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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH FLOWERS,

Defendant and Appellant.

A129473

(Marin County
Super. Ct. No. SC162573)

A jury convicted defendant Joseph Flowers of robbing Wei Mei Chen, Wendy Zhang, and Lin “Lili” Juan—three masseuses working at a San Rafael massage parlor—and kidnapping one of them, Zhang. Defendant asserts the prosecution’s evidence was insufficient to show he robbed Juan, as opposed to the other two masseuses, and asserts the trial court should have granted a mistrial when a prosecution witness stated in passing that defendant had been a “parolee at large,” suggesting defendant already had a criminal history. We reject defendant’s arguments and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 24, 2008, two men robbed the New Day Health Spa in San Rafael and kidnapped one of the three female masseuses working there. By amended information filed July 30, 2009, prosecutors charged defendant and his alleged accomplice, Douglas Patterson, with kidnapping, kidnapping for robbery, second degree burglary, and three counts of robbery—one count per masseuse.

An eight-day jury trial began on April 29, 2010 and concluded on May 11, 2010.

Interior and exterior surveillance cameras at the massage parlor captured part of the robbery and kidnapping. At trial, the prosecution played the surveillance tape during the testimony of massage parlor manager, Ms. Xiu He; one of the masseuses, Chen;¹ and Patterson, who on the first day of trial entered a plea bargain to lesser charges and agreed to testify for the state.

The interior surveillance tape showed defendant drawing a gun on the three masseuses and commanding them to get on the floor. The tape then showed defendant pointing his gun at Juan's head and grabbing her hair with his free hand. Patterson² and Chen both testified defendant demanded money from Juan and led her into a back room, out of the camera's view, so she could get "her money" for him. This back room, explained Chen, contained lockers where the masseuses kept personal items, such as their money. From the back room, both Patterson and Chen could hear defendant demand money, and indeed, defendant emerged from the back room with, according to Patterson, about "two or three" purses, and according to Chen, "a bag with money inside."

The tape next showed this scenario repeat, but with defendant dragging Chen into the back room by her hair at gunpoint. While in the back room, testified Chen, defendant forced her to open several lockers and defendant took money from a pink bag belonging to Zhang and about \$900 in personal and work money from Chen's purse.

When defendant returned with Chen, he began to repeat the process with the last masseuse, Zhang, grabbing her hair and pointing his gun at her head. According to Chen, Zhang pointed at her pink bag and tried to tell defendant he already had her money. Defendant then, with the gun still pointed at Zhang's head, dragged her outside. Patterson, by then waiting for defendant in a parked car, observed defendant emerge from the massage parlor and force Zhang at gunpoint into the car. The exterior surveillance camera captured this, as well.

¹ The other masseuses did not testify at trial.

² It appears Patterson occasionally confused the names of the masseuses in his testimony.

Patterson drove away, Zhang and defendant in the back seat, and defendant with his gun trained on Zhang. During the drive, Patterson saw defendant rummaging through his takings from the massage parlor. Patterson testified he convinced defendant to let Zhang go. They left Zhang in a *négligée* at Point Richmond in the rain.

A week after the robbery, Chen received an envelope in the mail with her checkbook and a letter demanding she provide an account pin number to someone who would call her. A police sergeant testified defendant's fingerprints were on the envelope and letter. At trial, Chen identified defendant as the perpetrator. She had also picked defendant's photo out of a lineup during the investigation.

The massage parlor manager, He, testified \$3,000 was lost in the robbery. This sum included, according to He, money belonging to each of the three women (who had large sums of cash with them to pay for rent and food expenses associated with recently moving into state), and also \$200 to \$300 in business revenue. The parlor keeps two-thirds of business revenues and the masseuses split the other third at the end of each day.

Just before trial, the court had granted a motion in limine prohibiting reference during trial "to [defendant's] prior record or prior felony conviction or prison incarceration" or "to his being on a parole hold or in custody." The court had further ordered counsel to admonish their witnesses about such pretrial rulings. Despite this, the prosecutor failed to admonish Lisa Holton, a corporal at the San Rafael Police Department assigned to investigate the robberies and kidnapping. Holton, while testifying midtrial, stated in passing defendant was a "parolee at large." Specifically, when asked why she did not use a particular photograph in the lineup she provided to Chen, Holton answered: "Because I knew that I was going to show Ms. Chen a line-up. I had spoken to her on the day that this information was released to the media. I tried to get her into the police department to show her the photo line-up that day. She told me she was going to be out of town and that she wasn't going to be able to meet with me until the following week. [¶] I felt that because of the weapon involved and the fact that we had released some of the surveillance video to the media already, there is a significant danger to the public, and I didn't want to hesitate in getting this information out to the

public for a public safety reason that we have a parolee at large who is possibly still armed in public. I felt that there was an urgency in releasing that to the media.”

Following a bench conference, the trial court instructed the jury to “disregard the portion of the answer that referred to the term parolee. That’s not for your consideration here. Don’t be biased by it or make any inferences from it. It’s not part of this case and has no bearing on your consideration of the issues here. Disregard that in its entirety.”

Defendant moved for a mistrial. The trial court, however, found the prosecutor did not intend to elicit the testimony, believed the jury would abide by the instruction to ignore the testimony, noted Holton gave no details about defendant’s prior conviction, and, finding no prejudice to defendant, denied the motion.

On May 11, 2010, trial concluded and the jury found defendant guilty of the charged crimes. The trial court sentenced defendant to a life term and an additional, consecutive term of 29 years four months. Defendant filed a timely notice of appeal.

DISCUSSION

Robbery of Juan

Robbery is the “felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (Pen. Code, § 211.) The jury convicted defendant of three counts of robbery, one corresponding to each of the three masseuses he assaulted. “ ‘[M]ultiple convictions of robbery are proper if force or fear is applied to multiple victims in joint possession of the property taken.’ ” (*People v. Scott* (2009) 45 Cal.4th 743, 746, 749-750.) Defendant contends, however, the evidence was insufficient to convict him of robbing Juan, as opposed the two other masseuses. Juan did not testify at trial, the surveillance camera did not record activity in the back room, and Chen’s testimony, defendant argues, at best establishes only that defendant dragged Juan to the back room, not that defendant took money particularly belonging to Juan.

“ ‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the

defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’ (*People v. Bolin* (1998) 18 Cal.4th 297, 331 . . . ; accord, *People v. Steele* (2002) 27 Cal.4th 1230, 1249)” (*People v. Torres* (2009) 173 Cal.App.4th 977, 983.) If circumstances reasonably justify a jury’s finding, “ ‘ “the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” ’ ’ ” (*People v. Solomon* (2010) 49 Cal.4th 792, 816; *People v. Lewis* (2001) 25 Cal.4th 610, 643-644.)

The evidence amply supports a robbery conviction as to Juan. First, the evidence clearly establishes defendant coerced Juan to aid him in stealing money from the back room. Whether this money was hers or her coworkers’, Juan was a robbery victim. (*People v. Moore* (1970) 4 Cal.App.3d 668, 670-671.) In *Moore*, the court held a visitor in a store forced to take money from the store’s cashbox and surrender it at gunpoint was a victim of the robbery. (*Id.* at p. 670.) “It is no defense to a charge of robbery (or of theft) that the victim was not the true owner of the property taken. Theft can be committed against one who was himself a thief. [Citations.] It follows that, once [the visitor] exercised dominion over the money, whatever her motivation in so doing, she became, insofar as defendant was concerned, the person in possession thereof, and she was properly designated in the information as the immediate victim of his robbery.” (*Id.* at pp. 670-671.) In this case, Juan was as much “exercising dominion” over the property stolen and as much a victim of the robbery as the visitor in *Moore*. She was not merely a bystander to the crime as in *People v. Nguyen* (2000) 24 Cal.4th 756, 762 (distinguishing *Moore* on these grounds) but forced to participate in it by providing to defendant property on her person or in her immediate presence against her will.

Second, the manager of the massage parlor, He, testified that business revenue was stolen during the robbery. Juan had a partial interest in that money and two-third of it belonged to the parlor. Even ignoring the portion of the money in which Juan had an interest, Juan was a robbery victim because defendant administered force to Juan in connection with stealing money belonging to the business at which she worked.

“ “ “[T]he theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims.’ ” [Citation.] [¶] . . . [A]ll employees on duty have constructive possession of their employer’s property and may be separate victims of a robbery.’ [Citation.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 687.)

Defendant agrees employees may be robbery victims when theft of employer property occurs, but argues, without elaboration, “Ms. He’s testimony that \$200 to \$300 was taken from the business was a guess based on hearsay.” Defendant gives no reason to question why the manager would not know whether business property was stolen. Moreover, defendant did not object to He’s testimony about business losses at trial, not on hearsay grounds or any other. Defendant cannot now make a hearsay objection on appeal. (*People v. Farley* (2009) 46 Cal.4th 1053, 1107 [“Defendant did not make a hearsay objection below, nor did he argue that the conversation was irrelevant because it did not threaten violence or damage. Therefore, these claims are forfeited”]; *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1507 [“Although defendant was improperly asked about his misdemeanor convictions rather than his prior conduct leading to misdemeanor convictions, defendant did not raise a timely hearsay objection to the prosecutor’s questions and is therefore foreclosed from seeking relief on appeal.”], italics omitted.)

Third, the jury also had sufficient evidence to infer defendant robbed Juan of her own money. Defendant forced Juan at gunpoint into the back room where the masseuses kept their money. He demanded “her money” in particular. Moments later, Patterson and Chen in the front room could hear defendant’s continued demands for money in the back room, and indeed, defendant emerged from the back room with, according to Patterson, about “two or three” purses, and according to Chen, “a bag with money inside.” The parlor manager, He, testified Juan’s money had been stolen, as had business revenue in which Juan had an interest. This was sufficient evidence. (See, e.g., *People v. Castaneda* (2011) 51 Cal.4th 1292, 1308, 1324 [persons other than the victim, who had been killed, testified the victim “kept her purse and wallet in the office area, where she

apparently was confronted by defendant . . . , and that her purse and wallet were missing from the scene. . . . Reviewing the evidence in the light most favorable to the judgment, we conclude substantial evidence supports” robbery of the purse and wallet].)

Mistrial

Defendant claims Corporal Holton’s reference to him at trial as a “parolee at large” required the trial court to declare a mistrial. The statement, says defendant, was a prejudicial violation of the pretrial order to not reference defendant’s parole hold and resulted from prosecutorial misconduct—that is, the prosecutor’s failure to tell Holton of the pretrial order.

“We review a trial court’s ruling on a motion for mistrial for abuse of discretion. [Citation.] Such a motion should only be granted when a defendant’s ‘chances of receiving a fair trial have been irreparably damaged.’ [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 128.) Even if prosecutorial misconduct is involved, this court will not reverse a conviction absent prejudice to the defendant. (See *People v. Riggs* (2008) 44 Cal.4th 248, 298 [under California misconduct law, no reversal unless “reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted”; under federal law, no reversal “unless the challenged action ‘ “so infected the trial with unfairness as to make the resulting conviction a denial of due process ” ’ ”].) Thus, if “any reasonable jury would have reached the same verdict” even in the absence of Holton’s statement, the trial court’s ruling will stand. (*People v. Bolton* (1979) 23 Cal.3d 208, 214-215.)

We need not address whether prosecutorial misconduct occurred. No matter the answer to that question, the passing comment by Holton was cured by instruction and not prejudicial. (See, e.g., *People v. Bolden* (2002) 29 Cal.4th 515, 554-555 [upholding the trial court’s denial of a motion for mistrial, finding it “doubtful that any reasonable juror would infer from the [witness’s] fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction”].) The surveillance tapes, the testimony from Chen and Patterson, and the fingerprint evidence strongly support the jury’s verdict and link defendant with the charged crimes. (See *id.* at p. 555; cf. *People v.*

Ozuna (1963) 213 Cal.App.2d 338, 341-342 [reversing denial of mistrial when defendant called “ex-convict” and the evidence of guilt was not “so strong as to preclude a finding of innocence”].) Further, the trial court admonished the jury to ignore Holton’s statement, and we presume the admonition avoided prejudice. (*People v. Bennett* (2009) 45 Cal.4th 577, 612 [“We assume the jury followed the admonition and that prejudice was therefore avoided.”].)

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.