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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RUBEN ALBERT ROMERO, Defendant and Appellant.	F044910 (Super. Ct. Nos. 1061512 & 1062537) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Loretta Murphy-Begen, Judge.

Linda Buchser, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Julie A. Hokans and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J., and Dawson, J.

In Stanislaus County Superior Court case No. 1061512 (case No. 1061512), a jury convicted appellant Ruben Romero of two counts of second degree robbery (Pen. Code,[1] §§ 211; 212.5, subd. (c); counts 1, 2) and found true enhancement allegations that appellant personally used a firearm (§ 12022.53, subd. (b)) in committing those offenses. In Stanislaus County Superior Court case No. 1062537 (case No. 1062537), appellant pleaded no contest to one count of second degree robbery and admitted a personal-firearm-use enhancement allegation. In sentencing appellant on both cases, the court imposed a prison term of 12 years, consisting of the 2-year lower term on count 1 in case No. 1061512 and a consecutive term of 10 years on the accompanying enhancement. The court imposed a concurrent 12-year term on count 2 and another concurrent 12-year term in case No. 1062537.

On appeal, appellant's sole contention is that the court improperly excluded evidence of third party culpability in case No. 1061512.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Instant Offenses—Prosecution Case

On June 21, 2003,[3] between midnight and 1:00 a.m., Nathan Bartelink and William Glaser were sitting on a curb in front of a friend's apartment, drinking beer and waiting for their friend to come home, when a man, whom Bartelink identified at a photographic lineup in early August and at trial as appellant, approached and, Bartelink testified, asked Bartelink and Glaser if they had any marijuana.[4] The two answered they

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] Because the facts of case No. 1062537 are not relevant to the issues raised on appeal, we will forgo recitation of those facts, and summarize the facts and relevant procedural aspects of case No. 1061512 only.

[3] References to dates of events are to dates in 2003.

[4] Except as otherwise indicated, the remainder of the factual statement is taken from Bartelink's testimony.

did not. After some "small talk" appellant asked if they had change for a $100 bill. Bartelink and Glaser again said they did not, at which point appellant pulled a gun from his belt, pointed it in the general direction of the two and said, " 'Give me your shit.' "

Bartelink handed appellant his wallet. Glaser did the same. Appellant also demanded that Bartelink hand over his beer. Bartelink did so. Appellant then walked to a nearby-parked car and got in on the passenger side. A "younger girl" was sitting in the driver's seat. She drove off. Shortly thereafter, Bartelink called the police on his cell phone.

Brenton Zumwalt testified that at some point prior to August 1, he was stopped by police while driving.[5] Appellant, who was Zumwalt's friend, was a passenger in the car. At the time of the stop, Zumwalt had in his possession a driver's license belonging to Nathan Bartelink. Zumwalt testified he "was over at the house where [appellant] stayed at" when he purchased the license for $5 from a person named Anthony. Zumwalt subsequently pleaded guilty to receiving stolen property, based on his possession of Bartelink's driver's license.

Zumwalt told police Detectives Brocchini and Hermosa that appellant gave him the license, and that appellant had stated he (appellant) "got the license by robbing two guys at gunpoint[.]" However, the detectives told Zumwalt that "a specific witness had identified [appellant] as the suspect in the robbery[,]" and "they made it seem like . . . they were gonna let [Zumwalt] go if [Zumwalt] told them what they wanted to hear." Zumwalt falsely implicated appellant in the robbery because he "figured . . . if [he did so] that they . . . wouldn't take [him] to jail." The detectives did not actually say Zumwalt would not be prosecuted, but Zumwalt received that "impression" when "[the detectives] told [him] that, . . . 'You better tell us what happened now or you're going to jail.' "

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[5] Except as otherwise indicated, the remainder of the factual statement is taken from Zumwalt's testimony.

Detective Hermosa testified to the following. He arrested Zumwalt on August 1 at Zumwalt's residence. Shortly after the arrest, Zumwalt stated appellant gave him Bartelink's license, and that he (appellant) obtained the license by "robb[ing] . . . two guys with a gun." Detective Hermosa did not "offer" Zumwalt "any kind of a deal," nor did he tell Zumwalt that a witness had identified appellant as the robber.

Detective Brocchini testified to the following. He interrogated Zumwalt on August 1 at the Modesto Police Department. At no time did he tell Zumwalt that Zumwalt "wasn't going to jail if he talked to [the detectives]," nor did he state that a witness had identified appellant as the robber.

Instant Offenses – Defense Case

Appellant testified to the following. He lives with his father, mother and 13-year-old brother, Justin. He spent the evening of June 20 and the early morning hours of June 21 at home. He went to sleep at approximately midnight and woke up at approximately 7:00 a.m. on June 21. His parents and his brother Justin were home during this time, and his girlfriend, Brittany Risdon, was also at his house.

Risdon and appellant's mother and father corroborated appellant's testimony as to his whereabouts on June 20 and 21.

Appellant's father testified appellant has another brother, Jeremy, who does not live with the family.

Procedural Background

Out of the presence of the jury, defense counsel informed the court of the following. Records indicated that in April appellant had suffered a conviction "for the passing of counterfeit money." In fact, however, appellant had not suffered such a conviction. Rather, "[a]nother individual passed himself off as Mr. Romero, using all of his identification, his birth date, Social Security number, everything . . . ." A fingerprint comparison confirmed that the person who suffered the counterfeiting conviction was not appellant.

The prosecutor stated that it appeared that the person who actually suffered that conviction was appellant's brother, Jeremy. Defense counsel then stated the following: "[T]his is my request. . . . [¶] Mr. Romero's brother [Jeremy] and Mr. Zumwalt are best friends, and Mr. Romero met Mr. Zumwalt through the brother, and we . . . contend that if anyone committed this robbery or gave the IDs to Mr. Zumwalt, it was the brother and not Mr. Romero, so I would like to ask my client about other use of his identification. It's kind of a reverse impeachment, I guess."

Subsequently, the court ruled, ". . . I'm . . . not going to allow any testimony about the brother's use of [appellant's] identification in the past . . . ."

DISCUSSION

Appellant contends the court erroneously excluded evidence of the following: (1) in April, two months prior to the alleged robbery, "[appellant's brother] Jeremy had used all of appellant's identification and 'passed himself off' as appellant"; (2) Jeremy and Brenton Zumwalt were "best friends"; and (3) "appellant had met Zumwalt through Jeremy."[6] This evidence, he argues, was relevant to prove that Jeremy, not appellant, committed the robbery and therefore the court's exclusion of this evidence was contrary to California Law and deprived appellant of a defense, in violation of appellant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Specifically, appellant argues as follows: "the excluded evidence supported the defense theory that the robbery was committed by Jeremy who both looked like appellant and would have been a likely person to give the wallet to Zumwalt. When coupled with

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[6] As indicated above, defense counsel's offer of proof referred only to the first of these items of evidence, i.e., in counsel's words, the "other use of [appellant's] identification," and the court's ruling was similarly limited to exclusion of "testimony about the brother's use of [appellant's] identification in the past . . . ." We assume without deciding that, as appellant suggests, the offer of proof and the court's ruling also applied to evidence of the relationship between Zumwalt, appellant and Jeremy.

evidence that appellant was at home with his parents and girlfriend during the time the offense was committed and that Jeremy was not at home during this period, the excluded evidence became highly relevant to the defense case."

"A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does 'not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' " (*People v. Sandoval* (1992) 4 Cal.4th 155, 176.)

We note first that appellant provides no citation to the record in support of his claims that Jeremy "looked like appellant" or that Jeremy "was not at home" at the time Bartelink and Glaser were robbed, and our review of the record has revealed no such evidence or offer of proof of these purported facts. In any event, even assuming the truth of these factual premises, appellant's argument is without merit. Evidence that Jeremy bore a physical resemblance to appellant, or attempted to "pass himself off" as appellant by means of false identification documents and/or false representations concerning his date of birth and Social Security number has no tendency in reason to prove that Jeremy committed an armed robbery two months later. And evidence that appellant met Zumwalt through Jeremy and that Zumwalt and Jeremy were best friends shows, at most, that Jeremy had the opportunity to commit the instant offense. None of this evidence " 'link[s] [Jeremy] to the actual perpetration of the crime.' " (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 176.) Therefore, the proffered evidence was not "capable of raising a doubt about [appellant's] guilt." (*Ibid*.)

DISPOSITION

The judgment is affirmed.