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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.

MICHAEL JAY SMART,

Defendant and Appellant.

B283566

(Los Angeles County
Super. Ct. No. 7PH00649)

APPEAL from an order of the Superior Court of
Los Angeles County, Jacqueline H. Lewis, Judge. Affirmed.

Heather E. Shallenberger, 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, Shawn McGahey Webb and Blythe J. Leszkay,
Deputy Attorneys General, for Plaintiff and Respondent.

Michael Jay Smart appeals from a parole revocation order, contending the evidence was insufficient to support a finding he had violated the conditions of his parole. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Smart's Murder Conviction and Release on Parole

In June 1990 Smart was convicted of first degree murder (Pen. Code, § 187)¹ and sentenced to a term of life with the possibility of parole. He was released on parole in April 2015 subject to various terms and conditions, including a prohibition on engaging in criminal conduct. That condition provided, “You shall not engage in conduct prohibited by law (state, federal, county, or municipal). You shall immediately inform your parole agent if you are arrested for any felony or misdemeanor crime. Be advised, your conduct, if prohibited by law, may result in parole revocation with or without a criminal conviction.”

2. Smart's Arrest for Domestic Battery and the Petition for Revocation of Parole

On February 16, 2017 Smart was arrested for committing battery on his then-girlfriend, Brandy Peterson. (§ 273.5, subd. (a).) A petition to revoke parole was filed on February 23, 2017, alleging Smart had punched Peterson in the face “several times” on January 26, 2017. The petition further alleged Smart’s actions were a violation of the parole condition that he not engage in criminal conduct. The court found probable cause to support revocation and preliminarily revoked parole pending a full hearing. Smart was held in custody without bail. At arraignment on the petition Smart denied the allegations.

¹ Statutory references are to this code.

3. The Revocation Hearing

The contested revocation hearing was held on May 9, 2017. Peterson testified she had been dating Smart in January 2017. Initially Peterson testified she did not remember whether she was with Smart on January 26, 2017. When asked whether she had a physical altercation with him on that date, she said, “I don’t want to talk about it. . . . I don’t remember that day. There was a lot of things on my mind.” When asked whether Smart punched her, Peterson responded, “I don’t want to talk to you. I don’t want to testify.” After being instructed by the court that she must answer the question, Peterson again stated, “I don’t know what happened on that day, so many things on my mind.”

Upon further questioning Peterson acknowledged she had an altercation with Smart in his home during which he punched her in the face and bit her on the leg. She did not remember how many times he had hit her, nor did she remember whether he had threatened her. Peterson stated Smart’s mother and a family friend were in the home at the time of the altercation. The family friend came into the room after Smart had hit Peterson and asked Smart, “What did you do to her?” Peterson initially testified the friend took her phone away because Peterson was going to call the police, but she later testified it was Smart who took her phone away. Peterson did not recall the day or month on which the altercation occurred.

After the altercation Peterson went home. The next day she went to the police station and reported the incident to the officer at the front desk. She told him about her injuries—a black eye, bruised lip and redness on her leg. Peterson also recalled receiving a telephone call from Smart’s parole agent at some point after reporting the incident, but Peterson could not

remember when they spoke. When asked if she told the agent everything she had told the police officer, she stated, “No, it was different. It was kind of like some things that happened and then things. It was different things.” Peterson also testified two police officers came to her house to interview her about the incident, but she could not recall when that visit occurred.

April Pendleton, Smart’s parole agent, testified she had been supervising Smart’s parole for approximately six months at the time of the January 2017 incident. She stated Smart had been a “model parolee”—he had completed the required six-month residential program, he was employed, and he had been in compliance with the terms and conditions of his parole. Pendleton testified she had received a report of Peterson’s statement to the police and called Peterson on January 27, 2017, the same day Peterson reported the incident. During that call Peterson told Pendleton that Smart had hit her. Peterson did not mention that she had a bruised lip or that Smart had bitten her, threatened her or taken her telephone during the altercation. Pendleton said Peterson had seemed “somewhat erratic” and “wasn’t concrete in her answers.” After their conversation ended, Peterson immediately called Pendleton three or four times to add additional details to her account of the incident. Pendleton testified, “[Peterson] would call me back and [say] ‘I’m very afraid of him,’ you know. Then she call[ed] back ‘Oh, one other thing, I used to date him for about five months.’ . . . Then she call[ed] back and says, ‘Oh I don’t want to see him no more,’ you know, just little things.”

Los Angeles Police Detective Marlon Prodigalidad testified he went to Peterson’s home on February 7, 2017 to take her statement regarding the January 26 incident. He observed

bruising around her eye and scabbing on her leg. He did not recall whether she had an injury on her lip. Peterson told him Smart had threatened to kill her during the incident.

Smart presented three witnesses in his defense. Barbara King, one of his friends, testified she was with Smart on January 26, 2017 at the home of another friend, Brenda Gardener. The three of them had spent January 24, 25 and 26 together painting Gardener's kitchen and bathroom. After lunch on January 26 Smart and King left Gardener's house and went to King's house. King said she was with Smart at her home until he left for work around 10 p.m. Gardener corroborated King's account of painting the house on January 24, 25 and 26. Unlike King, however, Gardener testified Smart was at her house on January 26 until he left for work that evening.

Smart testified in his own defense. He stated he was at Gardener's house painting on January 26, 2017 and, consistent with King's chronology, said he left Gardener's house with King after lunch and stayed with King until going to work in the evening. He insisted he did not see Peterson on January 26 and denied assaulting or threatening her. He also stated his mother was in the hospital on January 26 and could not have been at home as Peterson had testified.

At the request of Smart's counsel the parties stipulated to the admission of the testimony from the probable cause hearing of Los Angeles Police Officer Charles Burns, who took Peterson's initial statement on January 27, 2017. Burns had testified he was working the front desk of the Southeast Division police station on January 27, 2017. Peterson came into the station and said she wanted to report a domestic violence incident. Peterson told Burns that Smart had punched her in the face the day

before. Peterson said that, after being hit, she was afraid and left Smart's home. Burns observed a bruise on Peterson's left eye. Burns spent approximately 30 minutes with Peterson and testified that she did not seem frightened while making her statement, nor did she appear unstable or erratic.

After giving the parties an opportunity to argue, the court stated, "I would note that Ms. Peterson's testimony was not the most clear testimony that I've ever heard. However, the majority of her testimony I found to be consistent with what she told the police at the station was that there was an altercation where she got punched. She told that to the agent. She told that to the detective many days later. And she told us the same thing here in court. Did she have every detail down to a science? No, she did not. But that is not unusual for victims of violent crimes in any case. These incidents are traumatic. And I don't find what I consider small inconsistencies here to really be trouble." The court further noted there were material inconsistencies in the testimony of the defense witnesses. The court concluded, "After hearing all the evidence and judging the credibility of the witnesses . . . the court does find[] by a preponderance of the evidence that it is true that Mr. Smart has violated the terms and conditions of his parole supervision by engaging in criminal conduct, specifically, a domestic battery." The court revoked Smart's parole and remanded him to the custody of the Department of Corrections and Rehabilitation.

DISCUSSION

1. Governing Law and Standard of Review

When an individual has been sentenced to a term of life imprisonment for first or second degree murder and has been

released on parole supervision, a court may revoke and terminate parole if “the court determines that the person has committed a violation of law or violated his or her conditions of parole” (§ 3000.08, subd. (h); see also § 3000.1, subd. (a)(1).) The standard of proof for finding a parole violation is preponderance of the evidence. (See *People v. Rodriguez* (1990) 51 Cal.3d 437, 441-442, 446-447; *In re Miller* (2006) 145 Cal.App.4th 1228, 1234-1235.) We review a decision to revoke parole for substantial evidence (*People v. Butcher* (2016) 247 Cal.App.4th 310, 318), according great deference to the trial court’s ruling, “bearing in mind that ‘[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court.’” (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.)²

In reviewing the trial court’s decision for substantial evidence, we “‘presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]’ [Citations.] ‘Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.’” (*People v. Lee* (2011)

² “Parole and probation revocation hearings are equivalent in terms of the requirements of due process.” (*People v. Rodriguez, supra*, 51 Cal.3d at p. 441; accord, *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1198 “[p]arole revocation and probation revocation after the imposition of a sentence are constitutionally indistinguishable”).

51 Cal.4th 620, 632; accord *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681 [“The standard is deferential: ‘When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination”].)

2. *Substantial Evidence Supports the Decision To Revoke Parole Supervision*

The evidence before the trial court amply supported the finding, by a preponderance of the evidence, that Smart had committed domestic battery, violating a condition of his parole. The court found Peterson’s testimony to be credible despite some “small inconsistencies” and noted the injuries Peterson described to her eye and leg were corroborated by other witnesses’ testimony. The court also found there was no evidence supporting an inference Peterson was lying. In contrast, the court found the discrepancy in the defense witnesses’ testimony as to Smart’s whereabouts on the afternoon and evening of January 26, 2017 to be problematic.

On appeal Smart argues Peterson’s testimony was unreliable and the court should not have rejected the alibi testimony despite its being “slightly undermined.” Smart’s argument misapprehends the deferential standard of review that governs his appeal. It was the trial court’s exclusive responsibility to evaluate the demeanor and credibility of the witnesses. As discussed, “[r]esolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. Moreover, unless the testimony is physically

impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Furthermore, the “incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the [trier of fact] in the first instance” (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.)

Here, the trial court evaluated Peterson’s testimony, as well as that of the alibi witnesses and Smart himself, and resolved any uncertainties or contradictions in favor of Peterson’s account of events. Given the great deference we accord the trial court’s credibility determinations, Smart’s claim of insufficient evidence must be rejected.

DISPOSITION

The order revoking parole and remanding Smart to the custody of the Department of Corrections and Rehabilitation is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.*

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