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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FLORO VASQUEZRIVERA,

Defendant and Appellant.

2d Crim. No. B286261
(Super. Ct. No. 17F-00500)
(San Luis Obispo County)

Floro Vasquezrivera appeals from a judgment after a jury convicted him of one count of felony vandalism. (Pen. Code, § 594, subd. (b)(1).) The trial court sentenced him to two years in county jail and ordered one year of mandatory supervision. Vasquezrivera contends the judgment should be reversed because: (1) there was insufficient evidence to identify him as the perpetrator of the vandalism, (2) the court erred when it did not instruct the jury on eyewitness identification and his alibi defense, and (3) counsel provided ineffective assistance. We affirm.

FACTUAL AND PROCEDURAL HISTORY

In December 2016, Vasquezrivera and T.L. were in divorce proceedings. Around 7:30 p.m. on December 30, T.L. called 911 and reported that she saw Vasquezrivera break a bedroom window while she was in her San Miguel home. While speaking to the 911 operator, T.L. saw Vasquezrivera throw rocks at her car and break its windows. He then ran down the street.

Three weeks later, Deputy Ethan Strobridge spoke with Vasquezrivera about the vandalism at T.L.'s home. Vasquezrivera denied any involvement. He said he first heard about the vandalism in early January from T.L.'s mother.

Vasquezrivera testified at trial that he did not know where T.L. lived and that he was at work when the vandalism occurred. He said he left work in Paso Robles around 7:10 p.m. on December 30 and met a woman 10 minutes later. He said he and the woman were together in Paso Robles for the next 45 minutes to one hour.

Deputy Strobridge also testified at trial. He said that Vasquezrivera told him he was at work at 7:30 p.m. on December 30. Vasquezrivera told the deputy he called T.L. that night and asked her to keep their children because he was tired. He never mentioned to Strobridge that he was with a woman. He also told Strobridge that he heard about the vandalism from T.L.'s sister.

DISCUSSION

Sufficient evidence of identification

Vasquezrivera contends there was insufficient evidence to identify him as the perpetrator of the vandalism of T.L.'s house and car. We disagree.

When evaluating a claim of insufficient evidence, we “review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Here, T.L. identified Vasquezrivera in her 911 call. That is sufficient evidence to identify him as the vandal. (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1394; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 [evidence from a single witness can satisfy substantial evidence standard].)

Vasquezrivera counters that T.L.’s identification was “so weak as to constitute practically no evidence at all.” (*People v. Braun* (1939) 14 Cal.2d 1, 5.) But only evidence that is per se unbelievable is so weak that it amounts to no evidence at all. (*Ibid.*) Spontaneous statements, such as those T.L. made in her 911 call, are “a valuable form of evidence” that are “irreplaceable as substantive evidence.” (*People v. Hughey, supra*, 194 Cal.App.3d at p. 1393.) Moreover, to find T.L.’s identification unbelievable we would have to assess her credibility and reweigh the evidence. This we cannot do. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

People v. Cuevas (1995) 12 Cal.4th 252, on which Vasquezrivera relies, does not suggest an evaluation of T.L.’s credibility or reliability is required here. Because her identification was spontaneous, it was presumed reliable. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1266.) In contrast, the *Cuevas* witnesses’ out-of-court identifications were not spontaneous. (*Cuevas*, at pp. 258-259.) Moreover, the *Cuevas*

witnesses recanted their out-of-court identifications when they testified at trial. (*Id.* at p. 259.) T.L. did not recant the identification of her husband; she did not even testify at trial.

Jury instructions

Vasquezrivera contends the trial court erred when it did not instruct the jury on eyewitness identification and his alibi defense. But in the absence of a request, the court was not required to provide either of these instructions. (*People v. Wright* (1988) 45 Cal.3d 1126, 1144 [eyewitness identification]; *People v. Freeman* (1978) 22 Cal.3d 434, 437-438 [alibi].) Because counsel did not request them, Vasquezrivera forfeited his contention on appeal. (*People v. Jennings* (2010) 50 Cal.4th 616, 675.)

Vasquezrivera alternatively contends counsel provided ineffective assistance because he did not request the two instructions. To establish this claim, Vasquezrivera must prove that counsel's performance was deficient and resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) We will not find deficient performance unless no conceivable reason for counsel's actions appears on the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) We will not find prejudice unless Vasquezrivera shows "a probability sufficient to undermine confidence in the outcome." [Citations.] (*Ibid.*) We independently review whether Vasquezrivera has demonstrated ineffective assistance of counsel. (*In re Alvernaz* (1992) 2 Cal.4th 924, 944-945.)

Vasquezrivera has not demonstrated prejudice. The trial court instructed the jury on Vasquezrivera's presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, how to evaluate the evidence presented in the case, and how to evaluate witness credibility. The instructions on evidence,

prior statements, and burden of proof sufficiently informed the jury how to evaluate T.L.'s identification of her husband. (See *People v. Alcala* (1992) 4 Cal.4th 742, 803.) And with respect to the alibi defense, "it [was] sufficient that the jury [was] instructed generally to consider all the evidence, and to acquit [Vasquezrivera] in the event it entertains a reasonable doubt regarding his . . . guilt." (*Id.* at p. 804; see also *People v. Freeman, supra*, 22 Cal.3d at p. 438 [alibi instruction redundant where the jury also instructed on reasonable doubt].) Even if counsel committed error by not requesting instructions on eyewitness identification or alibi, our confidence in the outcome at trial is not undermined.

DISPOSITION

The judgment is affirmed.

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TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Craig B. Van Rooyen, Judge

Superior Court County of San Luis Obispo

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Appeal, for Defendant and Appellant.

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