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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MICHAEL GILMORE,

Defendant and Appellant.

D039279

(Super. Ct. No. SCN121340)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias and Carol C. Lam, Judges. Affirmed.

A jury convicted Steven Michael Gilmore of two counts of robbery (Pen. Code, § 211),¹ possession of firearm by a felon (§ 12021, subd. (a)) and possession of ammunition by a felon (§ 12316, subd. (b)(1)).² The jury also found Gilmore was armed

¹ All statutory references are to the Penal Code unless otherwise specified.

² The jury acquitted Gilmore of one count of receiving stolen property. The jury was unable to reach a verdict on two other robbery counts: one count of attempted

when he committed the two robberies (§ 12022, subd. (a)(1)). In a separate proceeding, the trial court found Gilmore had suffered a prior serious felony conviction (§ 667, subd. (a)(1)) and two prior strike convictions (§ 667, subds. (b)-(i)). The trial court sentenced Gilmore to a prison term of 82 years to life.

Gilmore appeals, contending his motion to suppress should have been granted because law enforcement illegally entered his residence and illegally detained him, thereby vitiating his consent to search the residence. Gilmore also contends the evidence was insufficient to support his robbery convictions. We affirm.

FACTS

On November 3, 2000, at 6:30 p.m., three Black men wearing masks entered Al & Ed's Auto Sound in Vista. Armed with handguns, they took approximately \$1,000 from the cash register and took the wallet of Jose Solorio, a customer. The robbers fled in a white Buick Regal. The victims described the height of the robbers as ranging from slightly under six feet to six feet three inches.

The Java Hut is a coffee shop located 6.5 miles from Al & Ed's Auto Sound. About 7:00 p.m. on November 3, three Black men wearing ski masks and armed with handguns "burst" into the Java Hut and announced it was a hold-up. One robber pointed a gun at customer Joanne Hamilton as he took her purse. Another robber forcibly grabbed the store clerk, Laura Hansen, and told her to open the cash register. Because

robbery and another count of receiving stolen property. The prosecutor dismissed a third count of receiving stolen property before the case went to the jury.

the cash register jammed, the robbers took it with them and fled. There was approximately \$57 in the register.

Hansen testified the height of one of the robbers was five feet four inches, another robber was a littler taller and the third robber was significantly taller. Hamilton testified two robbers were five feet seven inches tall and the third robber was five feet eight inches tall. At the scene, Hamilton's husband, who is six feet three inches tall, gave similar height descriptions, but at trial he testified one of the robbers was six feet tall. Gilmore's height is six feet one inch.

Responding to the scene, a deputy sheriff noticed a tan 1982 Buick Regal parked outside the Java Hut on the shoulder of the road; the engine was warm. The windshield wipers were running; it had been raining that evening. The steering column was damaged, with wires hanging out of it. The car had been reported stolen. A black, right-handed cloth glove was found on the driver's seat. Two of Gilmore's fingerprints were on or near the passenger door mirror.

During a search of Gilmore's apartment, sheriff deputies found two cases (1,000 rounds) of 7.62-caliber ammunition in a hallway closet and 45 rounds of nine-millimeter ammunition in Gilmore's bedroom closet. Also recovered from the apartment was a black knit cap with the eyes and mouth cut out and a credit card for Jose Solorio, a robbery victim from Al & Ed's Auto Sound.

Sheriff's deputies searched Gilmore's vehicle and found a garment bag containing a loaded nine-millimeter handgun, a loaded Mossberg 410-caliber pump action shotgun and a Ruger Mini-30 rifle. A black, left-handed glove also was found in the garment bag.

It was stipulated that Gilmore had been previously convicted of a felony.

Torrence Williams, who had previously been convicted of robbery and was serving a state prison sentence at the time of trial, testified on behalf of Gilmore. Williams, who had known Gilmore for approximately seven years, said he found Solorio's credit card on the sidewalk in front of Gilmore's apartment and left it on a counter inside. Williams also said he and two other individuals put the black bag containing guns into Gilmore's car. Williams refused to reveal the names of the others because he did not want to be labeled a snitch.

DISCUSSION

I

Suppression Motion Properly Denied

Gilmore contends evidence obtained during a warrantless search of his residence was improperly admitted because he was forced to consent to the search after law enforcement officers illegally entered the residence and illegally detained him. The contention is without merit.

A. Factual Background

On October 30, 2000, Lisbeth Abramson, a child protective services social worker, was assigned to investigate Gilmore for physical abuse of his four-year-old stepson. Gilmore admitted using corporal punishment and agreed to work with an in-home worker to develop nonphysical methods of child rearing.

In the fall of 2000, a multijurisdictional law enforcement task force was investigating a series of 33 robberies in northern San Diego County believed to have been

committed by members of the Deep Valley Crip gang. Gang member Torrence Williams became a suspect and was placed under surveillance. Williams and Gilmore were linked because Williams's girlfriend, Marie Malone, was observed at the Gilmore residence. Malone told authorities she and Williams had stored some of their belongings, including a tub of clothes, at Gilmore's residence. Williams and Gilmore also were linked by their association with the same gang.

On November 15, while conducting a search in Gilmore's apartment complex of another suspect's residence, law enforcement officers learned that Williams had been arrested in connection with a robbery and then Gilmore's wife was seen loading property into her vehicle. Officers stopped and detained Mrs. Gilmore on the belief that she was getting rid of Williams's property. In fact, Mrs. Gilmore was going to the laundromat. Deputy Sheriff Art Wager searched her vehicle and found nothing incriminating. Mrs. Gilmore told Wager that she had thrown away Williams's property, but Malone still had a purple storage tub with "their" property at the Gilmore residence. Wager asked Mrs. Gilmore for permission to search the Gilmore residence; she declined and told him to ask her husband. Authorities told Mrs. Gilmore, who was with some of her children, to "stay put" in the back of a patrol unit while Wager went to the apartment and sought Gilmore's consent to search.

Meanwhile, social worker Abramson wanted to revisit the Gilmore residence to check on the children's safety after learning guns were possibly inside the apartment. Abramson required a police escort for this type of home visit and coordinated a joint trip

with the task force. She met Wager and three other law enforcement officers outside Gilmore's apartment.

Wager knocked on the door of the apartment, and Gilmore answered. Gilmore was told the purpose of the visit was twofold: (1) to assess the risk to the children in light of guns being reported in the home and (2) to search for stolen property because people charged with robbery had been staying there. Gilmore allowed Abramson inside to check on the children's welfare. Wager and the other officers entered at the same time. Gilmore did not protest when the officers entered the apartment. Wager told Gilmore his wife and two of his children were being detained. While Wager patted down Gilmore for weapons, other officers did a protective sweep of the apartment to make sure no other adults were present. The officers then placed Gilmore on the sofa and told him to remain there. When Gilmore had opened the door, Wager saw a purple tub right inside the door; Wager believed this gave him probable cause to get a search warrant.

Initially, Gilmore refused to let the officers search his apartment without a search warrant. Wager said he would get a warrant. While Wager went outside to arrange for a search warrant, one of the officers refused to let Gilmore use the telephone, explaining the apartment was "frozen" while the warrant was being obtained. Gilmore asked how long it would take to get a warrant; the officer answered it could take from one-half hour to four hours. Gilmore replied: "If it's going to take that long, go ahead . . . search the place." Wager came inside and talked to Gilmore about giving consent. He had Gilmore sign a consent form.

Officers searched the apartment. Upon finding Jose Solorio's credit card, the officers halted the search to obtain a search warrant. Malone was brought to the apartment and gave her consent for authorities to search her purple tub.

Gilmore testified at the suppression hearing that when he answered the door, Abramson said she wanted to make sure the children were safe and Wager said he wanted to check Malone's purple tub. Wager did a pat-down search of Gilmore. Another officer checked the couch and ordered him to sit and stay on the couch. When Gilmore saw Abramson with the officers, he believed she was there to take his children because when she had come previously, she was not accompanied by law enforcement. When Gilmore refused to consent to a search, Wager said he would get a warrant and it would take four hours. Gilmore was not allowed to use the telephone, which made him feel he was under arrest.

When Wager stepped outside, another officer told Gilmore if he did not consent to a search, the authorities would take his children. If the threat about the children had not been made, Gilmore would not have consented to the search. The officers denied making such a threat.

B. *Legal Principles and Analysis*

Our standard for reviewing a trial court's ruling on a motion to suppress is well settled. "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

In the case of a warrantless search, "the burden shifts to the People to justify the search by establishing the search fell within an exception to the warrant requirement." (*People v. Bishop* (1996) 44 Cal.App.4th 220, 237.) Consent to a search is a recognized exception to the Fourth Amendment's warrant requirement. (*Ibid.*) The People have the burden to show consent was freely, voluntarily and knowingly given. (*People v. Harwood* (1977) 74 Cal.App.3d 460, 466.) Whether consent is voluntary is a factual question to be determined in light of all the circumstances. (*People v. James* (1977) 19 Cal.3d 99.)

We begin by considering whether the entry was legal within the meaning of the Fourth Amendment because a constitutional violation at that stage "might infect any purported consent to the subsequent search." (*People v. Meredith* (1992) 11 Cal.App.4th 1548, 1561.) "[T]he touchstone of reasonableness for search or seizure without probable cause is the presence of 'specific and articulable facts' that reasonably warrant the intrusion on personal liberty and privacy." (*People v. Glaser, supra*, 11 Cal.4th at p. 374.)

We conclude the officers were justified in going to Gilmore's residence on November 15 because they had articulable and reasonable suspicion that evidence relating to the robberies was located there. Gilmore and Williams were friends who were associated with the same gang. Williams had just been arrested for armed robbery and Williams's girlfriend had stored some of their possessions at the Gilmore residence. Mrs. Gilmore was observed putting items in her car, which to Wager seemed too coincidental to ignore. Additionally, the officers were justified in going to the apartment

because social worker Abramson needed a police escort to check out a tip that firearms were present there. The officers explained the dual purpose for their visit as soon as Gilmore answered the door.

Upon hearing this explanation, Gilmore opened the door and allowed Abramson and the officers to enter. The trial court — which has the power to judge witness credibility, resolve conflicts in testimony, weigh evidence and draw factual inferences — found the officers' entry was consensual. Substantial evidence supports this finding. Thus, the officers, having obtained Gilmore's consent, were legally inside the apartment.

Gilmore argues unpersuasively that Abramson's presence was a pretext or ruse used to obtain his consent to allow the officers to enter. Both Abramson and the officers went to the apartment for separate, legitimate reasons. The officers properly identified themselves, explained the dual purpose of the visit, and did not use trickery or subterfuge to mislead Gilmore. (See *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1577-1579; cf. *People v. Reeves* (1964) 61 Cal.2d 268, 273.)

Gilmore also argues that he was unlawfully detained inside the apartment, that is, when he was ordered to sit and stay on the couch. We disagree.

A detention is a seizure of the person and must be reasonable within the meaning of the Fourth Amendment. (*People v. Glaser, supra*, 11 Cal.4th at p. 363.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) In addition to the

specific and articulable facts establishing the officers' reasonable suspicion in going to the apartment, the purple tub was in Wager's plain view when Gilmore opened the door.³ The trial court found that Wager at that point had sufficient probable cause to obtain a search warrant. We agree. Thus, Wager had more than ample reasonable suspicion that evidence related to the North County robberies was present in the apartment and Gilmore may be involved in criminal activity. Detaining him was reasonable under the circumstances.

Gilmore characterizes his detention as an illegal defacto arrest. Gilmore points to the following facts: he was patted down; the officers conducted a protective sweep; he was told to sit on the sofa and "stay put"; and he was denied access to the telephone.

Detentions are "seizures of an individual which are strictly limited in duration, scope and purpose." (*In re James D.* (1987) 43 Cal.3d 903, 911.) "[T]he permissible purpose of a detention is . . . 'to permit a speedy, focused investigation to confirm or dispel individualized suspicion of criminal activity.'" (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1516.) Detentions are to be distinguished from "those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual's liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime." (*In re James D.*, *supra*, at pp. 911-912.)

³ The plain view doctrine applies because Wager rightfully was in the position from which he made the plain view observation. (See *People v. St. Amour* (1980) 104 Cal.App.3d 886, 891.)

"[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 384-385.)

Conducting a pat-down search was reasonable under these circumstances. The officers were investigating a series of armed robberies and there was a tip that firearms were in the apartment. There was no evidence that the pat-down was done for any purpose other than officer safety or was excessive in scope.

The protective sweep also was reasonable. A "protective sweep" is a quick and limited search incident to an arrest, one that is conducted to protect the safety of the officers or others. (*Maryland v. Buie* (1990) 494 U.S. 325, 327 (*Buie*).) To be valid, it must be confined to a cursory visual inspection of those places in which a person might hide. (*Ibid.*; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1674.) The reasonableness of the officers' conduct depends on the facts known to the officers at the time, and the conduct is reasonable if those facts would warrant a person of reasonable caution to believe the action taken is appropriate. (*People v. Block* (1971) 6 Cal.3d 239, 244.) The brief protective sweep was appropriate because the officers were investigating gang-related armed robberies and there was a tip firearms were in the apartment. Further, nothing in the record indicates the officers did anything but conduct a limited protective sweep for safety purposes. It does not matter that the protective sweep here was not

made incident to an arrest as was the case in *Buie*. The same safety considerations underlying *Buie* apply whether the officers are present to effectuate an arrest or conduct a search.

The telephone restriction was reasonable to prevent Gilmore from alerting gang members, who could in turn dispose of evidence connected with the robberies. Further, the officers were justified in denying Gilmore access to his apartment while they sought a search warrant because otherwise he could try to destroy or hide evidence.

We conclude there was no undue show of authority that transformed Gilmore's detention on the couch into a de facto arrest. The officers used the least restrictive restraint available based on the surrounding circumstances.

Having determined that the officers legally entered the apartment with Gilmore's consent and legally detained him, we address whether Gilmore consented to the search of the apartment. Initially, Gilmore refused to consent to a search of the apartment, leading Wager to begin the procedure to get a warrant. Then, when Gilmore was denied use of the telephone (pending issuance of the warrant) and told the warrant procedure could take up to four hours, he changed his mind and consented to the apartment search without a warrant. Wager discussed this decision with Gilmore to ensure Gilmore understood he did not have to consent to the search. Wager then read aloud a consent to search form to Gilmore, who read it and signed it. Gilmore testified that he consented to the search because when Wager went outside, one of the other officers told him if he did not consent they would take away his children. The officers denied this threat was made.

The court found Gilmore's consent to the search was voluntary and not the product of coercion, threat or duress. Substantial evidence supports this finding. "Unless clearly erroneous, we uphold the trial court's [factual] determination." (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408.) A trial court may accept an officer's testimony that the accused freely consented to the search even in the face of conflicting testimony from defense witnesses. (*People v. Ratliff* (1986) 41 Cal.3d 675, 687.)

The motion to suppress was properly denied.

II

Evidence Was Sufficient to Support Java Hut Robbery Convictions

Relying on the fact the jury could not reach a verdict regarding the robberies at Al & Ed's Auto Sound, Gilmore contends his fingerprint on the stolen vehicle constituted insufficient evidence to support his convictions of the robberies at Java Hut. The contention is without merit.

When faced with a claim of insufficiency of evidence:

"[O]ur role on appeal is a limited one. 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

The record contains substantial evidence to support the robbery convictions. The two Java Hut robbery victims testified that at least one of the robbers wore gloves cut to expose his fingers. Gilmore's fingerprints were on the stolen Buick Regal abandoned outside the Java Hut. The engine of the vehicle, which matched the description of the getaway vehicle used by the robbers of Al & Ed's Auto Sound, was warm and the windshield wipers were still running. The jury could reasonably conclude Gilmore and the other two Java Hut robbers drove to the scene in the Buick and he left his fingerprints on the vehicle. Our Supreme Court has repeatedly pointed out that fingerprints are the strongest evidence of identification and are generally sufficient by themselves to identify the perpetrator of the crime. (See e.g., *People v. Andrews* (1989) 49 Cal.3d 200, 211; *People v. Johnson* (1988) 47 Cal.3d 576, 601; *People v. Gardner* (1969) 71 Cal.2d 843, 849; *People v. Adamson* (1946) 27 Cal.2d 478, 495.)

Contrary to Gilmore's assertion, his fingerprints were not the only evidence to support the Java Hut robbery convictions. The Java Hut robbery victims testified the robbers wore black ski masks with cut-outs for their eyes and mouth; a black ski mask was found in Gilmore's apartment. Gilmore was also linked to the abandoned vehicle by a black, right-handed glove found inside the abandoned vehicle; police found a black, left-handed glove in Gilmore's car on the day he was arrested.⁴

⁴ An examination of exhibits 6 and 20 shows the fingers on these gloves were not cut off.

Gilmore makes too much of the jury's inability to reach a verdict on the Al & Ed's Auto Sound robbery counts. Different witnesses testified about each of the two robberies. Jurors, as triers of fact, have the power to assess the credibility of individual witnesses as they see fit. On this record, we cannot second-guess the jurors' unanimous verdict on the robbery counts at the Java Hut and their inability to reach a verdict on robbery counts at Al & Ed's Auto Sound. Nor would it be proper for us to speculate on the reasons why the jury was unable to reach a verdict on those counts.

DISPOSITION

The judgment is affirmed.

KREMER, P. J.

WE CONCUR:

BENKE, J.

HALLER, J.