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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY ALVARADO,

Defendant and Appellant.

2d Crim. No. B185157  
(Super. Ct. No. KA069654)  
(Los Angeles County)

Henry Alvarado appeals his conviction, by jury, of home invasion robbery in concert with another (count 1), first degree burglary (count 2), false imprisonment by violence (counts 3, 6), witness dissuasion (counts 4, 7), carjacking (counts 8, 9), forgery (count 10), second degree burglary (count 11), and grand theft (count 12). (Pen. Code, §§ 211, 213, subd. (a)(1)(A), 459, 236, 136.1, subd. (b)(1), 215, subd. (a), 470, subd. (b), 487, subd. (a).)<sup>1</sup> The trial court sentenced appellant to state prison for 13 years 4 months. Appellant challenges the sufficiency of the evidence and contends that the trial court committed evidentiary, instructional and sentencing errors. We affirm the judgment, vacate the sentence, and remand the case to the superior court for resentencing.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

## FACTS

### *The March 30, 2004, Crimes*

In 2004, Martha Hernandez and her two daughters lived with Martha's sister and brother-in-law on Loukelton Street in La Puente.<sup>2</sup> On March 30, 2004, around noon, Martha and her five-year-old daughter were home alone when a man, who appeared to be in his early 20's, knocked on the door and asked for Martha's brother-in-law. When Martha indicated that her brother-in-law was not home, the man asked for a pen to leave a message. The man entered Martha's home, uninvited, as she handed him a pen. Martha told him to leave, and he responded, "[S]hut the F up." Her daughter said, "Mommy, I'm scared. Is he going to hurt us?" Martha was also scared. Two other intruders entered the house, wearing oversized sweatshirts, with hoods covering their faces; one of them held a gun.

While the hooded intruders searched Martha's house, the first intruder moved Martha and her daughter toward the kitchen. At the direction of the first intruder, the gun-bearing intruder took Martha and her daughter to the bathroom, where they remained for approximately 20 or 30 minutes. The intruders took the keys to Martha's 1999 Expedition and her sister's 2003 Envoy and told Martha that they needed the cars, which they would leave in the neighborhood. They also told her not to call the police and stated that they knew where she lived and they would see her in the neighborhood. They took a laptop, jewelry, phone, purse, wallet, driver's license, and other small items. The police located both cars within a week.

After the intruders left, Martha went to a neighbor's house to wait for her cousin. Martha and her cousin went to school, before closing, to pick up Martha's eight-year-old daughter. Noticing that something was wrong, a school employee called the police. Martha did not call the police herself because the intruders had told her not to do so and she was afraid.

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<sup>2</sup> We refer to parties by their first names to avoid reader confusion.

Los Angeles County Sheriff Deputy Alfredo Gomez interviewed Martha at her home on March 30. She described the first intruder as a thinly built, five-feet, nine-inch tall Hispanic man, between 20 and 25 years of age, with brown hair and brown eyes.

*The April 7, 2004, Crimes*

On April 7, 2004, Margaret McBride worked at the Robinsons-May Department Store in Puente Hills Mall, as a loss prevention manager. At around 6:00 p.m., McBride observed appellant, three other men, and a woman named Melissa take approximately 48 items of merchandise to a cash register.

Appellant and two of the men left the store. The fourth man stayed with Melissa, while she tried to obtain an "instant credit" account. Melissa provided Martha's identification to the cashier who processed the instant credit application in Martha's name. When the application was denied, Melissa "took out . . . and . . . wrote a check" for the purchase in the amount of \$738.67, drawn on the account of Michael and Rosemary Black. Neither of the Blacks was among Melissa's shopping group. As marked, the merchandise Melissa "purchased" should have cost \$1,400. The cashier "overrode" the value of each item Melissa presented for purchase and entered a lower value in the cash register, without authorization to do so. McBride observed this activity via surveillance cameras and a Foxmon cash register reporting system.

Melissa and her companion left the store with the merchandise. Two security officers arrested them outside the store and seized several items from them, including a bank card, social security card, several checks in different names and Martha's California identification card. Another security employee apprehended the cashier.

When Deputy Sheriff Eric Mankau arrived at the Robinsons-May parking lot, he found appellant in a parked car, with the engine running, in front of the store. Appellant said that he went to Robinsons-May to shop, selected some clothing, and returned to the car, to wait for Melissa to purchase clothing with a check that she had "found." The deputy arrested appellant.

In November 2004, Los Angeles County Sheriff Detective Angel Matute met with Martha regarding the recovery of her driver's license. Before their meeting, Matute had no knowledge of the March 30th home invasion robbery. During their meeting, Matute was looking in his file when Martha noticed a man's photograph and said that he was one of the men from the March 30th home invasion robbery. Martha had pointed to a June 14, 2001, Department of Motor Vehicles photograph of appellant. Matute placed an April 7, 2004, booking photograph of appellant in a six photograph lineup display and showed it to Martha. Martha circled appellant's photograph and stated that the person in that photograph was the "same guy but had gained some weight for sure." Martha also identified a photograph of appellant's codefendant, Munoz, as the intruder who had carried a gun during the March 30th home invasion robbery.

#### DISCUSSION

##### *There is Sufficient Evidence to Support Appellant's Convictions*

Appellant claims that there is insufficient evidence to support his convictions. In reviewing such a claim, we view the evidence most favorably to the People and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) The test is whether, after considering the evidence most favorably to the prosecution, any rational trier of fact could have found the elements of the crime to be true beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *Johnson*, at pp. 576-578.) The same standard of review applies in cases in which the prosecution relies on circumstantial evidence to connect the defendant to the crimes. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not

warrant a reversal of the judgment." (Ibid.) "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." (Id. at p. 793.)

Appellant argues that Martha's out-of-court identification of him is not sufficient to prove that he is the perpetrator of the March 30th crimes (counts 1 through 9). The testimony of a single eyewitness identifying a defendant as a perpetrator is sufficient evidence to support a conviction. (Evid. Code, § 411; *People v. Watts* (1999) 76 Cal.App.4th 1250, 1259.) Even if identification is weak and strong alibi testimony is provided, appellate courts will defer to the jury's conclusion and not interfere with the verdict. (*People v. Westbrook* (1976) 57 Cal.App.3d 260, 262.)

Appellant stresses that Martha testified at the preliminary hearing and at trial that her earlier out-of-court identification of him was erroneous. A victim's inability to identify a suspect in court does not necessarily negate the evidentiary value of his out-of-court identification. (*People v. Cuevas* (1995) 12 Cal.4th 252, 257, 271-272.) Further, a victim's identifications of a suspect need not be positive to have evidentiary value. (*People v. Midkiff* (1968) 262 Cal.App.2d 734, 740.)

We may not reverse a judgment based on eyewitness identification unless the identification is "inherently incredible." (*People v. Keltie* (1983) 148 Cal.App.3d 773, 781-782.) Prior to his November meeting with Martha, Matute had no knowledge of the March 30th home invasion robbery. During their meeting, Martha noticed appellant's photograph in a file and recognized him as one of the home invasion robbers. She also identified another photograph of appellant when shown a display with photographs of five other suspects. Although Martha repudiated her out-of-court identification of appellant when she testified in court, her identification is not "inherently incredible." The jury heard but rejected appellant's attack on Martha's identification of him. We may not now reweigh the evidence or assess the credibility of witnesses to reach a different conclusion. (*People v. Watts, supra*, 76 Cal.App.4th at pp. 1258-1259.)

Appellant also argues that Martha's out-of-court identification of him was the only evidence of his involvement in the March 30th robbery. We disagree. The

People presented compelling circumstantial evidence of his involvement. On April 7, 2004, appellant was outside a Robinsons-May store, waiting for Melissa, right after he had been shopping with her in the store. Melissa used Martha's identification (a product of the March 30th robbery) in Robinsons-May to apply for "instant credit," while appellant waited for her. Sufficient evidence supports the jury's conclusion that appellant was the perpetrator of the March 30th crimes charged against him, including the burglary and robbery of Martha's home, the carjackings, witness dissuasion, false imprisonment and theft.

Appellant also challenges the sufficiency of the evidence of the April 7th crimes (forgery, commercial burglary and theft). He argues that because there is not sufficient evidence of the underlying forgery, he cannot be convicted as an aider and abettor of forgery. There is sufficient evidence of the underlying forgery. Forgery consists of "falsely mak[ing], alter[ing], forg[ing], . . . utter[ing], publish[ing], pass[ing] or attempt[ing] or offer[ing] to pass [a check or contract for money], as true and genuine, . . . knowing the same to be false, altered, forged or counterfeited," with the intent to defraud. (§ 470, subd. (d).)

Appellant argues that the prosecution "offered no evidence that the check was . . . signed" under the name of either Michael Black or Rosemary Black. We disagree. McBride testified that Melissa "took out . . . and . . . wrote a check" in the amount of \$738.67. The court admitted that check into evidence. It is drawn on the Blacks' account and includes a signature. This evidence supports the inference that Melissa completed the check, including the signature line. While the signature is not particularly legible, the jury reasonably concluded that Melissa presented a check with a counterfeit signature.

Appellant also argues that there was no evidence that Melissa lacked authority to "draw checks" on the Blacks' bank account. There was substantial circumstantial evidence that she lacked authority to do so. Melissa first tried to obtain instant credit, using Martha's stolen identification. As soon as the instant credit application was rejected, Melissa completed the Blacks' check and presented it to the

cashier. The Blacks were not among Melissa's shopping companions. Appellant stated that Melissa was going to buy clothing from Robinsons-May with a check that she had "found." Such evidence supports the inference that Melissa lacked authority to "draw checks" on the Blacks' account. The same evidence defeats appellant's claim that the prosecution presented no evidence of an intent to defraud. (See *People v. Cullen* (1950) 99 Cal.App.2d 468, 473; *People v. Leonard* (1962) 207 Cal.App.2d 409, 414 [circumstantial evidence held sufficient to establish lack of authority in forgery case]; but see *People v. Ross* (1961) 198 Cal.App.2d 723, 727 [circumstantial evidence held insufficient].)

We also reject appellant's claim that there was no evidence that he knew of Melissa's intent to commit forgery. Appellant participated in the March 30th robbery of Martha's home, the same robbery that yielded Martha's identification; Melissa used Martha's identification on April 7th to submit an instant credit application in Martha's name at Robinsons-May; appellant and three other men helped Melissa gather more than 48 items of merchandise she "purchased" on April 7th; appellant said that Melissa would use a check that she had "found" to make the purchase; and he waited for her in the store parking lot while she presented the stolen identification and the Blacks' check in making the purchase. (See *People v. Neder* (1971) 16 Cal.App.3d 846, 851.) The same evidence defeats appellant's claim that there was no evidence that he possessed any stolen items or supplied Melissa with Martha's identification.

Appellant also argues that there is no evidence that Melissa signed the instant credit application. Our examination of the application discloses that it was signed, in the name of Martha Hernandez. The cashier helped Melissa defraud the store, by providing her with large unauthorized discounts. Melissa submitted the application through or with the cashier. The jury could reasonably have inferred that Melissa or the cashier signed the credit application. A conviction for forgery is sufficiently supported by evidence that one aids another in passing forged documents, and a person can commit forgery without having executed the false instrument personally if there is proof that he procured its execution or aided or abetted another in doing so. (*People v. McKissack*

(1968) 259 Cal.App.2d 283, 287-288.) The evidence supports the inference that Melissa forged the instant credit application.

In challenging the sufficiency of the evidence of commercial burglary, appellant argues that the prosecution did not establish that Melissa formed any felonious intent before entering the store. Melissa entered the store with stolen identification and checks that did not belong to her, accompanied by four males who helped her gather substantial quantities of clothing. Melissa took the clothing to a cashier who entered a significant, unauthorized discount for the items Melissa presented to her. That evidence established that Melissa entered the store with a felonious intent.

Appellant also argues that there was no completed theft. He claims the crime was not complete because "the store consented to have [Melissa] remove the clothing from the store, even if only to arrest her outside its doors." We disagree. A store does not consent to theft by employing personnel to observe and apprehend customers who use dishonest means to obtain merchandise. (See *People v. Shannon* (1998) 66 Cal.App.4th 649, 653-657.)

#### *Request for Jury Demonstration*

Appellant argues that the trial court's erroneous restriction on his right to present demonstrative evidence (by standing close to the jury to exhibit his crossed eyes) compels the reversal of his convictions. We disagree.

Courts typically admit demonstrative evidence where it tends to prove a material issue, clarify circumstances of the crime, and help the jury understand the evidence. (*People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 316; *People v. Barnett* (1998) 17 Cal.4th 1044, 1135-1136; *People v. Roldan* (2005) 35 Cal.4th 646, 709.) The court did not prevent appellant from making any demonstration whatsoever during trial. It granted a defense request to permit appellant to stand and face the jury to display his eyes. Appellant nonetheless seeks the reversal of his convictions based on the court's statements after trial counsel expressed uncertainty about the ability of jurors to see appellant from across the court room. The court stated that further demonstration was unnecessary because appellant's eyes were visible to the court. Later, outside the jury's



presence, the court noted that crossed eyes could be an immutable characteristic, which might raise an "issue of whether there's been a waiver of the right to remain silent and the right not to testify," on the theory that the demonstration would be equivalent to appellant's "telling" the jury that he had crossed eyes. Thereafter, without ruling on its admissibility, the court cautioned counsel that a further demonstration might be a waiver of appellant's right to refrain from testifying. Appellant did not thereafter seek another demonstration.

Because the record does not establish that the jury could not adequately observe his eyes, appellant cannot establish any prejudice from the claimed denial of a further opportunity to demonstrate that his eyes were crossed. Moreover, there was ample other evidence to show that appellant's eyes were crossed. During final argument, appellant's counsel stressed that multiple witnesses, including Martha, had testified that appellant had a crossed eye or eyes, and that Martha had also testified that the first intruder to enter her home on March 30th did not have crossed eyes, and that her out-of-court identification of appellant as the first intruder was incorrect. Any error in denying the requested "close up" demonstration was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) and it is not reasonably probable that a result more favorable to appellant would have been reached absent any such error. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

#### *Instructional Error Claims*

Appellant contends that the trial court's failure to deliver a unanimity instruction requires the reversal of his forgery conviction. Based on a criminal defendant's right to a unanimous verdict, where the jury receives evidence of more than one factual basis for a conviction, the prosecution must select one act to prove the offense, or the court must instruct the jury that it must unanimously agree on one particular act as constituting the offense. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Jones* (1990) 51 Cal.3d 294, 304-305.) A unanimity instruction, however, is not required if the evidence shows only one criminal act, or if multiple acts constitute a continuous course of conduct. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) Multiple

acts are part of a continuous course of conduct when they are so closely connected as to form parts of a single transaction, when the defendant offers essentially the same defense to each of the acts, and when there is no reasonable basis for the jury to distinguish among them. (*Ibid.*)

The People argue that no multiple acts unanimity instruction was required below, among other reasons, because the acts involving the credit application and the check were part of a continuous course of conduct. We agree. As soon as the instant credit application was rejected, Melissa used a check from the Blacks' account to pay for the same merchandise that she would otherwise have charged to the new credit account, and presented the check to the same helpful cashier in the same transaction,

Appellant further contends that the trial court should have instructed the jury on theft by false pretenses. We reject this argument because it relies on the flawed premise that the victim consented to the taking. (The discussion above regarding the sufficiency of the evidence explains that there was no such consent.)

Appellant also contends that the court "essentially relieved the prosecution's burden to prove all elements of forgery" by failing to instruct the jury with CALJIC No. 15.26, which defines the intent to defraud. In so arguing, appellant cites the use note in CALJIC No. 15.00, which states that CALJIC No. 15.26 must be given. The court properly instructed the jury on the elements of forgery and informed it that a specific intent to defraud is an essential element of forgery. (See CALJIC Nos. 15.00 & 15.03.) The trial court was not required to give the jury an instruction defining "intent" and "defraud" because they are commonly understood terms. (*People v. Hardy* (1992) 2 Cal.4th 86, 153.)

#### *Sentencing Claims*

The court stayed imposition of sentence on counts 2, 3, 6, 10 and 12, and sentenced appellant to 13 years 4 months, including a nine-year upper term for count 1 (robbery), a consecutive 20-month term for count 8 (carjacking), four consecutive eight-month terms for each of counts 4 and 7 (witness dissuasion), 6 (false imprisonment), and 11 (second degree burglary), and a concurrent five-year term for count 9 (carjacking).

Appellant first contends that section 654 prohibited the imposition of consecutive sentences for the robbery and carjacking. Where two or more offenses are part of a single transaction, or share a common objective, the defendant may be punished for one, but sentencing for the others must be stayed. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *People v. Diaz* (1967) 66 Cal.2d 801, 807.) The trial court found that the count 8 carjacking had a separate intent from the robbery.

We review the court's determination of appellant's "separate intents" for sufficient evidence in a light most favorable to the judgment and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.) If all of the offenses share a single objective, the defendant may be punished for any one of such offenses but not more than one. (*Id.* at p. 267.) In selecting a consecutive term for the count 8 carjacking, the court found that "the carjacking . . . had an intent [to escape] that was separate from the intent to rob and falsely imprison and threaten the victims inside the home." The evidence supports that finding. The cars were not necessary for appellant and his accomplices to carry away the small items taken in the robbery--a laptop, jewelry, identification, a phone, purse, a wallet. (*Id.* at pp. 271-272.) Appellant misplaces his reliance on *People v. Dominguez* (1995) 38 Cal.App.4th 410, 420, where the court upheld the applicability of section 654 to a robbery and carjacking. The *Dominguez* defendant robbed a victim of jewelry while the victim sat in the same van that the defendant carjacked, and the prosecutor conceded section 654's applicability to the robbery and carjacking. Here, in contrast, the robbery victim was in her home at the time of the robbery, the prosecution did not concede section 654's applicability to the robbery and carjacking, and the trial court found that appellant had separate objectives for the carjacking (to escape) and the robbery.

After making statements suggesting that it found that the count 8 and 9 carjacking offenses shared a common objective, the trial court imposed a concurrent sentence for the count 9 carjacking. Where two offenses share a common objective, the sentence for one of the offenses must be stayed. (*People v. Dominguez, supra*, 38

Cal.App.4th at p. 420.) The court below erred by imposing a concurrent sentence for the count 9 carjacking. The trial court shall correct this error on remand.

Finally, appellant argues that the trial court incorrectly sentenced him to an upper term sentence for the count 1 robbery because the jury did not make the factual findings that the court used to select the upper term. Appellant contends that *Blakely v. Washington* (2004) 542 U.S. 296, *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Cunningham v. California* (Jan. 22, 2007) 549 U.S. \_\_ [2007 WL 135687], and federal constitutional principles of due process of law and trial by jury require that the jury determine beyond a reasonable doubt the factual findings used by the trial court to impose an upper term of imprisonment. The United States Supreme Court recently held that a judge may not impose an upper term sentence because the aggravating sentencing factors to support such a sentence must be tried by a jury. (*Cunningham, supra.*)

We affirm the judgment, vacate the sentence, and remand the case to the superior court for resentencing. (*Cunningham v. California, supra*, 549 U.S. \_\_ [2007 WL 135687].) On remand, the trial court shall resentence appellant for robbery and stay the sentence for the count 9 carjacking. The trial court shall forward the amended abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Charles E. Horan, Judge  
Superior Court County of Los Angeles

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