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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER BROWN, Defendant and Appellant.	B231267 (Los Angeles County Super. Ct. No. TA112788)

APPEAL from an order of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed with directions.

Jennifer Hansen, 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, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Christopher Brown appeals from his convictions arising out of a robbery, contending evidence of two (out of three) out-of-court eyewitness identifications were inadmissible at trial because no substantial evidence established that the robbery was fresh in the witnesses' minds when they selected defendant's photograph from a photo array. Defendant also contends the abstract of judgment should be amended to reflect the sentence given orally by the trial court. We affirm the conviction but direct that the abstract of judgment be modified.

BACKGROUND

On October 15, 2009, defendant and a male accomplice, both of whom are African American, entered a Boost Mobile phone store, defendant armed with a semiautomatic gun. The store owner, Young Bin Yu, who is Korean, two employees, Natalie Mejia and Miriam Delarosa, and Mejia's mother, Lucia Hernandez, who is Hispanic, were present. The men told Yu and the others to put their hands up and repeatedly yelled, "Bitches, where are the cell phones? Where is the money?" The man with the gun pointed it at Yu, Mejia, Hernandez and Delarosa and ordered them to lie down, then placed the gun against Hernandez's head. They took approximately $4,000 to $5,000 worth of money and cell phones and exited the store. Yu and Delarosa followed them outside and saw them get into a small, dark, four-door car that had one or two gray-primered passenger doors. Hernandez, who watched from a window, testified the car had a "white part."

On November 1, 2009, defendant was stopped by police while driving a blue, four-door sedan that had a gray-primered passenger door. A search of his apartment recovered a blue steel semiautomatic handgun and an assault rifle, both hidden in a ceiling vent.

Nineteen days after the robbery, Delarosa identified defendant from a photographic six-pack, writing on the photo array, "'He look exactly like the person that came with the gun and laundry bag.'"

Twenty days after the robbery, Hernandez identified defendant from a photo array after looking at it for 10 or 20 seconds, writing, ". . . he had the gun. I remember his eyes and his lips that were thick." Los Angeles Police Detective Alejandro Garcia testified

Hernandez went from calm to "very upset after she saw the photo," and "[l]ooked like she wanted to cry."

Yu identified defendant from a photo array 32 days after the robbery. He at first circled the photographs of two men including defendant, but then selected only defendant after realizing the other man was not as thin as the robber.

None of the witnesses was able to confirm the photo identification at a live lineup conducted in October 2010, one year after the robbery.

Trial was in February 2011. Yu, Hernandez and Delarosa were not asked to identify defendant at trial, but all three confirmed they had identified him in a photo array shortly after the robbery (although Delarosa testified she was not sure about the identification at the time she made it).

Yu further testified he was seated at his desk when the robbers entered, one of the men had a gun and ordered everyone to the ground, one of the employees was taken to the back of the store, the cash register was opened, and the robbers left the scene in a car that had a primered door.

Defendant's evidence at trial was that Yu and Delarosa had told police that the car the robbers escaped in had two primered doors, not one. Further, Latrice Rivers, defendant's sister-in-law, and Wesley Brown, his brother, testified defendant was with them at the time of the robbery.

Defendant was convicted by a jury of three counts of robbery (Pen. Code, § 211),[1] one count of assault with a firearm (§ 245, subd. (a)(2)), and one count of possession of an assault weapon (§ 12280, subd. (b)), and the jury found true several special allegations that defendant personally used a firearm in the commission of the robbery. (§ 12022.5, subd. (a).) He was sentenced to 23 years and four months in state prison, consisting of a three-year term on the first robbery count, two consecutive one-year terms on the second and third robbery counts, a consecutive one-year term on the assault count, and a

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

consecutive eight-month term on the possession count.[2] Added to these were a consecutive 10-year term pursuant to the firearm allegation attached to the first robbery count and two consecutive three-year, four-month terms pursuant to the firearm allegations attached to the second and third robbery counts.

Defendant timely appealed.

DISCUSSION

Defendant contends the trial court prejudicially erred when it admitted evidence of the photographic identifications made by Hernandez and Yu, 20 and 30 days after the robbery, respectively, as no evidence established the crime was fresh in their minds when they selected defendant's photograph from an array of photos. However, defendant did not object at trial to admission of the evidence, which deprived the prosecution of an opportunity to cure any foundational defect. The contention is therefore forfeited. (Evid. Code, § 353; *People v. Redd* (2010) 48 Cal.4th 691, 729 [trial counsel's failure to object to claimed evidentiary error results in a forfeiture of the issue on appeal].) Defendant's claim also would fail on its merits because the record establishes the robbery was reasonably fresh in each witness's mind when the identification was made.

Evidence at trial of a statement made out of court by a witness, offered for the truth of the matter asserted, is hearsay. Hearsay is generally considered to be unreliable, and for that reason is inadmissible unless an exception applies. (Evid. Code, § 1200 (the hearsay rule).) The proponent of a hearsay statement may "overcome its questionable reliability by proof of collateral factual matters which bring the statement within an exception to the hearsay rule, thereby demonstrating its reliability." (*People v. Tewksbury* (1976) 15 Cal.3d 953, 966.)

Evidence Code section 1238 sets forth the "prior identification" exception to the hearsay rule. It provides that a statement "previously made by a witness is not made

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[2] Defendant contends and the People concede that the clerk's minutes and abstract of judgment erroneously indicate the trial court imposed a one-year term—not eight months—on the possession count. The record confirms the error. Accordingly, we will order that the abstract of judgment be modified.

inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and: [¶] (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence; [¶] (b) The statement was made *at a time when the crime or other occurrence was fresh in the witness' memory*; and [¶] (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time." (Evid. Code, § 1238, italics added.) The issue here is whether sufficient evidence at trial showed that when Hernandez and Yu selected defendant from photo arrays, the crime was fresh in their memory. No similar issue exists as to Delarosa's identification because she testified at trial that the crime was fresh in her mind when she identified defendant from a photo array.

Determination of factual matters establishing the elements of a hearsay exception is made on proof by a preponderance of the evidence. (*People v. Tewksbury*, *supra*, 15 Cal.3d at p. 966.) If no direct evidence is presented as to the elements, the facts may be inferred from other evidence. (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 178, fn. 7.) We review the determination for abuse of discretion, upholding it if it is supported by substantial evidence. (*People v. Anthony O*. (1992) 5 Cal.App.4th 428, 433.)

Although Hernandez and Yu testified at trial that they had identified defendant from a photographic lineup, they were never asked whether the memory of the crime was fresh when they made the identification. In fact Yu, when asked whether the face of his assailant was clear in his mind when he viewed the photo array, responded, "No. I did not have the face clearly in my recollection."

Lacking direct testimony that the robbery was fresh in Yu's and Hernandez's minds, the issue is whether other evidence supported the trial court's implicit finding that it was. (*People v. Cowan* (2010) 50 Cal.4th 401, 466 [courts may "consider all pertinent circumstances in determining whether the matter was fresh in the witness's memory when the hearsay statement was made"].)

When Hernandez identified defendant she wrote on the photo array that she did so "because he had the gun," and she remembered "his eyes and his lips that were thick."

She looked upset when shown the photo array, like she wanted to cry. From this evidence the court could infer the robbery was reasonably fresh in her memory when she made the identification.

No similar evidence exists as to the circumstances surrounding Yu's identification. But at trial 16 months after the robbery, Yu was able to recall many details about the crime, including his position when the robbers entered and their actions.

In *People v. Cummings* (1993) 4 Cal.4th 1233, the prosecution sought to admit a prior statement by a jailhouse informant who had told police that the defendant discussed the shooting of a police officer with him. At trial, the informant testified he had no recall of the conversations either with the defendant or the police, and "had been undergoing detoxification, was sometimes delusional, and was still having drug-related problems at the time of trial." (*Id*. at pp. 1292-1293.) However, the informant was able to testify he spoke to police a few days after a bus ride with the defendant, he told them the truth, and the conversation with defendant "was then fresh in his mind . . . . On cross-examination he accurately described the location in the bus where the defendant had been seated and the security provisions that segregated and secured him, a 'high power' prisoner, in a special holding area." (*Id*. at p. 1293.) The informant later attempted to recant his testimony and intentionally avoided efforts by the court and the parties to have him reappear. (*Ibid*.) On the freshness issue, the Supreme Court held the informant "had sufficient recall of the events that the trial court had a sufficient basis for concluding that his testimony was reliable." (*Id*. at p. 1294.) The judge was aware of all the circumstances surrounding the informant's testimony and was in the best position to assess his credibility. Her conclusion that the informant testified truthfully and reliably when he said his statement to the detective was true was supported by the record. (*Ibid*.)

Here, the trial court could reasonably conclude from Yu's detailed recollection of the robbery and the relatively short time between that traumatic event and his identification of defendant—32 days—that the robbery was reasonably fresh in his mind when he made the identification. That Yu testified defendant's face was not fresh in his mind is of no moment, as Evidence Code section 1238 requires only that the crime—not

the perpetrator's face—be fresh in the witness's mind when the identification is made. It is the nature of memory that a face can be recognized and identified even if not kept continuously fresh in the mind.

Defendant refers us to several law review articles and a recent unanimous decision of the New Jersey Supreme Court to the effect that eyewitness misidentification is the leading cause of wrongful convictions in this country. (See *State v. Henderson* (2011) 208 N.J. 208.) Factors that make misidentification more likely were present here, including the passage of time between the incident and identification, the presence of a gun during commission of the crime, and differences in race between witnesses and the person identified. We do not doubt that misidentification occurs often. But whether Yu, Hernandez or Delarosa misidentified defendant in this case was a factual matter to be resolved in the trial court. Our review is only for substantial evidence.

DISPOSITION

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect a consecutive sentence of eight months for defendant's conviction for possession of an assault weapon, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.