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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN JOSEPH GONZALES,

Defendant and Appellant.

2d Crim. No. B265980
(Super. Ct. No. 2012026762)
(Ventura County)

Ruben Joseph Gonzales appeals a judgment following conviction of unlawful driving or taking of a vehicle, driving under the influence of drugs or alcohol, and receiving stolen property. (Veh. Code, §§ 10851, subd. (a), 23152, subd. (a); Pen. Code, § 496d, subd. (a).)[1] We affirm.

[1] All further statutory references are to the Penal Code unless stated otherwise.

FACTUAL AND PROCEDURAL HISTORY

In the early morning of July 12, 2012, Fred Ruiz delivered newspapers on Ketch Avenue in Ventura. At approximately 5:45 a.m., he parked his blue Nissan Altima automobile, left the engine running, and delivered newspapers on foot. As Gonzales returned to his vehicle, he saw a stranger enter it and "burn[] rubber" as he drove away.

Ruiz ran home and telephoned for police assistance. An Oxnard police officer responded to the call and interviewed Ruiz, who gave a general description of the thief.

At trial, Ruiz described the thief as a Hispanic man approximately 27 to 30 years old, with a medium build, five foot seven inches tall, and 180 pounds. The man wore jeans and a black shirt. Ruiz was approximately 20 feet from his vehicle when he saw him.

At 10 a.m. that morning, Mark Krist and George Lopez were at a rental yard in Santa Paula when they saw a vehicle, later identified as belonging to Ruiz, "jump[]" the adjacent freeway in an "airborne" and "upside down" position. After the vehicle struck a block wall and stopped, the driver left the vehicle and ran away. Krist and Lopez described the driver as a Hispanic man, with a muscular build and closely cropped hair. Krist recalled that the driver wore a white shirt and Lopez recalled that the driver wore a blue shirt.

Santa Paula Police Officer Lawrence Johnson soon saw Gonzales "crouched" in a backyard approximately five or six blocks from the accident scene. Gonzales wore jeans and a white tank-top shirt and held a black shirt. He was perspiring and "out of breath."

When arrested, Gonzales's eyes were red and glassy, his body twitched, and he stumbled. However, he did not display any injuries consistent with a recent traffic accident. A later laboratory analysis of his blood specimen revealed the presence of methamphetamine and amphetamine.

Within an hour of the accident, California Highway Patrol Officer Russell Carver conducted a field-identification of Gonzales by Krist and Lopez. The two witnesses separately identified Gonzales as the driver of Ruiz's vehicle as it jumped the freeway and crashed down an embankment.

Police officers later returned Ruiz's vehicle to him. It was "totally damaged."

The jury convicted Gonzales of unlawful driving or taking of a vehicle, driving under the influence of drugs or alcohol, and receiving stolen property. (Veh. Code, §§ 10851, subd. (a), 23152, subd. (a); § 496d, subd. (a).) In a separate proceeding, the trial court found that Gonzales suffered a prior conviction for unlawful driving or taking of a vehicle. (§ 666.5, subd. (a).) The court sentenced Gonzales in combination with Case No. 2013036292 (an unrelated prosecution); he received a

term of five years eight months; four years to be served in county jail and the balance in mandatory supervision. The court imposed but stayed sentence on the receiving stolen property count, pursuant to section 654. The court also imposed a $750 restitution fine, a $750 probation revocation restitution fine (suspended), and a $443.86 criminal justice administration fee; ordered $5,000 in victim restitution; and, awarded Gonzales 76 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.44; Gov. Code, § 29550.2.)

Gonzales appeals and contends that: 1) there is insufficient evidence of identity to support the convictions; 2) the trial court erred by not striking Carver's testimony regarding the witnesses' field-identifications; and 3) the trial court erred by instructing with incomplete instructions regarding the elements of the theft-related offenses.

DISCUSSION

I.

Gonzales argues that there is insufficient evidence of identity to support his convictions for unlawful driving or taking of a vehicle and for receiving stolen property. He points out that no physical evidence connected him to Ruiz's vehicle and that no witness saw his face. Gonzales adds that there is no evidence of distinctive physical characteristics or clothing, or that he suffered injuries from the rollover accident.

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (2015) 60 Cal.4th 966, 988; *People v. Jackson* (2014) 58 Cal.4th 724, 749.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact"].) We must accept logical inferences that the jury might have drawn from the evidence although we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241, overruled on other grounds as stated in *People v. Harris* (2013) 57 Cal.4th 804, 834.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar*, at p. 60.) Our analysis reviews the evidence that was presented, rather than evidence that did not exist or was not presented. (*People v. Story* (2009) 45 Cal.4th 1282, 1299.)

Identification of an accused may be established by proof of peculiarities of size, appearance, features, or clothing. (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.) Thus, it is

not necessary that a witness observed an accused's face in order to identify him. (*Ibid.*) A reviewing court will set aside a finding of guilt only if the evidence of identity is "so weak as to constitute practically no evidence at all." (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 493.)

There is sufficient evidence of identity to support Ruiz's convictions and satisfy constitutional commands of due process of law. Although no witness saw Gonzales's face, three witnesses observed his general characteristics -- height, weight, age, haircut, ethnicity -- from a close distance. Shortly following the accident, a police officer found Gonzales hiding in a backyard five to six blocks from the accident scene. Gonzales was perspiring and carried a black shirt. Ruiz testified at trial that the thief wore a black shirt and jeans. Krist and Lopez also identified Gonzales in a field-identification conducted shortly after Gonzales's detention. This evidence, considered together, sufficiently supports Gonzalez's convictions.

II.

Gonzales contends that the trial court erred by not striking Officer Carver's testimony regarding "a correct identification" of Gonzales by the witnesses during the field identification. Gonzales asserts that this brief testimony denied him due process of law and a fair trial because Carver's opinion regarding "a correct identification" was an improper opinion on

guilt that invaded the jury's factfinding tasks. He argues that the error is prejudicial pursuant to any standard of review.

At trial, Gonzales objected to this testimony by Carver regarding the field-identification: "Q: Were you satisfied that the procedures were followed that day and there was a correct identification of the defendant by both Mr. Krist and Mr. Lopez?" Defendant's attorney: "I'm going to object. Calls for ultimate conclusion. Vouching." The Court: "Overruled." Witness Carver: "Yes."

Any error is harmless pursuant to any standard of review. Carver's limited tasks concerned creating an area perimeter to locate Gonzales and conducting a field-identification by the witnesses. The trial court instructed that the jurors were the sole triers of fact. (CALCRIM No. 200.) The jury also received instruction regarding eyewitness identification. (CALCRIM No. 315.) The jury requested readback of portions of testimony by Carver, Krist, and Lopez, suggesting that the jury carefully considered the witnesses' identification testimony. We presume that jurors understand and follow the instructions. (*People v. Bryant* (2014) 60 Cal.4th 335, 447; *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024 ["'We credit jurors with intelligence and common sense . . . and do not assume that these virtues will abandon them when presented with a court's instructions'"].)

III.[2]

Gonzales argues that the trial court erred prejudicially by not instructing sua sponte that he could not be convicted of vehicle theft *and* receiving the *same* stolen property. (*People v. Garza* (2005) 35 Cal.4th 866, 871 [conviction for unlawfully taking a vehicle with the intent to permanently deprive the owner of possession in violation of section 10851, subdivision (a) precludes conviction of receiving that same vehicle as stolen property].) He adds that the court did not instruct sua sponte regarding the specific intent element of theft in CALCRIM No. 1750, "Receiving Stolen Property." Gonzales contends that the errors lessened the prosecution's burden of proof and denied him a fair trial, due process of law, and the right to present a defense pursuant to the federal and California constitutions. He asserts that the errors are prejudicial pursuant to any standard of review.

The common law precluded a conviction for theft of identified property and for receiving that same property as stolen goods. (*People v. Garza*, *supra*, 35 Cal.4th 866, 874-875 [common law rule that one cannot be both a thief and a receiver of the same stolen property].) *Taking* a vehicle with the intent to permanently deprive the owner of possession in violation of section 10851 is a crime of theft. (*Garza*, at p. 881.) A defendant

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[2] All statutory references in *III.* are to Vehicle Code section 10851, subdivision (a), unless stated otherwise.

cannot be convicted of taking a vehicle in violation of that section and receiving that vehicle as stolen property absent evidence of complete divorcement between the theft and a subsequent receiving. (*Id.* at pp. 874-875 [divorcement occurs when the thief has disposed of the property and then subsequently receives it back in a transaction separate from the original theft].) *Driving* a previously stolen vehicle in violation of section 10851 is not a crime of theft, however, and a defendant can be convicted of violating the statute in that manner ("posttheft driving") and also receiving the same vehicle as stolen property. (*People v. Smith* (2013) 57 Cal.4th 232, 242 ["[T]here are two ways of violating section 10851: the defendant can either 'drive' or 'take' the vehicle"]; *Garza*, at p. 881.) When the prosecution charges a violation of section 10851, the trial court must instruct sua sponte that a defendant cannot be convicted of both taking a vehicle and receiving the same stolen vehicle absent evidence of divorcement between the theft and a subsequent receiving. (*Garza*, at p. 881.)

Posttheft driving occurs when "a defendant . . . steals a vehicle and then continues to drive it after the theft is complete." (*People v. Garza, supra,* 35 Cal. 4th 866, 880.) Our Supreme Court has noted two possible tests when a theft is complete: whether the driving is no longer part of a continuous journey away from the locus of the theft, and whether the taker had reached a place of temporary safety. (*Ibid.*)

Here the trial court did not instruct that Gonzales could not be convicted of taking Ruiz's vehicle *and* receiving it. As in *People v. Garza*, *supra*, 35 Cal.4th 866, 882, however, the error is harmless. It is not reasonably probable that a properly instructed jury would have reached a result more favorable to Gonzales. (*Garza*, at p. 882 [*Watson* standard of review].) The information charged a violation of section 10851 by unlawful driving or taking and the jury's verdict did not disclose which theory it accepted. The prosecutor argued both theories during summation and the trial court properly instructed regarding the elements of section 10851, subdivision (a) (CALCRIM No. 1820). Gonzales carelessly drove and wrecked Ruiz's vehicle approximately four hours after the taking occurred in a nearby city. Neither the victim nor law enforcement was pursuing Gonzales. It is a commonsense and a reasonable inference from this evidence that Gonzales was no longer driving in a continuous journey from the locus of the theft and that he had long reached a place of temporary safety. There is no reasonable probability that the jury would not have convicted him of posttheft unlawful driving. (*Garza*, at p. 882.) Accordingly, we affirm both convictions by construing Gonzales's section 10851 conviction as a non-theft conviction for post-theft driving. (*Garza*, at p. 882.)

The trial court's failure to instruct regarding the specific intent for theft as used within the receiving stolen property instruction is also harmless pursuant to any standard of

review. (CALCRIM No. 1750 ["Property is *stolen* if it was obtained by any type of theft . . . ."].) The only reasonable inference from the evidence is that Gonzales, a stranger to Ruiz, took Ruiz's vehicle intending to permanently deprive him of possession. Rather than returning the vehicle, Gonzales drove it to another city and, more than four hours following the theft, carelessly drove from the freeway onto an embankment. In the process, the vehicle was destroyed and Gonzales fled the accident scene.

IV.

Gonzales argues that the cumulative effect of prejudice arising from his asserted errors compel reversal. We have either concluded that there is no error or that any error is harmless. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1017 [general rule regarding cumulative error].)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J. TANGEMAN, J.

David R. Worley, Judge

Superior Court County of Ventura

Janet Gusdorff, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, John Yang, Deputy Attorney General, for Plaintiff and Respondent.