

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

NESTOR VENTURA VELASQUEZ,

Defendant and Appellant.

B282428

(Los Angeles County
Super. Ct. No. SA089032)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan I. Rubin, Judge. Affirmed.

James Koester, 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, Marc A. Kohm and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Nestor Velasquez (Velasquez) guilty of robbery, but deadlocked when deciding whether the robbery was committed for the benefit of a street gang and deadlocked as to whether Velasquez or a principal personally used a firearm during the robbery. On appeal, Velasquez contends that the prosecution presented insufficient evidence of identity at trial. We disagree with Velasquez and affirm the conviction.

BACKGROUND

I. Charges

The Los Angeles County District Attorney charged Velasquez with second degree robbery. (Pen. Code, § 211.)¹ The District Attorney did not charge Velasquez under an aiding and abetting theory. The district attorney further alleged that the robbery was committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), that Velasquez personally used a firearm (§ 12022.53, subd. (b)), and that a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)). The district attorney also alleged that Velasquez had incurred a prior serious or violent felony strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior conviction for a serious felony (§ 667, subd. (a)(1)), had served two prior prison terms (§ 667.5, subd. (b)), and had committed the instant offense while out on bail (§ 12022.1). Velasquez pleaded not guilty to the section 211 charge, denied the special allegations, and proceeded to jury trial. Trial on the prior conviction, prior prison term, and bail allegations was bifurcated.

¹ All further statutory references are to the Penal Code, unless otherwise specified.

II. Prosecution evidence

On September 7, 2014, Zachary Capehart (Capehart) lived in the Palms neighborhood of Los Angeles. Capehart went for a walk at 12:30 a.m. because he had insomnia. At 1:00 a.m., Capehart walked north on Bagley Avenue and crossed Regent Street. The area was well lit. A car pulled up to the curb but Capehart did not see anyone get out of the vehicle. One person, alleged to be Velasquez, approached Capehart from behind and shouted, “Hey” to get Capehart’s attention.² Capehart turned around, observed the man, and then turned back north, where he saw a second man, later determined to be Oscar Dominguez, approaching him.³

The first man held a gun in his right hand and approached Capehart; the closest he got to Capehart was about two to three feet away. The first man pointed the gun at Capehart and said “Give us everything you’ve got.” Dominguez then approached Capehart and said, “Give us everything you’ve got.” Capehart

² Given that the primary issue on appeal is whether this person was indeed Velasquez, we refer to him as the first man or the first robber when reciting the prosecution’s evidence.

³ On cross-examination, law enforcement witnesses confirmed that Dominguez had pleaded guilty to the robbery charge and had perhaps admitted the gun allegation as well. In closing argument, Velasquez’s attorney unequivocally stated that Dominguez had admitted he used a weapon. However, it is unclear from the record on appeal whether Dominguez admitted that *he* personally used a firearm or that a principal personally used a firearm during the crime. Indeed, it is unclear if Dominguez pleaded to the gun allegation at all. According to the online criminal case summary for case number SA089032, Dominguez pleaded guilty to the robbery charge *only*.

said, “Are you serious?” The first man and Dominguez responded, “Yeah.” Capehart said he did not have cash, but had cards. Dominguez slapped Capehart’s face and Capehart gave his wallet to Dominguez. Capehart’s wallet contained a Bank of America card, a Discover card, and his driver’s license. Dominguez asked for Capehart’s PIN number. Capehart gave him a fake number. The first man and Dominguez told Capehart to turn around and get down on the ground. The first man and Dominguez walked to the car. Capehart heard the doors close. He turned and saw the car leave. Capehart estimated that the robbery was complete by 1:08 a.m. at the latest.

Capehart went to his apartment and reported his cards stolen to Bank of America and Discover. The next morning, he went to the police station and reported the robbery. A day or two later, Capehart described the robbery to Los Angeles Police Department Detective Luis Jurado. Capehart contacted Bank of America and the bank told Capehart where three attempts to use his card had been made. Capehart then forwarded that information to the police. Detective Jurado showed Capehart photographs of a car with a distinctive center taillight similar to the one he had seen at the time of the robbery.

Capehart told the police that a Black man and a Hispanic man had robbed him and that the gunman was about 5 feet 7 inches to 5 feet 8 inches tall. At the preliminary hearing, Capehart testified that Velasquez closely resembled the gunman and that Velasquez’s general build and skin color were similar to the gunman’s. At trial, Capehart described Velasquez as wearing a baseball cap with a bill and a baggy jacket, Hispanic, with “relatively full” eyebrows, “relatively light-skinned,” and about 5 feet 10 inches tall—shorter than Capehart, who was about six-

feet tall.⁴ Capehart said he could not see Velasquez's hair under the cap. As he had said at the preliminary hearing, Capehart testified at trial that Velasquez closely resembled the gunman; stating that the general structure of Velasquez's face, the build of Velasquez's body, and Velasquez's skin tone were consistent with the gunman's. However, Capehart could not say with absolute certainty that Velasquez was the gunman.

At the preliminary hearing, Capehart described Dominguez as "Black," meaning African-American, about 6 feet 2 inches tall, with "voluminous" hair that appeared to be in braids or dreadlocks, and light facial hair or a goatee. At trial, Capehart again described Dominguez as about 6 feet 2 inches tall, a Black or a darker-skinned Hispanic man, with darker skin than Velasquez. Capehart did not remember seeing tattoos on either Velasquez or Dominguez. Capehart described the robbers' car as a late model sedan, gray or silver with a distinctive center taillight.

According to Bank of America records, on September 8, 2014, at 1:16 a.m., an attempted withdrawal was made using Capehart's ATM card. The attempted withdrawal failed because an invalid PIN was used. A second attempt was made around 1:19 a.m. and a third attempt was made around 1:20 a.m. ATM

⁴ However, when Velasquez stood next to Capehart at trial, it was clear that Velasquez was taller than the six-foot Capehart, standing about 6 feet 2 inches to 6 feet 3 inches tall. Detective Jurado testified that "depending on a person's perspective, someone may appear taller or shorter." Moreover, the prosecutor argued at trial, Capehart may have been mistaken as to certain aspects of his description due to the "fear and chaos" of the robbery.

records revealed that the attempted transactions were made at Sam's After Dark, a gentleman's club about nine or ten miles from the crime scene. Capehart relayed this information to Detective Jurado. The detective then went to Sam's After Dark, which was about a 10 minute drive from the crime scene without traffic.

Detective Jurado spoke with Al Minato, the security manager for Sam's After Dark. Minato gave him the surveillance video for September 8, 2014, between 12:30 a.m. and 2:30 a.m. The video was played at trial. The video showed a car resembling the car that had been involved in the robbery arrive at Sam's After Dark. Two men exited the rear passenger doors; one was Velasquez, who was wearing a light blue shirt, pants and a baseball cap with a sticker on the lid, and the other was Dominguez, who was wearing shorts and a baseball cap. Velasquez had a tattoo on his right forearm and the back of his head.⁵ Dominguez had a large tattoo on the back of his neck. Dominguez appeared dark skinned and had darker skin than Velasquez. He was also significantly shorter than Velasquez. Velasquez entered Sam's After Dark, went to the ATM, stood over it, then stepped away. Dominguez then entered the club. Velasquez, Dominguez, and a third person wearing a "DC" T-shirt went over to the ATM, looked at a receipt, and stepped away. The third person then entered the club's dance floor area.

⁵ Although Capehart did not observe Velasquez's tattoos, we note that Velasquez was wearing both a cap and a jacket at the time of the robbery.

Velasquez pushed the ATM's buttons while Dominguez hovered nearby, then they both walked away.⁶

After the prosecution rested its case, defense counsel filed a section 1118.1 motion for acquittal, arguing that the prosecution had failed to present substantial evidence of Velasquez's identity. The trial court denied the motion, stating there was strong circumstantial evidence of Velasquez's identity in addition to the victim's testimony that Velasquez closely resembled one of the robbers.⁷

III. Verdict and sentencing

The jury convicted Velasquez of the section 211 charge but was unable to reach a verdict as to the gang and firearm allegations. The trial court declared a mistrial as to those allegations and subsequently granted the prosecution's motion to dismiss them. Velasquez admitted the prior conviction, a prior prison term, and out on bail allegations. Velasquez was sentenced to a total term of 18 years in state prison, calculated as follows: five years for the section 211 conviction, doubled to 10 years under the "Three Strikes" law, plus five years for the serious felony conviction enhancement, one year for the prior

⁶ Detective Jurado also found an Instagram account for Dominguez using the name "Papucho 55." Photos uploaded to the account showed Dominguez and Velasquez.

⁷ The prosecution also presented evidence in support of the allegation that the robbery was committed for the benefit of, at the direction of, and in association with a criminal street gang, and that Velasquez and Dominguez were members of that gang. During the defense case, Velasquez's expert witness opined that the robbery was a crime of opportunity rather than a crime designed to benefit the gang.

prison term enhancement; and two years for the bail enhancement.

STANDARD OF REVIEW

We review the evidence under the familiar and deferential substantial evidence standard. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) Substantial evidence is evidence that is “reasonable, credible, and of solid value.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) In reviewing for substantial evidence on appeal, 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) 51 Cal.4th 620, 632.)

“When a jury’s verdict 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 any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It is of no consequence that the jury believing other evidence, or drawing different inferences, might have reached a contrary conclusion.” (*People v. Brown* (1984) 150 Cal.App.3d 968, 970.) Reversal under this standard of review “is unwarranted unless it appears ‘that upon no hypothesis

whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The standard of review when determining the sufficiency of the evidence supporting an enhancement is the same as that applied to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

DISCUSSION

According to the evidence presented at trial, two men approached Capehart on the street—one was undisputedly Dominguez while the other was alleged to be Velasquez. Although it is unclear whether a third person waited in the getaway car during the robbery, minutes after the crime took place, surveillance video captured the getaway car arriving at Sam’s After Dark. Dominguez and Velasquez then exited through the car’s rear doors and entered the club, strongly suggesting that a third person was in the driver’s seat—and had been in the driver’s seat at the time of the robbery as well. Surveillance video then captured Dominguez, Velasquez and a still-unidentified third man as they repeatedly tried to use Capehart’s ATM card at an ATM inside the club. Thus, the evidence yielded three possible scenarios: (1) Velasquez was not present during the robbery and was picked up en route to Sam’s After Dark; (2) Velasquez was present during the robbery but remained inside the getaway car instead of approaching Capehart on the street with Dominguez; or (3) Velasquez was present during the robbery and approached Capehart on the street with Dominguez. By convicting Velasquez of robbery, in the absence of an aiding and abetting instruction, the jury necessarily believed the third scenario to be true.⁸

⁸ The jury found this third scenario to be true despite defense counsel’s closing argument, which focused on Capehart’s

I. Applicable law

We first note that the prosecution was not required to rule out every hypothesis except that of guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 326.) Thus, the prosecution did not have to disprove the first two scenarios in order to prove the third scenario here. Furthermore, as noted above, we may reverse Velasquez's robbery conviction only if it appears that under no hypothesis is there sufficient substantial evidence to support the jury's finding. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 331; *People v. Mendez* (2010) 188 Cal.App.4th 47, 59.) In other words, if the circumstances reasonably justify the jury's finding, reversal is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Valdez* (2004) 32 Cal.4th 73, 104; *People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

With respect to identity, California courts once held that, in order to set aside a jury's finding of guilt, "the evidence of

alleged misidentification. As defense counsel noted: "So, maybe, the district attorney could have charged . . . aiding or abetting or some other crime. Use of a stolen credit card, but they didn't. . . . There is one charge and one charge only and that is robbery. And for robbery, you have to put Mr. Velasquez at the scene of the crime, not the scene of Sam's. So it boils down to one thing which is the identification." As counsel concluded: "[T]he only evidence of the robbery is Mr. Capehart's testimony. Just think about his testimony. Five foot eight, Hispanic male with a gun who's already pled to both of those charges and the six foot two, Black male. And I think . . . you'll come to the conclusion that Mr. Velasquez was not the one, beyond a reasonable doubt was not the one who assisted Mr. Dominguez that evening and you'll vote not guilty."

identity must be so weak as to constitute practically no evidence at all.” (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 493, citing *People v. Braun* (1939) 14 Cal.2d 1, 5.) However, in *Jackson v. Virginia*, *supra*, 443 U.S. at page 320, the United States Supreme Court held that this so-called “no evidence” rule was “simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt” given that a mere modicum of evidence could satisfy this standard. Thus, when now reviewing for sufficiency of evidence, we do not determine whether we believe the evidence at trial establishes guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Id.* at pp. 317–320.)

Here, the jury was presented with two pieces of evidence tying Velasquez to the robbery—Capehart’s description of the robbers as well as surveillance video of Velasquez exiting the getaway car and attempting to use Capehart’s ATM card within minutes of the robbery. Although Capehart could not state with certainty that Velasquez was one of the robbers, “it is not essential that a witness be free from doubt as to one’s identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime, and the want of positiveness goes only to the weight of the testimony.” (*People v. Lindsay*, *supra*, 227 Cal.App.2d 482, 494.) “The qualification of identity and lack of positiveness in the testimony . . . were matters going to the weight of the evidence and the credibility of the witnesses and were for the observation and consideration of the jury in the first instance. (*People v. Wiest* (1962) 205 Cal.App.2d 43, 45–46.) Indeed, “[t]estimony that a defendant

‘resembles’ the robber [citation] or ‘looks like’ the same man” has been deemed sufficient. (*People v. Yates* (1958) 165 Cal.App.2d 489, 494.) Furthermore, to the extent there are inconsistencies and contradictions in Capehart’s testimony, it is not our function to resolve them, especially given that defense counsel highlighted these discrepancies throughout the trial and argued that the jury’s verdict hinged on the issue of identification. Indeed, “the claimed weaknesses of identification testimony are a matter of argument to the trier of fact and cannot properly be directed to this court or effectively urged on appeal.” (*People v. Johnson* (1960) 187 Cal.App.2d 116, 122.)

II. Capehart’s description of the robbers

Capehart described the individual who came up behind him with a gun (i.e., Velasquez) as Hispanic and perhaps about 5 feet 10 inches tall. The individual was also relatively light-skinned and had relatively full eyebrows. He was wearing a baseball cap with a bill and a large, loose fitting baggy jacket. Capehart did not recall any insignia or other particular identifying markings on the baseball cap. Capehart described the second individual (i.e., Dominguez) as taller than Capehart, perhaps around 6 feet, two inches tall, with noticeably darker skin than the first robber. Capehart believed that the second robber was perhaps a dark-skinned Hispanic man or a Black male with a voluminous hair style, perhaps a cross between cornrows and dreadlocks.

On appeal, Velasquez contends that the first robber—the shorter, lighter-skinned Hispanic man—was not Velasquez but was instead Dominguez and the second robber—the taller, dark-skinned Hispanic or Black man with cornrows or deadlocks—was

a different, still-unidentified, man altogether.⁹ As he did at trial, Velasquez cites alternative inferences that could be drawn from the evidence. Nevertheless, we conclude that sufficient evidence supported the jury's determination that Velasquez was one of the robbers. At both the preliminary hearing and trial, Capehart testified that Velasquez closely resembled the gunman; stating that the general structure of Velasquez's face, the build of Velasquez's body, and Velasquez's skin tone were consistent with the gunman's. As noted above, testimony that a defendant resembles the robber or looks like the same man has been deemed sufficient evidence of identity. (*People v. Yates, supra*, 165 Cal.App.2d at p. 494.) Furthermore, an appellate court has "no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." (*Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370, disapproved on another ground in *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2; see *People v. Akins* (1997) 56 Cal.App.4th 331, 336–337 [defendant bears "massive burden" when claiming insufficient evidence supported conviction given limited role of reviewing court].) Instead, as noted above, our power begins and ends with a determination as to whether there is any substantial evidence to support the jury's finding. (*Ibid.*) Here, Velasquez's undisputed possession of Capehart's ATM card and repeated attempts to use it shortly after the robbery, coupled with Capehart's testimony that Velasquez closely resembled the light-

⁹ It is undisputed Velasquez did not match the description of the second robber. At trial, Capehart acknowledged that Velasquez was not the second robber.

skinned Hispanic robber, constituted substantial evidence supporting the robbery conviction. The jury was entitled to credit those portions of Capehart's testimony supporting the conclusion that Velasquez was the gunman while disregarding any inconsistent testimony on the grounds that Capehart, as an armed robbery victim, may not have correctly perceived or recalled those details. Given our limited standard of review on appeal, we are compelled to affirm the conviction here.

III. Surveillance video

With respect to burglary and robbery, the California Supreme Court has recognized that possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. (See *People v. Grimes* (2016) 1 Cal.5th 698, 731; *People v. McFarland* (1962) 58 Cal.2d 748, 754 [possession of recently stolen property with false or absent explanation sufficient to support burglary conviction]; see also CALCRIM No. 376.) Put another way, the "knowing possession by a defendant of recently stolen property raises a strong inference of the other element of the crime: the defendant's knowledge of the tainted nature of the property. This inference is so substantial that only 'slight' additional corroborating evidence need be adduced in order to permit a finding of guilty." (*People v. Anderson* (1989) 210 Cal.App.3d 414, 421.)

Initially, we note that when Velasquez and Dominguez arrived at Sam's After Dark, they exited their vehicle's rear passenger doors, after which the still-unidentified driver parked the car. Given that mere minutes had passed since the robbery, it is reasonable to infer that Velasquez and Dominguez exited the

vehicle before the robbery—and re-entered the vehicle after the robbery—through those same rear passenger doors, thus supporting the jury’s determination that Velasquez was one of the robbers. Indeed, one would expect the individuals actually robbing a victim to exit the getaway car from passenger seats, while one would expect the getaway driver to remain behind the wheel, at the ready. Based on both the compressed timeline as well as the surveillance video, it is reasonable to assume that neither Velasquez nor Dominguez drove the getaway car and were instead the passengers who committed the robbery.¹⁰

Furthermore, it is undisputed that Velasquez possessed Capehart’s stolen ATM card and tried to use it shortly after the robbery. Bank records showed three attempts to use Capehart’s ATM card at Sam’s After Dark between 1:16 a.m. to 1:19 a.m., about 15 to 20 minutes after the robbery took place. Surveillance video revealed it was Velasquez who tried to use Capehart’s ATM card. In addition to this compact timeline, we also note that Velasquez was accompanied by Dominguez at the ATM machine, and that Dominguez admitted he was one of the robbers. We also note that Velasquez tried to use Capehart’s ATM card, without success, at least three times. Given that Capehart gave the robbers a fake PIN number during the robbery, Velasquez’s

¹⁰ Given that only a few minutes passed between the robbery and Velasquez’s attempted use of the ATM card, it is also reasonable to infer that the occupants of the getaway car did not change. Being in a getaway car shortly after a crime and having some of the same general characteristics as a perpetrator will likely constitute substantial evidence of identity. (See *People v. Sanford* (2017) 11 Cal.App.5th 84, 92.)

repeated failures at the ATM supports the jury's determination that Velasquez was indeed the other robber.

In short, Velasquez's possession of Capehart's ATM card was accompanied by the slight corroboration required under California cases. Velasquez's unsuccessful attempts to use the card, which required relying on incorrect information only the robbers could know, was conduct tending to show his guilt. (See *People v. Grimes, supra*, 1 Cal.5th at p. 731.) Furthermore, Capehart testified that Velasquez closely resembled the gunman; specifically, that the general structure of Velasquez's face, the build of Velasquez's body, and Velasquez's skin tone were consistent with the gunman's. Finally, Velasquez's use of the ATM took place close in time to, and a short distance from, the robbery. Taken together, this was sufficient evidence for a reasonable jury to find Velasquez guilty of robbery.¹¹

¹¹ In addition to contending there was insufficient evidence of identity, Velasquez also contends there was insufficient evidence to support the gang allegation. Velasquez acknowledges the jury did not find the gang allegation to be true, but raises the claim to bar a potential retrial of the allegation. The claim is premature. "We do not decide the double jeopardy question defendant raises here. Unless and until the prosecution chooses to retry the STEP Act allegation, the issue is premature." (*People v. Zermeno* (1999) 21 Cal.4th 927, 933–934, fn. 3)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J.*

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