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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.

JOHN ANTHONY MARTONE,

Defendant and Appellant.

B270643

(Los Angeles County
Super. Ct. No. BA435802)

APPEAL from a judgment of the Superior Court for Los Angeles County, James R. Dabney, Judge. Affirmed.

Stanley Dale Radtke, 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 Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Anthony Martone appeals from a judgment sentencing him to six years in state prison after a jury found him guilty on two counts of first degree burglary. (Pen. Code, § 459.)¹ He contends the trial court erred in denying his motion to suppress pretrial identifications that he asserts were the result of impermissibly suggestive identification procedures. He also contends the trial court erred in denying his section 1118.1 motion on the ground that substantial evidence did not support the charges against him. We conclude that the identification procedures used were not impermissibly suggestive under the circumstances, and that there was sufficient evidence to support an inference that defendant intended to commit larceny when he entered the victims' homes. Accordingly, we affirm the judgment.

BACKGROUND

At around 8:30 p.m. on April 15, 2015, Oralia Licardi and her husband, Efrain Santos, were at their apartment on the first floor of a two-story apartment building at 149 South Westmoreland Avenue. A man from their church was with them, and they were waiting for a fourth person to join them. While they were waiting, the three of them were reading their bibles together, and the door was left unlocked.

They heard someone come in the door, but did not immediately look up from their bibles. When they did look up, they saw a man they did not know. He had a lot of tattoos, including one on his arm of a

¹ Further undesignated statutory references are to the Penal Code.

black figure with two red eyes. He had come into the apartment, closed the door, and was leaning against it. He did not say anything. Instead, he made a hand gesture like a gun (with his finger pointed at them) with one hand, and appeared to be reaching for something in the small of his back with the other hand. Licardi and Santos thought he was reaching for a gun, but his hand came back empty. The man then saw Licardi's cell phone, which was sitting on the sofa and plugged into a charging cable. He went to grab it, but Santos grabbed it first; the man ended up holding the charging cord, which he then dropped. Licardi spoke to him, asking him what he was doing there and what he wanted. She told him she thought he went into the wrong apartment, and asked him to leave. He said something indecipherable, and reached behind him for the doorknob. He opened the door and backed out of the apartment. He had been in the apartment for at least a minute or more.²

After the man left, Licardi ran to the door and locked it. A few seconds later, she and Santos heard their upstairs neighbor scream. Santos and their church friend started to run outside to help, but they heard someone running down the steps, so they went back inside and locked the door again. A few minutes later, they saw their neighbors outside, and went out to join them. Licardi and others went to see if the man may have hidden in the building's laundry room. They did not find

² Santos testified that he was in the apartment for a minute or more; Licardi testified that he was in the apartment for five to ten minutes.

him, but instead found a black bag; they told their neighbor Maritza Popoca about it while she was talking to the police.

Maritza Popoca lived in an apartment on the second floor of 149 South Westmoreland Avenue. On the evening of April 15, 2015, she was in her apartment with her two young children, her brother-in-law, and her two dogs. The dogs were very unsettled, and kept growling. Popoca checked her door to see if anything was happening in the hallway; she did not see anything out of the ordinary.

A short time later, she heard a jiggling at her front door. Her husband did not have his keys with him, so she did not think it was unusual. She went to the door and opened it without first looking through the peephole. There was a man she had never seen before.

The man did not say anything. She looked at him and, after a few seconds began to close the door. He stopped the door with his hand and foot, and then stepped inside her apartment while making a hand gesture like putting a gun to her head. She tried to scream, but nothing came out. He took two more steps toward her, and she finally was able to scream. Her German Shepherd reacted and came running toward them. The man saw the dog and left. He had been in her apartment for approximately 10 seconds.

Popoca called her husband, who told her to call 911. While standing with her neighbors, who had gathered after hearing the scream, she called 911 and told the operator that a man had entered two apartments in her building. She described the man as White, in his late 20s or 30s, wearing a white shirt, black pants, black hat with blue

inside, and said that he had tattoos. She also told the 911 operator that the intruder left two bags in the apartment building's laundry room.

Los Angeles Police Officer Taoufik Nkila and his partner arrived eight to twenty minutes after Popoca's 911 call.³ Officer Nkila spoke to Popoca. She told the officer that the suspect was a White male with tattoos on his face and what looked like prominent acne scars on his neck. She also told him about the bag left in the laundry room behind the building; she told him that it did not belong to anyone in the building. He went to the laundry room and found the bag. He opened it and found some paperwork with defendant's name on it along with other miscellaneous items.

Officer Nkila and his partner went to their patrol car, where his partner got on the computer and downloaded a photograph of defendant to his cell phone. They went back to Popoca and showed her the photograph. She immediately said, "That's him, the same guy who was inside the apartment." They then showed the photograph to Licardi, who had not yet provided the officers with a description of the

³ There is some confusion about when the police responded to the scene. Popoca testified that the police arrived around eight minutes after her 911 call. Licardi testified that it took the police 15 to 20 minutes to arrive. Officer Nkila testified that he received a radio call about the burglary at 8:35 p.m. and that it took about 10 minutes for them to arrive at the scene, meaning that they arrived at 8:45 p.m. He admitted, however, that his police report stated that they arrived at 2145 hours, or 9:45 p.m.

perpetrator. Upon viewing the photograph, Licardi said that it was the person who came into her apartment.⁴

The next day, Popoca and Licardi each met with Detective Martinez. Each identified defendant in photographic lineups that had the neck and a portion of the forehead of each of the men blacked out. The redactions covered the places where defendant had tattoos; he was the only person in the lineup who had visible tattoos. According to Popoca, she also was shown the same lineup without the redactions before she was shown the redacted one.⁵

Defendant was charged by information with two counts of first degree burglary. Before trial, defendant moved to suppress the identification of defendant by Popoca and Licardi on the ground that Popoca testified at the preliminary hearing that she was shown a redacted photograph of defendant on the night of the incident, and then was shown an unredacted photographic lineup the following day in which defendant was the only person with tattoos. He argued that the identifications should be excluded because the procedures used were unnecessarily suggestive. Defendant also noted that Licardi testified at the preliminary hearing that when she was shown the photograph the night of the incident, the police officer who showed it to her “just told

⁴ Officer Nkila testified that he showed only one photograph. Popoca testified that she thought she was shown two or three photographs, and Licardi testified that she thought she was shown two.

⁵ Licardi testified that she did not remember seeing Defense Exhibit A (the unredacted lineup), but said that Detective Martinez showed her two sets of photographs. Detective Martinez did not testify at trial.

me I want you to recognize this person, whether it is or it isn't." He contended this statement by the police officer made the procedure even more suggestive.

In opposing the motion, the prosecutor conceded that the showing of a single photograph was suggestive, but argued that it was necessary. He noted that the police officers had received a call that a burglary had just occurred in the apartment complex, the perpetrator was still on the loose, and a stranger's property was in the complex. Therefore, the prosecutor argued that the police officers were addressing a public safety issue by determining whether the owner of the property was the perpetrator of the burglary. The prosecutor also argued that even if the showing of a single photograph was unnecessary, the identifications were reliable under the totality of the circumstances, and therefore they were admissible.

In making its ruling, the court first noted that Licardi's testimony regarding what the police officer said was "inartfully phrased," and said that it appeared what the officer was asking her was to tell him whether the photograph "is or isn't" the perpetrator.⁶ The court then observed that the Supreme Court has found that showing a single photograph does not necessarily violate due process. The trial court found that under the circumstances in this case -- where the police had a potential suspect based on property that was found on the property, and that suspect was still at large -- it made sense that the police

⁶ We note that Licardi testified in Spanish using the services of a Spanish interpreter at both the preliminary hearing and the trial.

officers did not take the time to put together a photographic lineup. With regard to the unredacted photographic lineup, the court found that it was not so suggestive that it violated due process. The court concluded that it would be for the jury “to determine whether or not this is so suggestive that they’re going to disregard it. That goes to the weight at this point.” Therefore, the court denied defendant’s motion to suppress the identifications.

At trial, Popoca, Licardi, and Santos⁷ all identified defendant as the man who entered their apartments. In his testimony, Officer Nkila admitted that it is not normal Los Angeles Police Department procedure to show a single photograph of a suspect out in the field, and that the proper procedure is to show six photographs of the suspect and five other people with similar features. He explained that he and his partner did not follow the normal procedure because they believed the perpetrator could still be in the area (especially in light of the fact that he left his belongings behind), and could be committing another crime, so they showed a single photograph to confirm that defendant was the suspect for the safety of the public.

In his defense, defendant presented Dr. Robert Shomer as an expert in eyewitness identification, perception, and memory. Dr. Shomer testified extensively regarding the problems with eyewitness identification generally, the proper procedures that should be used to diminish the likelihood of incorrect identification, and the problems

⁷ Santos testified that he was never asked by the police to look at any photographs.

with using a single photograph. He particularly criticized the procedure used in the present case, in which the witnesses were shown a single photograph and then shown a photographic lineup the following day; he stated that any identification that came from that lineup was “completely invalid.” When presented with a hypothetical stating the facts of this case, he opined that the procedure used had “no reliability at all.” He also opined that such a procedure “would influence any subsequent identification, including identification in court.”

In addition to presenting Dr. Shomer, defendant testified on his own behalf.⁸ Defendant denied ever being at the apartment building. He said that he had been arrested for possession of methamphetamine on April 14, 2015, the day before the burglaries, and was released from jail late that same night. The next morning, April 15, he had his bag with his personal property in it at the Red Line station on Santa Monica Boulevard; he set the bag down on a bench, and it was stolen. He was in Hollywood from April 15 to 16 to help a friend move.

Defendant also testified that he has tattoos on the top of his head, on the side of his face above his left eyebrow, on his neck, and on his left hand. In addition, he has a tattoo on his forearm of a skull with red eyes. He also testified that he has a large scar on his neck from an old gunshot wound and a scar on his nose. Finally, he admitted that he previously was arrested and took plea bargains on three prior occasions,

⁸ Defendant also presented a private investigator, David Kale, who testified that he attempted to get video footage from the security cameras at the apartment building, but was not successful.

on charges of auto burglary, possession of another's credit card, and petty theft.

During deliberations, the jury sent two requests. First, the jury asked for a read back of any testimony that mentioned "red dots." The second stated, "Does [the] fact the police officer failed to follow protocol by showing a single photo prior to getting a description from the witness require[] us to find not guilty on a technicality." The court responded, "No. Whether the procedure violated protocol or not is only relevant if the procedure affected the reliability of the identifications of the defendant."

The jury convicted defendant on both charges. Defendant moved for a new trial, arguing that the suggestive identification procedures denied him due process and that there was insufficient evidence of his intent when he entered the apartments. In ruling on the motion, the trial court stated that it was troubled by Popoca's testimony that she was shown the unredacted photographic lineup before being shown the redacted lineup, but the court noted that the testimony on that issue was in conflict and the jury was aware of it. The court also found that, while the facts of the case were strange, there was sufficient evidence that defendant intended to commit larceny when entering the apartments; the court commented, "No other rational intent seemed to have been presented by the evidence." The court therefore denied the motion, and sentenced defendant to the high term of six years on count 1, with a concurrent six-year sentence on count 2. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

Defendant raises two arguments on appeal. First, he contends the trial court erred by denying his motion to suppress and allowing eyewitness identifications that were the product of impermissibly suggestive procedures, which violated his right to due process. Second, he contends the trial court erred by denying his section 1118.1 motion to dismiss, because there was insufficient evidence for a jury to conclude he intended to commit a theft when he entered the apartments. We address each contention in turn.

A. *Eyewitness Identifications*

“In order to determine whether the admission of identification evidence violates a defendant’s right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness’s degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.]

“The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] ‘The question is whether anything caused defendant to “stand out” from the others in a way that would suggest the witness should select him.’ [¶] . . . [¶]

Moreover, there must be a ‘substantial likelihood of irreparable misidentification’ under the “‘totality of the circumstances’” to warrant reversal of a conviction on this ground.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990; see also *People v. Clark* (2016) 63 Cal.4th 522, 556-558.) “A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard.” (*People v. Clark, supra*, 63 Cal.4th at pp. 556-557.)

Defendant contends there were two unnecessarily suggestive procedures used in this case: (1) the showing of a single photograph by the police officers on the night of the incident, and (2) the subsequent showing of an unredacted photographic lineup in which only defendant had visible tattoos.

There is little doubt that, generally, showing a witness a single photograph poses a danger of suggestiveness. But that same danger exists when a witness participates in a field show-up. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 106, 116.) These procedures are not, however, “necessarily or inherently unfair.” (*People v. Clark* (1992) 3 Cal.4th 41, 136.) As one appellate court observed, although many courts have condemned the use of a single photograph identification procedure, “numerous cases have found no due process violation from the admission of evidence of identifications made either at the time of or subsequent to a single photo showup.” (*People v. Contreras* (1993) 17 Cal.App.4th 813, 820-821.) In the case of in-field show-ups, one court

has noted that “single-person show-ups for purposes of in-field identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness’s mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.] The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.” (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387, italics omitted.)

In the present case, the showing of a single photograph to Popoca and Licardi on the night of the incidents was similar to conducting an in-field identification. It was done while the events were fresh in their minds,⁹ and it served the interests of both defendant and the police to determine whether there was a connection between the intruder and the bag found in the building’s laundry room. Under these circumstances, the admission of the identifications made from the single photograph was not error.

With regard to the unredacted photographic lineup, we agree that the fact that defendant is the only person shown with visible tattoos makes the lineup somewhat suggestive. Nevertheless, we find that

⁹ Popoca testified that she was shown the photograph about 15 minutes after the incident in her apartment. Licardi testified that it was about 40 minutes from the time she first saw defendant in her apartment until she was shown the photograph.

Popoca's and Licardi's identifications of defendant on the redacted version admissible.

First, we note it is unclear whether both witnesses saw the unredacted lineup before identifying defendant on the redacted version. At the preliminary hearing, Popoca testified that the single photograph she was shown on the night of the incident covered up defendant's tattoos, but the lineup showed them; Licardi was not asked whether the lineup she was shown showed defendant's tattoos. At trial, Popoca testified that she was shown the unredacted version before she circled defendant's photograph on the redacted version, but Licardi testified that she was not certain whether she ever saw the unredacted version. Thus, at the very least defendant failed to meet his burden to "demonstrat[e] the existence of an unreliable identification procedure" as to Licardi. (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.)

Second, even if the unredacted lineup was shown to Popoca before she was asked to identify defendant on a redacted version -- a procedure that we do not encourage -- and was unduly suggestive, we must consider "whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.)

Here, Popoca had the opportunity to view the suspect at the time of the offense. She testified that she opened the door to him and was standing close to him, face to face, the entire time he was in her apartment. She was very alert during the incident, noticing the clothes he was wearing and that he had a lot of tattoos, as well as scars on his neck. Although her description of the suspect was fairly generic for the most part, she accurately described the scarring on his neck (although she attributed the scar to acne), which was not visible in defendant's photograph. She also made the identification from the lineup the morning after the incident, and she was very certain that defendant was the intruder.

Considering these factors, we conclude Popoca's identification of defendant from the photographic lineup was reliable. We echo the United States Supreme Court's observation in *Mason v. Braithwaite*: "Surely, we cannot say that under all the circumstances of this case there is 'a very substantial likelihood of irreparable misidentification.' [Citation.] Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (*Manson v. Brathwaite, supra*, 432 U.S. at p. 116.)

The Supreme Court's observation is particularly apt in this case, where the jury heard expert testimony criticizing the methods used here, and the potential problems with any identifications that resulted

from them. That the jury understood that testimony was demonstrated by the note it sent during its deliberations, asking whether the jurors were required to find defendant not guilty because the police officers failed to follow proper procedures.

In any event, even if the admission of the identifications by Licardi and Popoca had been error, the error was harmless. First, defendant was identified at trial by Santos, who was not shown any photographs of defendant. Second, Licardi testified that the intruder had a tattoo on his forearm of a black figure with red eyes. That tattoo was not visible in any of the photographs that she was shown, and apparently was not visible at trial. But defendant admitted during his testimony that he had a tattoo of a black skull with red eyes on his forearm. The jury appeared to give great weight to Licardi's testimony and defendant's admission, because it asked for a read back of those portions of their testimony and came back with its guilty verdict less than 25 minutes after the read back concluded.¹⁰ Finally, defendant's bag, which contained paperwork in his name, was found in the building's laundry room on the night of the incident. All of this evidence connected defendant to the crime, regardless of the

¹⁰ In fact, in denying defendant's request for a different appointed attorney for his sentencing hearing, the trial court told defendant that his attorney had done a good job by calling the expert witness on eyewitness testimony but that defendant "sunk" himself when he insisted on testifying. The court said, "You should have listened to [your attorney] and sat down in that chair and not said anything. [¶] When you took the stand, you buried yourself . . . because the D.A. didn't ask, and once you hit the stand, your tattoos on your left arm were disclosed and that pushed things over. They come back with a verdict about two seconds after they got that read-back."

identifications made by Licardi and Popoca. Thus, the admission of those identifications, if error, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 36.)

B. *Section 1118.1 Motion*

At the close of the prosecution's case-in-chief, defendant moved to dismiss the charges under section 1118.1 on the ground that the prosecution had failed to present sufficient evidence from which a jury could find that defendant had any intent to commit a theft when he entered the apartments.¹¹ The trial court denied the motion, stating, "[W]hile I recognize that [intent] is going to be an issue -- an interesting issue based on the unusual facts that have come out, I do believe it's enough to take it to the jury under 1118.1. [¶] I think there is an inference that could be drawn that -- certainly not the only one -- but an inference that could be drawn is that his intent in entering was to commit a theft."

On appeal, defendant argues the trial court erred in denying his motion to dismiss because "a mere inference is not substantial evidence." We disagree.

""The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, 'whether from the

¹¹ Although defense counsel moved to dismiss the charges under section 1118.1, a section 1118.1 motion is actually a motion for judgment of acquittal. (See *People v. Odom* (1970) 3 Cal.App.3d 559, 564.)

evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.” [Citation.] “The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.” [Citations.] The question “is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.” [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review.” (*People v. Maciel* (2013) 57 Cal.4th 482, 522.)

Defendant argues the prosecution’s evidence established that no property was taken from Licardi’s apartment and that, at most, the evidence merely “suggested” that defendant attempted to steal Licardi’s cell phone after he entered the apartment. He contends that this evidence shows only a crime of opportunity, rather than a burglary, and therefore was insufficient evidence to present the charge to the jury for its determination because it would require the jury to speculate that he intended to attempt to steal the cell phone before he entered the apartment. Not so.

As the Supreme Court instructed, when faced with a section 1118.1 motion, the trial court must consider all evidence presented up to that point, *including all reasonable inferences* that could be drawn from that evidence, in determining whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination. (*People v. Maciel, supra*, 57 Cal.4th at p. 522.) The trial court in this case correctly concluded that the jury reasonably could

infer that defendant intended to steal something when he entered Licardi's apartment from the evidence that defendant tried to steal Licardi's cell phone. Therefore, the court did not err by denying defendant's section 1118.1 motion with respect to the burglary of Licardi's apartment.

With regard to the burglary charge related to Popoca's apartment, defendant argues that because there was no evidence of an actual or attempted theft, no reasonable jury could conclude that he entered the apartment with the intent to commit a theft, and therefore the trial court erred in denying his motion. But in making this argument, he ignores the evidence of his attempted theft of Licardi's cell phone, which gives rise to a reasonable inference that he intended to commit a theft when he entered Licardi's apartment. A reasonable jury reasonably could infer, based upon that reasonable inference, that defendant harbored the same intent when he entered Popoca's apartment less than a minute after he left Licardi's apartment. Therefore, the trial court did not err when it denied defendant's motion with respect to the burglary of Popoca's apartment.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.