal-armed (§ 12022, subd. (a)(1)) and personal-use (§ 12022.53, subd. (b)) gun allegations.

On October 13, 2016, the trial court sentenced Urena to 23 years eight months, which included terms on the gun enhancements.

DISCUSSION

I. Sufficiency of the evidence

Urena contends there is insufficient evidence he participated in the robberies. We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains 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. McCurdy* (2014) 59 Cal.4th 1063, 1104.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the

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[5] All further statutory references are to the Penal Code.

conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 106.) Where the circumstances reasonably justify the jury's verdict, we may not reverse the judgment simply because the circumstances can be reconciled with a contrary finding. (*Ibid.*; *Zamudio*, at pp. 357–358.)

Here, Urena argues that the circumstantial evidence merely showed that a common sports hat with his DNA on it was in the van, but this does not establish he participated in the robberies. We disagree. The totality of the evidence raised the reasonable inference that Urena participated in the robberies. (See generally *People v. Barnum* (1957) 147 Cal.App.2d 803, 805 [identity of perpetrator may be established entirely by circumstantial evidence].) That is, the robbers drove a distinctive white van with a ladder on top. Not long after the robberies, Alfredo Perez was stopped in a van matching that description and having 383 as the last three numbers of the license plate. Lemus also identified the van. Although the victims could not identify Alfredo Perez as a participant in the robberies, Alfredo Perez matched the description of the getaway driver in that he was wearing a sleeveless shirt like the one Lemus said the getaway driver wore. Hence, there was convincing evidence that this van was the one involved in the robberies.

Inside the van was apparel that victims said the robbers wore: a red and gray San Francisco 49ers cap, a gray and black Raiders cap, and bandanas. Two of those items that, inferentially, a robber wore had Urena's DNA on them: the 49ers cap and the bandana with a skull graphic. Evidence other than

the DNA connected Urena to those items: Urena had photographs on his Facebook page of him wearing a 49ers cap identical to the one the robber wore and of an identical skull bandana hanging on a wall.

A cell phone found in the van contained contact information for "49er." The phone number associated with this contact was registered to Urena. Urena made phone calls to the cell phone on the day of the robberies.

In sum, a robber wore a 49ers hat and a distinctive skull bandana. In photographs, Urena had an identical hat and bandana. Moreover, Urena's affinity for the 49ers was such that he was named "49er" in a cell phone found in the van. Urena's DNA was on the 49ers hat and bandana found in the van. A reasonable inference was that the hat and bandana in the van belonged to Urena and that he wore them *during* the robberies. Therefore, after further review, this evidence was more than sufficient to show that Urena participated in the robberies.

II. Senate Bill No. 620

Urena's sentence included a 10-year term and two consecutive terms of three years four months for firearm enhancements, all under section 12022.53, subdivision (b). When that sentence was imposed in 2016, the trial court lacked discretion to strike the gun enhancements. Urena contends, and the People concede, that he is now entitled to the benefit of newly amended section 12022.53, subdivision (h), which became effective January 1, 2018 and which provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant

to any other law." (See generally *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507 [Senate Bill No. 620 applies retroactively to nonfinal convictions]; *People v. Woods* (2018) 19 Cal.App.5th 1080 [same].)

The matter must be remanded so that the trial court can exercise its informed discretion in making its sentencing choices. We offer no opinion as to how its discretion should be exercised.

DISPOSITION

The sentence is vacated and remanded for reconsideration of the sentence. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.