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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN LEE ELBYE,

Defendant and Appellant.

B267572

(Los Angeles County
Super. Ct. No. BA427805)

APPEAL from the judgment of the Superior Court of
Los Angeles County, William N. Sterling, Judge. Affirmed.

Juliana Drous, under appointment by the Court of Appeal,
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Jonathan Lee Elbye appeals from the judgment entered following his conviction by jury of falsely reporting a bomb, with admissions he suffered prior prison terms. (Pen. Code, §§ 148.1, subd. (c),¹ 667.5, subd. (b).) We affirm.

FACTUAL AND PROCEDURAL SUMMARY

1. People's Evidence.

The People's evidence at trial established as follows. A cell phone with phone number (323) 809-6709, belonged to appellant. Between 1:40 a.m. and 1:45 a.m. on July 25, 2014, appellant was in the immediate vicinity of Union Station.² At 1:46 a.m., someone using the above phone number called 911 from Union Station in Los Angeles and reported a bomb was there. A CD reflected the call. (The CD and a transcript of the call were admitted into evidence.) At 2:39 a.m. and 2:48 a.m., someone made a 911 call from the above phone number.

Law enforcement personnel using a reverse directory determined the cell phone was at the Los Angeles County/ University of Southern California Medical Center. They went there and found appellant with the phone in his hand. Appellant showed it to Los Angeles County Sheriff's Detective Keith Schumaker. Its call log reflected 911 calls at 2:40 a.m. and

¹ Penal Code section 148.1, subdivision (c), states, "[a]ny person who maliciously informs any other person that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the information is false, is guilty of a crime punishable by imprisonment in a county jail not to exceed one year, or pursuant to subdivision (h) of Section 1170."

² The parties stipulated to this fact.

2:48 a.m. Appellant said he made those two calls because he was having abdominal cramps. Appellant denied that he had made a bomb threat or a third call. Appellant showed Schumaker, from the phone's call log, that no third call had been made from the phone. Schumaker told appellant that calls could be deleted from the log. Appellant denied deleting a call. Appellant never told Schumaker that appellant let an unknown male use appellant's phone at Union Station.

2. Defense Evidence.

In defense, appellant, who had suffered 2005 and 2009 felony convictions for crimes of moral turpitude, and a 2003 conviction for a crime of moral turpitude, testified as follows. On July 24, 2014, appellant, on parole, was at Union Station. Appellant's phone number was (323) 809-6709. Four deputies contacted him about whether he had a Transit Access Pass (TAP) card that would permit him to pass through the turnstiles, and he showed them his TAP card. About 1:00 a.m. on July 25, 2014, he fell asleep at the station. He awoke and attempted to leave when two security officers approached and asked what he was doing. He spoke with them and later left.

About 1:43 a.m., an unknown male asked to use appellant's phone. Appellant granted the request and gave the male privacy while he used the phone. Appellant handed the phone to the male in the bus turnaround area behind Union Station. The male must have used appellant's phone to call 911. Appellant did not know the male was going to make a bomb threat. At 2:42 a.m. and again at 2:50 a.m., appellant made 911 calls regarding his abdominal pains.

Appellant told Detective Schumaker that if he looked at the camera between bays six and seven at Union Station, Schumaker would see appellant handing the phone to the unknown male. However, in response to questioning by the court, appellant testified he did not see any cameras in that area or pointed at that area. Appellant showed his call log to Schumaker so he could see that appellant made only two 911 calls.

Appellant also testified that on July 25, “2015” (*sic*), he was in the Twin Towers Correctional Facility when he saw a wanted poster. The poster depicted a wanted person and a phone number to be called if the person had been seen. Appellant called the number and asked for Schumaker. Appellant left a message on Schumaker’s voicemail. The message asked Schumaker to contact appellant and referred to the unknown male who had borrowed appellant’s phone.

Detective Schumaker testified he had stated in his report that based on the totality of his investigation, he believed appellant made the 911 bomb threat call. Schumaker believed appellant disguised his voice. Before Schumaker was a detective, he had been assigned to the Los Angeles County Men’s Central Jail. When an inmate called from jail, a recording would indicate the inmate was calling collect. The person called would have to accept a collect call. During Schumaker’s assignment in the Central Jail, there was no posted phone number that inmates could use to call sheriff’s personnel. Moreover, Schumaker received no voicemail from appellant.

William Gibson, a forensic audio and video examiner, testified as a defense expert. Gibson, using software, compared the voice of the person who made the 911 call reporting the bomb threat with an exemplar of appellant's voice that appellant had provided over the phone. The software reflected a 92 percent probability that appellant's voice was not the voice of the person who made the bomb threat. The voice of the 911 caller was low, resonant, and without speech impediments. The exemplar of appellant's voice reflected it was high-pitched and appellant had a marked speech impediment, i.e., he repeatedly said "uh."

During cross-examination, Gibson testified the software had been tested with a sample group of people who had modified their voices. Gibson did not know whether the software had been tested with a sample group of people who had tried to disguise their voices. According to Gibson, the 911 caller tried to lower his pitch and was probably trying to disguise his voice.³ Defense expert Gibson testified there were cameras in the bus bay behind Union Station but he did not know where they were focused.

³ Gibson had appellant's investigator confirm that appellant's voice was on the exemplar. Gibson had the investigator listen to the exemplar and then asked if the voice sounded like appellant's voice. During cross-examination, Gibson acknowledged the investigator did not have to use "some software" to opine the voice sounded like appellant's voice. During the prosecutor's cross-examination of appellant, appellant acknowledged that, when he allegedly contacted Schumaker's voicemail, appellant did not "need some magical software in order to determine that it was [Schumaker's] voicemail."

3. Procedural History.

The felony complaint alleged a violation of “Penal Code section 148.1, [subdivision] (a).” On August 1, 2014, appellant pled not guilty and elected to represent himself. At his October 22, 2014 preliminary hearing, appellant was held to answer. The information filed November 5, 2014, alleged appellant committed the above violation and had suffered two prior prison terms (Pen. Code, § 667.5, subd. (b)). On November 5, 2014, the court arraigned appellant and he pled not guilty. Appellant represented himself at trial.

Following the presentation of evidence and outside the presence of the jury, the court commented there did not appear to be any testimony that a camera filming the bus turnaround area might have filmed appellant handing his phone to someone. The court, during its final charge, instructed on the present offense using language from Penal Code section 148.1, subdivision (c).

During jury argument, the prosecutor argued he had to prove, *inter alia*, that appellant “maliciously informed another person that a bomb or other explosive had been placed or secreted in any public or private place.” The prosecutor also argued appellant had been “lying from the very beginning.”

The prosecutor further argued as follows. Appellant, evidencing consciousness of guilt, deleted the 1:46 a.m. 911 bomb threat call from his call log. At trial, appellant testified he once told Schumaker there were only two 911 calls on his phone (the ones appellant had made for his alleged abdominal pain) and no third call had been made. However, after appellant learned through discovery that the prosecution could prove that at 1:46 a.m., a third 911 call relating a bomb threat had been made from his phone, he changed his story. For the first time at trial,

he claimed that a third call had been made from his phone but that it was made by the unknown male. In addition, the jury could compare appellant's voice as the jury had heard it throughout the trial with the voice of the bomb threat caller and reach its own conclusion as to whether appellant made the bomb threat.

Appellant, during jury argument, urged various People's witnesses lied and he gave his phone to the unknown male. On June 19, 2015, the jury convicted appellant and he entered admissions as previously indicated.⁴

On October 6, 2015, the court sentenced appellant to prison for four years, consisting of the three-year upper term for the present offense, plus one year pursuant to Penal Code section 667.5, subdivision (b). The court struck the remaining prior prison term enhancement. The court awarded appellant presentence credit and imposed various fees and fines. On October 6, 2015, appellant filed a notice of appeal.

CONTENTIONS

On August 2, 2016, appointed counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. On August 3, 2016, the clerk of this court advised appellant to submit within 30 days any contentions, grounds of appeal, or arguments he wished this court to consider.

⁴ Appellant's probation report reflected he had suffered numerous convictions, including convictions for evading railroad fare.

On August 31, 2016, this court granted appellant's personal request for an extension until October 3, 2016, to file his supplemental brief. On October 3, 2016, appellant's counsel filed a request for an extension until November 3, 2016, for appellant to file his supplemental brief. Counsel's supporting declaration stated appellant had been in a car accident and expected to be released from the hospital on October 4, 2016.⁵ On October 5, 2016, this court granted appellant's counsel's request.⁶ No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*People v. Wende* (1979) 25 Cal.3d 436, 443; *Smith v. Robbins* (2000) 528 U.S. 259, 278-284.)

⁵ On October 4, 2016, appellant personally filed a request for an extension to December 1, 2016, to file his supplemental brief.

⁶ In light of the October 5, 2016 granting of appellant's counsel's request, this court, on October 5, 2016, denied appellant's October 4, 2016 personal request for an extension (see fn. 5, *ante*).

DISPOSITION

The judgment is affirmed.

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GOSWAMI, J.*

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

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