Filed 7/23/18 P. v. Gant CA2/5

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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. IVAN DEVON GANT, Defendant and Appellant.	B282929 (Los Angeles County Super. Ct. No. TA140902)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Shultz, Judge. Affirmed.

Barbara A. Smith, 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, Senior Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant Ivan Devon Gant of second degree robbery. (Pen. Code, §§ 211, 212.5, subd. (c).)[1] The jury also found true a personal handgun use enhancement allegation. (§ 12022.53, subd. (b).) The trial court found defendant had a prior "strike" conviction (§§ 667, subd. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)(1)). The court imposed a 21-year state prison sentence.

On appeal, defendant argues the evidence was insufficient because the victim's eyewitness identification was unreliable. Defendant also argues this case should be remanded so that the trial court may exercise its discretion to dismiss the firearm enhancement under subdivision (h) of section 12022.53 as amended by Senate Bill No. 620 effective January 1, 2018. We conclude substantial evidence supported defendant's conviction. We further conclude no purpose would be served by a remand. Accordingly, we affirm the judgment.

II. THE EVIDENCE

Danny Bradfield left his daughter's house at 3:00 a.m. on July 27, 2016, to obtain some items from his truck and move it from one side of the street to the other. He was sitting in the front passenger seat looking through documents in the glove compartment when a man he later identified as defendant

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[1] Further statutory references are to the Penal Code.

approached. Defendant opened the door, stuck a gun in Bradfield's chest and said, "I need that out you, OG." Defendant's face was about a foot from Bradfield's. The vehicle's dome light was on but "[n]ot very bright." While Bradfield focused on defendant's face, defendant removed jewelry from Bradfield's finger, wrist, and neck. An unidentified accomplice, also armed with a gun, stood outside the truck.

Five days later, on August 1, 2016, Bradfield met with Detective Michael Lanza at the police station. Detective Lanza showed Bradfield a photographic lineup of six men including defendant. Bradfield chose defendant's photograph right away, without hesitation. He was 100 percent certain defendant was the robber. Bradfield confirmed that identification at trial. He testified he was 100 percent certain defendant was the man who robbed him. Bradfield also identified defendant in court as the robber.

Defendant's girlfriend Tierria Mack testified as a defense witness. She stated that in July 2016, she and defendant resided in a small room at defendant's mother's house. She later testified that she did recall the evening of July 26, and defendant went to bed with her. According to Mack, she told Officer Delores Lett that defendant was with her that night. Officer Lett testified that on August 3, 2016, she telephoned Mack and asked if she could confirm that defendant was at home at 3:00 a.m. on July 27. Mack paused and then stated, "He's never out that late."

Detective Lanza testified that he interviewed defendant some time after the robbery. Defendant stated he stayed at both his mother's house and his grandmother's house and that on the night of the incident, he had stayed at his grandmother's house. Defendant's mother's house and grandmother's house were in

close proximity to one another. Officers searched both residences. They did not find any items connecting defendant to the crime.

II. DISCUSSION

A. *Bradfield's Eyewitness Identification of Defendant*

Defendant asserts insufficiency of the evidence in that the only thing connecting him to the crime was Bradfield's unreliable identification of him as the perpetrator. We conclude substantial evidence supported defendant's conviction.

The standard of review for sufficiency of the evidence is well-established: "We 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] In determining whether a reasonable trier of fact could have found [the defendant] guilty beyond a reasonable doubt, we presume in support of the judgment '"the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Nelson* (2016) 1 Cal.5th 513, 550.) "[I]t is the jury, not the reviewing court, that must weigh the evidence, resolve conflicting inferences, and determine whether the prosecution established guilt beyond a reasonable doubt. [Citation.]" (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.)

"Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585; see also Evid. Code, § 411.)

"Moreover, a testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court. [Citations.] Indeed, 'an out-of-court identification generally has *greater* probative value than an in-court identification, even when the identifying witness does not confirm the out-of court identification: "[T]he [out-of-court] identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [Citations.] . . ." [Citations.]' [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) Any doubts about the identification are for the trier of fact to resolve. (*People v. Elliott, supra*, 53 Cal.4th at p. 585; *People v. Rist* (1976) 16 Cal.3d 211, 216.) "Confusion, or lack of clarity and positiveness in a witness' identification testimony goes to the weight, not the admissibility of the testimony. [Citations.] Defendant's identification was thus a question for the trier of fact and having been resolved on substantial evidence must be sustained on appeal." (*People v. Rist, supra*, 16 Cal.3d at p. 216.) "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, [and] where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

Under the authority cited above, Bradfield's out-of-court identification of defendant alone was sufficient to support the verdict. Moreover, Bradfield confirmed that identification at trial. He was at all times 100 percent certain defendant was the perpetrator.

Defendant argues Bradfield's out-of-court identification was inherently improbable because Bradfield did not see a tattoo on defendant's face or a missing front tooth.[2] But Bradfield testified defendant's hair was hanging down around his face during the robbery. Bradfield further testified while *outside* the truck, before he could see defendant's mouth, defendant said, "I need that out you, OG"; but once *inside* the vehicle, defendant never opened his mouth again. That Bradfield did not see a tattoo on defendant's cheek or a missing front tooth did not render his identification unreliable; these were issues for the trier of fact to weigh. (*People v. Williams* (1973) 9 Cal.3d 24, 37, disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Gonzales* (1968) 68 Cal.2d 467, 472.) The jury resolved against defendant the question of Bradfield's failure to see defendant's tattoo or his missing tooth. We do not second-guess that determination.

Defendant points to Bradfield's testimony he *twice* identified defendant in photographic lineups (rather than once) as undermining the reliability of the identification. Bradfield viewed three photographic lineups, two on August 1 and a third on August 9. Only the first lineup included defendant's photograph. Bradfield identified defendant as the robber. The second and third lineups contained photographs depicting men matching Bradfield's description of defendant's unidentified

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[2] Mack testified that at the time of the robbery defendant had a tattoo on his cheek and was missing a front tooth. Detective Lanza testified that in August 2016, when he first contacted defendant, defendant had a tattoo on his face. The Attorney General does not dispute that these traits existed at the time of the robbery.

accomplice. According to Detective Lanza, Bradfield did not identify anyone in the second or third lineup. But Bradfield testified he viewed a third lineup on August 9 and identified defendant a second time: "Q. And in that particular six-pack on August 9th, were you able to identify anyone? [¶] A. Yes. [¶] Q. Yes or no? [¶] A. Yes. [¶] Q. And was that another person or was it the same? [¶] A. Same person." On further examination, however, Bradfield said: "I believe [the detective] came and showed me another six-pack of the defendant on there. . . . . I may be wrong." Bradfield believed he had twice identified defendant, but he did not remember whether it was the same or a different photographic lineup. The jury could reasonably conclude either defendant was mistaken or, on August 9, Detective Lanza showed Bradfield the first lineup, in which he identified defendant, as well as the third six-pack, which did not contain defendant's photograph. This uncertainty did not detract from Bradfield's confidence in his identification of defendant as the robber.[3]

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[3] The first photographic lineup Bradfield viewed, the only one that contained defendant's photograph, was being displayed in the courtroom when Bradfield testified as follows: "Q. [By defense counsel]: And then you were shown three sets of photographs of six-packs like similar to the one that is in front of you on that screen, correct? [¶] A. Yes, sir. [¶] Q. First time you were shown the six-pack, you circle the picture that you thought was the man who robbed you, correct? [¶] A. Correct. [¶] Q. Then you're shown another six-pack and you didn't circle anybody, correct? [¶] A. Correct. [¶] Q. And then you were shown a third six-pack which had the defendant's picture again, and you said that's the man who committed this robbery? [¶] A. Correct. [¶] Q. The third time that occurred was at your home?

B. *Firearm Enhancement: Senate Bill No. 620*

As noted above, the jury found true a personal handgun enhancement allegation. The trial court imposed a mandatory, consecutive ten-year enhancement term. (§ 12022.53, subd. (b).) After defendant filed his notice of appeal, Senate Bill No. 620 took effect. (Sen. Bill No. 620 (2017-2018 Reg. Sess.) eff. Jan. 1,

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[¶] A. Yes. [¶] Q. Was it . . . the same six-pack that we're looking at that's on the screen right now? [¶] A. I don't recall. [¶] . . . [¶] Q. And the third time that you looked at this six-pack, did you look at all the individuals in that six-pack again to be careful and pick out the right guy? [¶] A. Yes. [¶] Q. And . . . the other five people in that third time, were they the same people that are up there now on the screen? [¶] A. I don't recall. [¶] Q. Well, I mean did they look like they switched them around on you? [¶] A. I don't recall. [¶] . . . [¶]

Q. [by the prosecutor]: Mr. Bradfield, I've shown you what's been marked as People's 2 which is already on the screen? [¶] A. Yes. [¶] Q. When Detective Lanza first showed you this six-pack, was that on August 1st? [¶] A. Yes. [¶] Q. Now, when you saw this six-pack did you have any hesitation in regards to picking out the defendant? [¶] A. No. [¶] . . . [¶] Q. Now, in the subsequent or the following six-packs, you weren't able to ID anybody, correct? [¶] A. Correct."

On recross-examination Bradfield further testified: "Q. Now, you say three times you were shown pictures. [¶] The first time you told us you were positive it was the defendant, correct? [¶] A. That's correct, sir. [¶] Q. The second time you didn't see the defendant in the six-pack? [¶] A. That's correct. [¶] Q. The third time you saw the defendant . . . you weren't any less positive the third time, were you? [¶] A. I was just as positive as when I saw him in the third six-pack as I was in the first six-pack, sir."

2018.) Pursuant to that legislation, a trial court has discretion, in the interest of justice, to strike or dismiss a section 12022.53 firearm enhancement. As amended, subdivision (h) 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." (Stats. 2017, ch. 682, § 2.) The Attorney General concedes that Senate Bill No. 620 applies to defendant because his case is not yet final. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.)

Defendant argues we should remand this case to allow the trial court to exercise its discretion under section 12022.53, subdivision (h) as amended. We decline to do so. At sentencing, the trial court found multiple factors in aggravation and none in mitigation. Moreover, in imposing the ten-year enhancement under section 12022.53, subdivision (b), and the five-year enhancement under section 667, subdivision (a)(1), the court clearly indicated it would not exercise discretion to strike those enhancements even if it had discretion to do so. The court commented, "That's six years as to count I plus an additional ten years pursuant to the 12022.53(b) allegation. [¶] *I'm not suggesting for a moment that I want to do anything*, but the Court lacks any discretion to do anything with that . . . . I'm compelled to sentence him to ten years consecutive to the six. [¶] Plus an additional term of five years. Again, the Court lacks any discretion to do anything with the five-year prior, *not that I would*." (Italics added.) In light of this record, no purpose would be served by a remand. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

III. DISPOSITION

The judgment is affirmed.

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KIM, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.