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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DIMAS RODRIGUEZ,

Defendant and Appellant.

B285861

(Los Angeles County
Super. Ct. No. VA138624)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Benjamin P. Lechman, 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, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General and Shezad H. Thakor, Deputy Attorney General for Plaintiff and Respondent.

INTRODUCTION

Appellant Dimas Rodriguez appeals from the order revoking his probation and sentencing him to three years in state prison. The trial court revoked Rodriguez's probation based on findings that he possessed a firearm while on probation and failed to report for mandatory drug testing. Rodriguez contends that (1) the evidence was insufficient to establish that he possessed a firearm and (2) the court erroneously imposed a prison sentence based solely on his failure to report for drug testing. We conclude that the evidence was sufficient to support the trial court's finding that Rodriguez possessed a firearm, and therefore need not resolve the second issue. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 24, 2014, Rodriguez pleaded guilty to (1) felony possession of methamphetamine with a firearm (Health & Saf. Code § 11370.1, subd. (a))¹; (2) misdemeanor possession of methamphetamine (§ 11377, subd. (a)); and (3) carrying a loaded, unregistered firearm in public (Pen. Code, § 25850, subd. (a) & (c)(6)). The trial court suspended imposition of sentence and placed Rodriguez on three years of formal probation on the condition that Rodriguez serve 230 days in county jail, with credit for time served. On March 20, 2016, while on probation, Rodriguez was arrested for being a felon in possession of a firearm. While the prosecution did not pursue charges against Rodriguez in March 2016 for this arrest, Rodriguez was later charged with this offense after he failed to report for mandatory drug testing on March 7, 2017.

¹ All further statutory references are to the Health and Safety Code, unless stated otherwise.

At the probation violation hearing on October 5, 2017, Sheriff's Deputy Bryce Loll testified that while on patrol around midnight on March 20, 2016, he saw Rodriguez standing in the front yard of a residence. Rodriguez appeared startled when he noticed Loll. From a distance of about 30 to 40 feet, Loll observed Rodriguez walk towards a wall separating the residence from an adjacent property. Loll saw Rodriguez throw a silver object over the wall and then heard a gunshot less than a second afterward. About 15 minutes later, after calling for backup and apprehending Rodriguez, Loll searched the neighboring property and found a silver colored semi-automatic handgun on the other side of the wall. Loll testified that the handgun had a bullet casing stuck in the chamber, consistent with what often happens when a firearm is dropped.

The sole witness for the defense, a long-time family friend of Rodriguez, testified that on March 20, 2016, she was walking to meet Rodriguez and arrived at the scene around the same time as Loll. She did not see Rodriguez make a throwing motion nor did she hear any sounds resembling a gunshot. She saw Rodriguez holding his cell phone in one hand and a shiny silver object, which she believed to be a nail clipper, in the other hand. She then observed two officers arrest Rodriguez. She had previously made a statement to an investigator that the incident occurred in the afternoon, but during the probation violation hearing, she testified that it was dark when the incident occurred.

The court found that Rodriguez had violated his probation by failing to report for drug testing and by possessing a firearm. The court revoked Rodriguez's probation and sentenced him to three years in state prison.

DISCUSSION

In general, Penal Code section 1203.2 authorizes a court to revoke probation “if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation.” (Pen. Code § 1203.2, subd. (a).) The violation must be willful. (*People v. Gonzalez* (2017) 7 Cal.App.5th 370, 382, disapproved on another ground in *People v. DeLeon* (2017) 3 Cal.5th 640, 646.)

We review a trial court’s finding that a person has violated a condition of probation for substantial evidence. (*People v. Buell* (2017) 16 Cal.App.5th 682, 687; *People v. Urke* (2011) 197 Cal.App.4th 766, 773.) We review an order revoking probation for abuse of discretion. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447; *Urke*, at p. 773.)

Rodriguez contends that there was insufficient evidence to support the finding that he possessed a firearm. Specifically, he argues that his proximity to the property where the gun was found is not enough to prove that he knowingly possessed the firearm absent direct evidence tying him to the gun. Rodriguez bases his argument on *People v. Sifuentes* (2011) 195 Cal.App.4th 1410,[disapproved on another ground in *People v. Farwell* (2018) 5 Cal.5th 295], in which the court held that finding a gun in a motel room that the defendant shared with another occupant was insufficient to demonstrate that the defendant possessed the gun. (*Id.* at pp. 1413-1414, 1419.) The prosecutors presented evidence that the defendant and occupant were members of a gang, as well as expert testimony that a prominent part of gang culture was passing “gang guns” freely among gang members. (*Id.* at pp. 1414-1415.) However, the expert did not testify that the gun

found was a gang gun or that all gang members had the right to control gang guns. (*Id.* at pp. 1417-1418.) Because there was no evidence demonstrating that the defendant had the right to control the gun, the Court of Appeal held that there was insufficient evidence to support the finding that the defendant possessed the gun. (*Id.* at p. 1419.)

In contrast, in this case, there was substantial evidence tying Rodriguez to the gun. Deputy Loll's testimony provided evidence from which the trier of fact could infer that Rodriguez had possession of, and control over, the gun. Deputy Loll testified that he saw Rodriguez throw a silver object over the wall and immediately heard a gunshot. Approximately 15 minutes after that, Deputy Loll found a silver colored semi-automatic gun on the other side of the wall. He testified that the gun had a bullet casing stuck in the chamber, consistent with having been dropped. This testimony was sufficient to establish Rodriguez's possession of the gun. (See *People v. Duncan* (2008) 160 Cal.App.4th 1014, 1018 [testimony of one witness is sufficient to constitute substantial evidence unless it is physically impossible or inherently improbable].) The officer's testimony as to what he saw, heard, and retrieved was neither physically impossible nor inherently improbable.

Rodriguez argues that the testimony of his witness conflicts with Loll's testimony and thus, Loll's testimony is insufficient to support the finding that Rodriguez possessed a gun. However, "[c]onflicts 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 . . . to determine the credibility of a witness." (*People v. Letner & Tobin* (2010) 50 Cal.4th 99, 161-162.) It is not the role of the appellate court to

reweigh the evidence or reevaluate witness' credibility. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.) Where, as here, the factual determination by the trier of fact is supported by substantial evidence, we accord deference to that determination. (*People v. Barnes* (1986) 42 Cal.3d 284, 303–304.)

Rodriguez also contends that the court erroneously imposed the three-year prison sentence based solely on his failure to report for drug testing. This argument is contingent upon the court's acceptance of Rodriguez' first argument that the evidence was insufficient to establish that he possessed a firearm. Because we conclude that substantial evidence supports the finding that Rodriguez possessed a firearm during his probation, we need not address Rodriguez's argument that the trial court abused its discretion in revoking probation and sentencing him to three years in state prison based solely on his failure to report for drug testing.²

² We also need not decide the issue of forfeiture raised by respondent and discussed by both appellant and respondent at oral argument. Respondent argues that although the trial court is required to give a statement explaining its decision to revoke probation and impose a prison sentence, Rodriguez forfeited his right to object on these ground by failing to complain about the lack of a statement. We need not decide this issue as Rodriguez did not raise this argument in his briefing except in a brief reference as part of his argument that the prison sentence imposed was unnecessarily harsh. (See *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1 [a point not presented in the appealing party's brief is deemed abandoned or waived]; *In re S.C.* (2006) 138 Cal.App.4th 396, 410 [merely stating a ruling is error without explanation or analysis is insufficient to present the issue for review].)

DISPOSITION

The order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.