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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

HAMID YAZDANBAKHESH,

Defendant and Appellant.

B275407

(Los Angeles County  
Super. Ct. No. BA440031)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

Caneel C. Fraser, under appointment by the Court of Appeal, and Hamid Yazdanbakhesh, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Hamid Yazdanbakhesh was convicted following a jury trial of three counts: residential burglary (Pen. Code, § 459),<sup>1</sup> assault with

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

caustic chemicals (§ 244), and assault with a deadly weapon (§ 245, subd. (a)(1)). The jury also found true the allegation that a person was present during the commission of the burglary. (§ 667.5, subd. (c)(21).) He was sentenced to a term of seven years and now appeals from the judgment of conviction. We affirm.

## **BACKGROUND**

Farrokh Hadjian testified at trial that he had known appellant for approximately 25 years and had given appellant money throughout their acquaintance. About a year before the offense, Hadjian told appellant he would not give him any more money.

On January 29, 2015, around 4:00 or 5:00 a.m., Hadjian was asleep in his second-floor apartment when he heard someone open his balcony door. He saw a man, later identified as appellant, wearing a mask and using a flashlight to peer into his apartment. Hadjian asked him what he was doing, and appellant entered and threw bleach into Hadjian's face. Hadjian tried to run away, but appellant stood in the way of the front door. Hadjian struggled with appellant and yelled for his neighbor, Reza Bagheri, to call the police. When Hadjian gained the upper hand in the struggle, appellant said, "I have a gun." Several days after the incident, Hadjian realized the voice was that of appellant.

Hadjian threw appellant against a closet door and ran to Bagheri's apartment, where he washed his eyes. Bagheri called the police and watched Hadjian's front door from the window. Bagheri testified that

no one exited Hadjian's apartment through the front door. The only other exit from Hadjian's apartment was the balcony.

A forensic specialist found shoe prints on top of a pedestrian gate at Hadjian's apartment building. Investigators also found a bottle of Clorox bleach inside Hadjian's apartment and the cap to a bottle of Clorox bleach outside the pedestrian gate, beneath Hadjian's balcony. The cap was tested for DNA evidence.

On January 30, the day after the incident, appellant called his brother, Reza Yazdanbakhsh (Reza). Appellant told Reza he had fallen and hurt his leg and needed money to go to the hospital. The following day, Hadjian called Reza, and Reza told Hadjian about his conversation with appellant.

Santa Monica Police Department Detective Michael Chun was one of the officers who investigated the incident. In February, Hadjian realized he recognized appellant's voice and told Detective Chun to investigate appellant. When Detective Chun met with appellant on March 10, 2015, he noticed that appellant was limping badly and had a swollen foot. Appellant explained that he hurt his foot mowing the lawn and kicking a cement curb. Appellant told Detective Chun that he injured himself on January 28, 2015. Appellant showed Detective Chun a DVD case with a disc of his X-rays from the hospital, indicating a date of January 28, 2015. Detective Chun subsequently obtained a search warrant and examined the disc more closely. Detective Chun noticed the number "8" in the January 28 date was written in different ink and looked as if it had been altered from a number "9." Detective Chun

interviewed appellant again in June, and at that interview appellant said he actually hurt his foot two days before going to the hospital.

During the search of appellant's home, officers found in his closet a pair of navy blue Vans shoes with "splatter stains" that appeared consistent with bleach stains. Detective Chun took the shoes for evidence and to determine whether the tread marks matched the shoe prints found on the gate at appellant's apartment building. Detective Chun also took a DNA sample from appellant.

A Los Angeles County Sheriff's Department criminalist compared the tread of the Vans shoes with the shoe prints found at Hadjian's apartment building. The criminalist determined that one of the prints was similar in tread, size, and amount of wear to the right shoe.

Another criminalist tested the lid from the bleach bottle for DNA and found two contributors. Appellant was the major contributor to the DNA found on the lid. There was no conclusion regarding the minor contributor.

Appellant was held to answer following a November 18, 2015 preliminary hearing. He was charged in a December 2, 2015 information with three counts: count 1, first degree burglary with a person present (§§ 459, 667.5, subd. (c)); count 2, assault with caustic chemicals (§ 244); and count 3, assault with a deadly weapon (§ 245, subd. (a)(1)). He entered not guilty pleas, and the case proceeded to trial.

The jury convicted appellant of all three counts and found true the allegation that a person other than an accomplice was present during

the burglary. The court sentenced appellant to a total term of seven years, calculated as follows: upper term of six years on count 1; one year on count 2, consecutive to the sentence on count 1; and one year on count 3, stayed pursuant to section 654. Appellant timely appealed.

## DISCUSSION

After review of the record, appellant's court-appointed counsel filed an opening brief asking this court to review the record independently pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441.

On January 6, 2017, we advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider. Appellant has filed three supplemental briefs, raising numerous contentions, which we address seriatim.

(1) Appellant asserts that he was in custody for five months without being informed of the charges against him. The record shows that appellant was arrested on June 5, 2015, and the preliminary hearing was held on November 18, 2015. There is nothing in the record to indicate whether appellant waived time. Appellant has not shown that any alleged delay was prejudicial. (See *People v. Lomax* (2010) 49 Cal.4th 530, 557 ["Although a defendant seeking pretrial relief for a speedy trial violation is not required to make an affirmative showing of prejudice [citation], the situation is different after judgment. [Citations.] 'Upon appellate review following conviction, . . . a defendant who seeks to predicate reversal of a conviction upon denial of his right to speedy trial must show that the delay caused prejudice

. . . .””]; *People v. Malabag* (1997) 51 Cal.App.4th 1419, 1422 [“the judgment of the trial court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent and error must be affirmatively shown.”].)

(2) Appellant challenges the veracity of various items of evidence. He contends the prosecutor allowed Reza, his brother, to deny speaking with a detective even though this was false. He also contends that a pair of shoes belonging to his roommate was erroneously assumed to belong to him and that there were inconsistencies in witness descriptions of the length of his hair.

“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 . . . 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. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 403 (*Maury*).) Consequently, we cannot and will not re-weigh the evidence or substitute our evaluation of the credibility of a witness’ identification for that of the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Detective Chun testified that he spoke with Reza, contrary to Reza’s testimony. The jury thus heard evidence that Reza’s testimony was contradicted by Detective Chun. The jury also heard the testimony regarding the length of appellant’s hair and Detective Chun’s testimony that he did not check whether the shoes belonged to appellant, check

appellant's shoe size, or have appellant try on the shoes. As discussed below, the verdict is supported by substantial evidence. We therefore defer to the jury's determination of the credibility of the witnesses and the jury's weighing of the evidence. (*Maury, supra*, 30 Cal.4th at p. 403.)

(3) Appellant contends his *Miranda* rights were violated during his June 5 interview with Detective Chun. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Appellant did not raise this issue below and therefore has forfeited it. (See *People v. Scott* (2011) 52 Cal.4th 452, 482 ["An allegation of invocation under *Miranda* was not one of the several grounds upon which defendant challenged the admissibility of his statement below. As a result, the trial court had no opportunity to resolve material factual disputes and make necessary factual findings. Therefore, . . . the claim has been forfeited."].)

(4) Appellant contends the court did not respond to a question from the jury. During deliberations, the jury buzzed signaling a question at 10:30 a.m. on May 16, 2016. However, the court did not respond and, shortly thereafter, at 11:01 a.m., the jury buzzed signaling a verdict. The court subsequently informed counsel that when the jury buzzed with a question, "the bailiff was busy because the court was still in session."

Appellant did not object to the court's failure to respond to the jury question and therefore has forfeited the issue. (See *People v. Boyette* (2002) 29 Cal.4th 381, 430 [where the defendant did not object to the trial court's decision not to respond to a juror's note, the

defendant “failed to preserve the issue for appeal and, indeed, may be held to have given tacit approval of the trial court’s decision”].) Even if not forfeited, there is no indication of any prejudice from the court’s failure to respond to the question because, shortly thereafter, the jury returned a verdict.

(5) Appellant contends the trial court failed to instruct the jury on the allegation as to count one that a person was present during the burglary. “We review de novo whether a jury instruction correctly states the law. [Citations.] Our task is to determine whether the trial court “fully and fairly instructed on the applicable law.” [Citation.]’ [Citation.]” (*People v. Franco* (2009) 180 Cal.App.4th 713, 720 (*Franco*)). The trial court correctly instructed the jury.

After receiving the verdict, the trial court spoke to counsel outside the jury’s presence and informed them that the court mistakenly failed to give the jury an instruction on the person present allegation as to count 1. The court brought the jury in, gave the instruction orally, gave the jury a verdict form for the allegation, and ordered the jury to resume deliberations. The court instructed the jury as follows: “If you find the defendant guilty of the crime as charged in Count 1, you must also decide whether the People have proved the additional allegation that another person other than an accomplice was present in the residence during the commission of the burglary.” After further deliberations, the jury found true the allegation that another person, other than an accomplice, was present in the residence during the commission of the burglary.



Although the court initially failed to instruct the jury on the person present allegation, defense counsel at trial did not object to the instructions when first given, and after realizing the omission, the court properly instructed the jury. Moreover, there is no prejudice from any alleged error because the evidence was overwhelming that there was a person present during the commission of the burglary. (See *Franco*, *supra*, 180 Cal.App.4th at p. 720 [“Instructional error affects a defendant’s substantial rights if the error was prejudicial under the applicable standard for determining harmless error.”].)

(6) Appellant challenges the sufficiency of the evidence to support his burglary conviction. “Where, as here, a defendant challenges the sufficiency of the evidence to support his conviction, [t]he standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Zaun* (2016) 245 Cal.App.4th 1171, 1173.)

The evidence was sufficient to sustain appellant’s conviction. Hadjian testified that he had known appellant for many years and recognized his voice. Detective Chun testified about appellant’s injury and his changing story about the injury and the date of the injury, and the jury was shown the X-ray case with the date that appeared to have been altered. The criminalists testified that a shoe print found at the scene matched the shoe found in appellant’s closet and that appellant’s

DNA was found on the bleach bottle cap found at the scene. There is substantial evidence in the record from which a reasonable jury could find appellant guilty beyond a reasonable doubt.

(7) Appellant contends the trial court erred in not allowing defense counsel to play the recording of his interview with the detective during cross-examination. The trial court's rulings on the admission and exclusion of evidence are reviewed for abuse of discretion. (*People v. Chism* (2014) 58 Cal.4th 1266, 1291.) “[I]f the ruling was correct on any ground, we affirm.” [Citation.]” (*Id.* at p. 1295, fn. 12.)

During trial, defense counsel acknowledged that the interview recordings were not transcribed but asked if Detective Chun would be allowed to listen to the recordings in order to refresh his recollection during cross-examination. The trial court replied that the interviews should have been transcribed in order to play the recordings for the jury and denied the request. Defense counsel asked if Detective Chun could listen to the recordings with headphones, and the court replied that defense counsel should have prepared by having Detective Chun listen to the recordings the night before. The court explained that allowing Detective Chun to listen to the recordings privately during trial would consume time that the court did not know would be required. The court did not abuse its discretion in denying the request. (See *People v. Allen* (2008) 44 Cal.4th 843, 868 [citing the trial court's authority to manage the proceedings before it].)

(8) Appellant contends that DNA found on the cap to the bleach bottle was not tested and that the DNA actually belonged to his

roommate. The criminalist testified that, although there was a major contributor and a minor contributor to the DNA found on the cap, the major DNA profile he found had a “random match probability estimate” of 1 in 52 trillion to appellant. The criminalist was not given a DNA sample from appellant’s roommate to compare and therefore was not able to determine whether the roommate was the minor contributor. Regardless, even if the roommate was the minor contributor, given the criminalist’s testimony that the match to appellant’s DNA sample had a probability of 1 in 52 trillion, appellant suffered no prejudice.

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel’s compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

## **DISPOSITION**

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.