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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DEWITTY,

Defendant and Appellant.

B281666

(Los Angeles County
Super. Ct. No. LA081624)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan M. Speer, Judge. Affirmed.

Earl E. Conaway, III, 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, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michael Dewitty was convicted of robbing a convenience store based largely, although not exclusively, on fingerprint evidence. Specifically, the robber had handled a package of gum, which he left near the store's cash register, and the only two identifiable fingerprints on the gum matched defendant. On appeal, defendant challenges the sufficiency of the evidence that he was the robber. We affirm. We also reject defendant's supplemental request that we remand for resentencing in light of a change in the law while this appeal was pending.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Robbery*

On March 7, 2014, Marvin Prieto was working the night shift at an AM/PM store located at a gas station. At around 11:00 p.m., a man entered the store wearing a red hooded sweatshirt with the hood raised. He went to the candy/gum aisle and selected a pack of Stride gum. The gum was in a flat rectangular packet. Surveillance video showed that the man took the gum from the highest or second-highest shelf of the stand-alone candy/gum aisle. He grabbed the wrapped gum package in his right hand, and tossed it between his left and right hand twice as he approached the register. He put the gum on the counter with his left hand.

Prieto, who wore latex gloves, picked up the gum, scanned it, set it down, and told the man it was \$1.49. The man put his right hand in his pocket and withdrew a black handgun. He pointed it at Prieto and said, "Give me all the money." Prieto, frightened, opened the register, removed the cash drawer, and placed it on the counter. During this time, the robber put his left hand over the packet of gum and, using his left thumb on the

front of the gum package, slid the gum under his left hand. Once Prieto brought out the cash drawer, the robber used his left hand to remove all the bills. He took between \$100 and \$200 in total. He left the store, leaving the gum on the counter. Prieto locked the store and called police.

2. *The Robber's Height*

Police interviewed Prieto. Prieto is a Spanish-speaker, he speaks little English. The interviewing officers spoke some Spanish, and the conversation was “a little labored.” The height of the robber would be a matter of dispute at trial. The police report indicated that Prieto described the robber as 5’4”, but Prieto gives heights in centimeters; he cannot convert to feet and inches. The interviewing officer does not recall how the height of 5’4” ended up in his report; it could simply have been an inference from Prieto describing the robber’s height in relation to his own height. Prieto is 5’6” tall. He recalls telling police that the robber was around his same height. However, when Prieto was standing behind the cash register, he was on a 3-inch mat, raising his elevation. At trial, he explained that the robber was about his height when he was standing on the mat – a fact which would make the robber approximately 5’9”. It is unclear, however, whether Prieto made the police aware of the 3-inch mat when he was describing the robber’s height. This much is clear: the door to the convenience store has markings at 4, 5, and 6 feet. The surveillance video of the robber shows that, when he was passing through the doors, he was much closer in height to the 6-foot mark than the 5-foot mark. Defendant is 5’9 1/2” tall.

After defendant was identified as a possible suspect, nearly 18 months after the robbery, Prieto was shown a photographic

array containing defendant's picture. He was unable to make an identification.

3. *The Fingerprint Evidence*

A forensic print specialist at Los Angeles Police Department (LAPD) processed the gum package for latent prints. He recovered two prints of value, both from the front of the pack. Other prints had insufficient information to establish identity. The two prints were submitted to the Automated Fingerprint Identification System (AFIS), which searches L.A. County records and provides possible matches as results. Neither of the two prints generated a possible match in AFIS. Pursuant to LAPD protocol, the prints were then transferred to an "unsolved" database for a comparison with every new arrestee's print which comes into AFIS.

Over a year later, defendant was identified as a possible suspect. Fingerprint comparisons were done and first one print, and then the other, was positively matched to defendant.¹ Specifically, both prints were of defendant's left thumb.

¹ Initially, only the first print was matched to defendant. At the preliminary hearing, in order to prove the print was defendant's, defendant was fingerprinted at that time. The print specialist rolling his prints took extra prints of defendant's left thumb, being careful to include the full print from nail to nail. After the preliminary hearing, another print specialist decided to check the unidentified second print against these additional rolls and determined that the print was, in fact, a print of the side of defendant's left thumbnail.

4. *The Information*

Defendant was charged by information with one count of robbery (Pen. Code, § 211).² An enhancement for personal use of a firearm, within the meaning of section 12022.5, subdivision (a), was charged. It was also alleged that defendant had suffered two prior “strikes” within the meaning of the Three Strikes law (§ 667, subds. (b)-(i)), one prior serious felony (§ 667, subd. (a)), and four prior prison terms (§ 667.5, subd. (b).) Defendant entered a plea of not guilty and denied all allegations. He waived jury and agreed to a bench trial. Thereafter, the prosecution moved to amend the information to change the firearm allegation from section 12022.5, subdivision (a), which provides for a range of sentencing choices of 3, 4, or 10 years, to 12022.53, subdivision (b), which provides for a mandatory enhancement of 10 years. Defendant objected to the amendment, arguing that he had agreed to waive jury in part in reliance on the fact that the trial court could choose to impose the low or middle term on the enhancement. The trial court denied the prosecution’s request to amend.

5. *The Trial*

The case proceeded to trial. Defendant did not present any expert testimony challenging the identification of the fingerprints as his. Instead, defendant testified on his own behalf, and denied committing the robbery. While he had no specific recollection of ever being in this particular AM/PM, he testified that he often stops at gas stations in the area, and may well have been there. As to how his fingerprints could have ended up on a package of gum in that store, he testified that his kids “tend to try to grab

² All further undesignated statutory references are to the Penal Code.

candy and gum and I have to take it out of their hands and put it back” He further testified that he chewed gum himself, and has no particular brand he usually chews.

The trial court found defendant guilty, on the basis that the fingerprints on the gum package were conclusively defendant’s, and that the robber had extensively handled the gum. The court also concluded that Prieto’s description of the robber was consistent with defendant’s appearance – specifically accepting the prosecution’s explanation of the height disparity in the police report. The court believed that not only was the height of the robber in the video consistent with defendant’s height, but that the robber in the video matched defendant’s general build and skin color as well. The court also found the firearm allegation to be true. Defendant admitted the two strike and single prior serious felony prior allegations. Later, he admitted suffering two prior prison terms; the prosecution dismissed the remaining two.

6. *Sentencing*

Prior to sentencing, defendant moved under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to strike one or more of his prior strikes. The court granted the motion with respect to one of them. Defendant then argued for imposition of the middle term for both the robbery and the firearm enhancement.

The court imposed the high term of 5 years, doubled to 10 (for the strike) plus the high term of 10 years on the firearm enhancement. An additional 5 years was imposed for the prior serious felony, plus an additional 2 years for the two prior prison terms. Defendant’s total sentence was 27 years in prison. Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant challenges the sufficiency of the evidence. Specifically, he argues that he cannot be convicted based solely on the evidence that his fingerprints were found on the packet of gum at the scene, in the absence of any evidence that the gum was not accessible to him, as a member of the public, prior to the robbery. By supplemental briefing, defendant also argues that a recent amendment to section 12022.5 grants trial courts new discretion to strike firearm enhancements, and the case should be remanded to allow the trial court to consider whether to exercise its discretion to do so in this case.

1. *Sufficient Evidence of Identity*

“Our Supreme Court has set forth the applicable constitutional test concerning the sufficiency of evidence in cases where the conviction is premised on fingerprint evidence as follows: ‘An appellate court called upon to review the sufficiency of the evidence supporting a judgment of conviction of a criminal offense must, after a review of the whole record, determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.] The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence. [Citation.] Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. “ ‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a

contrary finding does not warrant a reversal of the judgment.’ ” [Citations.] “Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.” [Citation.]’ [Citations.]” (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587 (*Figueroa*).)

“The California Supreme Court has repeatedly emphasized that fingerprints are the strongest evidence of identity and ordinarily are sufficient by themselves to identify the perpetrator of the crime. [Citations.]” (*Figueroa, supra*, 2 Cal.App.4th at p. 1588.)

Here, the evidence of identity was not merely sufficient, it was overwhelming. Surveillance video showed the robber to be a man of defendant’s general description. The robber repeatedly handled the package of gum – first tossing it between his hands, and then fidgeting with it while waiting for Prieto to open the cash drawer. If anyone’s prints were on the gum, they were very likely to be the robber’s. Indeed, the robber slid the gum under his hand by using his left thumb on the front of the package – a motion which likely would be done with the right side of the left thumb. The two prints found on the front of the package were both of defendant’s left thumb, one was the right side of his thumbnail.

As to defendant’s suggestion that his prints might have been found on the gum because he may have taken it from his child’s hands at some point, we find persuasive the case of *People v. Crosslin* (1967) 251 Cal.App.2d 968. In that case, the defendant attempted to rob and assault a clerk at a liquor store. He placed a can of beer on the counter and ordered the cashier to open the register. The cashier refused to comply, and the defendant shot her, then ran from the store, leaving the beer

behind with his fingerprints on it. (*Id.* at p. 972.) At trial, the defendant testified that he “could have touched the can which was found on the counter in the liquor store because he took a can or two out of the cooler and then placed them back, but that he did not recall when that might have occurred.” (*Id.* at p. 974.) On appeal, the defendant argued there was insufficient evidence that he committed the crimes. The court disagreed, relying on the strong evidence provided by the fingerprint. It went on to state, “Although defendant attempted to explain the presence of his fingerprints on this can by testifying that it is possible that he went to the liquor store, attempted to purchase several cans of beer and put one or two back, this testimony need not necessarily have been believed by the jury since defendant could not specifically recall when he might have done this. Moreover, it seems highly improbable that an unknown assailant would pick up the exact can as was handled by defendant at an earlier time.” (*Id.* at p. 985.) Similarly, it seems “highly improbable” that defendant’s child would pick up the exact same packet of gum that an unknown robber would later handle – particularly when the gum packet was on a high shelf, above the eye-level of any small child.

Defendant relies on the Ninth Circuit’s opinion in *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353, for its explanation of the necessary standard of proof when the sole evidence of identity is fingerprint evidence. “We have held that fingerprint evidence alone may under certain circumstances support a conviction. [Citation.] However, in fingerprint-only cases in which the prosecution’s theory is based on the premise that the defendant handled certain objects *while committing the crime in question*, the record must contain sufficient evidence from which the trier

of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date. [Citations.] In order to meet this standard the prosecution must present evidence sufficient to permit the jury to conclude that the objects on which the fingerprints appear were inaccessible to the defendant prior to the time of the commission of the crime. [Citation.]” (*Id.* at pp. 356-357, fn. omitted.) As there was no evidence that the gum package was inaccessible to defendant prior to the robbery, he argues the evidence of identity was insufficient as a matter of law, under *Mikes*.

Defendant’s argument is unpersuasive for three reasons. First, “*Mikes*, a decision of an intermediate federal appellate court, is not binding authority on California courts.” (*Figueroa, supra*, 2 Cal.App.4th at p. 1588.) Second, the *Mikes* rule on which defendant relies is limited to “fingerprint-only” cases, which this is not. Here, a witness to the robbery described the culprit, and video evidence also confirmed the description of his appearance. Third, *Mikes* did not consider the type of evidence presented by our case. The Ninth Circuit concluded that, in a fingerprint-only case, the prosecution must present sufficient evidence from which the factfinder could reasonably conclude that the fingerprints in question were made at the time of the offense and not before. We have no quarrel with this proposition. *Mikes* went on to hold that, in order to meet that standard, the prosecution must present evidence that the objects on which the prints were found were inaccessible to the defendant prior to the commission of the crime. Here, we disagree. There are other ways to meet the requirement of sufficient evidence that the prints in question were made at the time of the offense and not before. In this case, that requirement was met with surveillance

video of a man generally matching defendant's build, skin color and height. More specifically, the video actually showed the robber handling the object, at the time of the robbery, in a manner consistent with leaving on the gum the fingerprints subsequently matched to defendant.

We also find unpersuasive defendant's reliance on *Birt v. Superior Court* (1973) 34 Cal.App.3d 934, in which the Court of Appeal found the fingerprint evidence to be insufficient. In that case, the victim returned to his home to find it was being burglarized. A rental van was parked nearby. The victim saw two men in the van. The men threw some of the victim's stolen items from the van and fled on foot. Charges were brought against the defendant, a woman, based solely on her fingerprint being found on a cigarette lighter found in the front seat of the van. (*Id.* at pp. 936-937.) The trial court denied the defendant's motion to set aside the information, and the Court of Appeal reversed, stating, "At most, the presence of petitioner's fingerprint on the lighter found on the front seat showed that, at some unknown time and place, she had been inside the van; but there was no direct or circumstantial evidence to indicate when and where that had been." (*Id.* at p. 938.) The case is clearly distinguishable; there was no eyewitness testimony that the burglar was a woman matching the defendant's description, nor was there video evidence of the burglar handling the lighter during the crime.

2. *No Remand For Resentencing Necessary*

While this appeal was pending, the Legislature amended section 12022.5, subdivision (c), to provide that, effective January 1, 2018, "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, § 1.) In contrast, the prior version of the statute specifically provided, “Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.” (§ 12022.5, fmr. subd. (c).)

Because the amended section provides discretion to strike an enhancement which was previously not permitted to be stricken, defendant argues this case should be remanded to allow the trial court to decide whether to exercise that discretion. In response, the prosecution concedes that the statutory amendment is applicable to this case, but argues that remand is unnecessary given that the record demonstrates that the trial court would not have exercised its discretion to strike the enhancement.

The prosecution’s argument is convincing. When *Romero* first gave trial courts discretion to strike so-called “strike” priors, remand for resentencing was unnecessary when the sentencing court had made it clear that it would not have exercised its discretion to strike the prior. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) There is no reason the same rule would not apply here.

In this case, at the time of sentencing the trial court did not have discretion to strike the firearm enhancement, but it had discretion to impose the lesser term of 3 years, the middle term of 4 years, or the upper term of 10 years. Defendant argued for the imposition of one of the lesser two terms, going so far as to state that the availability of one of the lesser terms on the enhancement was one of the reasons he waived a jury trial. The court clearly recognized that it had discretion to impose one of the lower terms on the enhancement, but instead imposed the

high term of 10 years. It is simply unreasonable to believe that a sentencing judge who declined to exercise her discretion to impose a 3- or 4-year term, would somehow exercise her discretion to strike the enhancement entirely. Thus, there is no need to remand for resentencing.

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES. J.

HALL, J.*

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