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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LARA GUTIERREZ,

Defendant and Appellant.

B234823

(Los Angeles County  
Super. Ct. No. KA090987)

APPEAL from an order of the Superior Court of Los Angeles County, Douglas Sortino, Judge. Affirmed.

Jose Lara Gutierrez, in pro per.; and Renee Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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## **INTRODUCTION**

In the wake of several home invasion robberies and a residential burglary in May 2010, defendant Jose Lara Gutierrez was arrested and charged by information with committing residential robbery (Pen. Code,<sup>1</sup> § 211; counts 1, 2 and 7), residential burglary (§ 459; count 3) and possession of a firearm by a felon (§ 12021, subd. (a)(1); count 8).<sup>2</sup> The information specially alleged some of the robbery victims were elderly or disabled within the meaning of section 667.9, subdivision (a), and defendant had personally used a firearm in committing the robberies pursuant to section 12022.53, subdivision (b). As to all counts, it was alleged defendant had served one separate prison term for a felony under section 667.5, subdivision (b).

In a bifurcated proceeding, defendant admitted the prior prison term allegation. The trial court sentenced him to an aggregate state prison term of 17 years and 8 months for his offenses. The court struck the prior prison term enhancement in the interests of justice.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The case proceeded to a jury trial in March 2011. On April 1, 2011, the trial court declared a mistrial after the jury deadlocked as to counts 1, 2, 3 and 8. As to count 7, the jury convicted defendant of residential robbery, as charged.

Counts 1 and 2, of the mistried counts, arose from the residential robbery of Margaret Alvarado (Alvarado) (count 2) and her 87-year-old mother, Lupe Alvarado (count 1). According to the evidence adduced at the retrial, on the afternoon of May 19, 2010, two armed men broke down the front door of Alvarado's home in Pico Rivera and demanded money and jewelry at gunpoint from Alvarado and her mother, who was

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The information did not include counts 4, 5 and 6.

wheel-chair bound. After tying up Alvarado and her mother with a telephone cord, the two men fled with cash and other valuables. Alvarado identified defendant in court as one of the gunmen. She previously had been unable to identify his picture in a six-pack photographic lineup.

Cora Vigil (Vigil), a neighbor of Alvarado's, testified that when leaving her house to drive to her bank on May 19, 2010, she noticed two men standing outside Alvarado's front door. Vigil returned home some 15 minutes later to retrieve her bank deposit slip. Before entering her home, she noticed a Honda, painted with black primer, parked on the street. Unable to find her bank deposit slip, Vigil decided to drive back to the bank. On her driveway, she was approached by the two men. They pointed to Alvarado's house and asked Vigil if it was the "Rodriguez house." Vigil replied that it was not, and minutes later, she left again for the bank.

On direct examination, Vigil confirmed that on May 20, 2010, she selected defendant's photograph in a six-pack photographic lineup as "the person that looked familiar enough that I had seen the day before." Vigil then identified defendant in court as one of the two men with whom she spoke on May 19.

On cross-examination and redirect examination, Vigil acknowledged she had characterized her selection of defendant's photograph as a "maybe" to police, because she "was rattled" at the time, concerned about her missing deposit slip.

On the afternoon of May 19, 2010, Maria Hilbert (Hilbert) reported to police the license plate number of a black primer-painted Honda that she had seen parked outside her friend's house in La Palma. At the time, police were at the house investigating the residential burglary that gave rise to count 3.

Jasmine Santana, the girlfriend of codefendant Alfred Pouliot (Pouliot), identified the black primer-painted Honda as the one her boyfriend and defendant were using on May 19, 2010.<sup>3</sup> On that day, the two men left the hotel room in which the three of them

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<sup>3</sup> Vigil also identified Pouliot in a six-pack photographic lineup and at trial. Pouliot is not a party to this appeal.

were staying, leaving Santana behind. The men returned about 90 minutes later with pillow cases containing purses and guns.

The same day, police arrested defendant. A search of his hotel room yielded items belonging to Alvarado and the victim of the residential burglary, as well as guns. Police also recovered the black primer-painted Honda with the same license plate recorded by Hilbert. Pouliot was arrested the next day.

The defense was misidentification. April Moore, a friend of defendant, testified that on May 19, 2010, defendant was at her house from approximately 10:30 a.m. to 1:00 p.m.

Following the retrial, the jury convicted defendant on counts 1, 2, 3 and 8, and found true the attendant special allegations.

## **DISCUSSION**

We appointed counsel to represent him on appeal. After examination of the record, counsel filed an opening brief in which no issues were raised. On January 3, 2012, we advised defendant that he had 30 days within which to personally submit any contentions or issues he wished us to consider.

On January 20, 2012, we received a handwritten letter in which defendant requested the appointment of a new appellate counsel on the ground his current counsel misstated the evidence. Specifically, defendant claimed that she wrongly stated in her opening brief that prosecution witness Vigil identified defendant first in a photographic six-pack prepared by police and then at trial, when Vigil stated that her identification was “a maybe.”

While the opening brief may not have been as exact or complete as defendant would have liked, it did not fall below an objective standard of reasonableness (*In re Avena* (1996) 12 Cal.4th 694, 721) such that defendant was deprived of the effective assistance of appellate counsel. Moreover, we have examined the entire record and are satisfied defendant’s attorney has fully complied with the responsibilities of counsel, and

no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *People v. Wende* (1979) 25 Cal.3d 436, 441.) We thus deny his request for the appointment of new appellate counsel.

To the extent defendant is contending the evidence was insufficient to prove his involvement in the home invasion robberies as charged in counts 1 and 2, his claim is without merit. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Determining witness credibility is the exclusive province of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Nothing in the record suggests Vigil's testimony was inherently improbable or physically impossible. (See *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372.) Vigil's positive in-court identification of defendant alone would have been substantial evidence that defendant committed the home invasion robberies. (See *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497 [single witness's in-court identification of the defendant, even without corroboration of prior photographic evidence, is sufficient evidence of identity to support a conviction].) However, apart from Vigil's testimony, the victim's positive in-court identification, as well as the strong circumstantial evidence in this case, constituted substantial evidence to support the verdicts.

## **DISPOSITION**

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.