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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMARIAE JESEAN SPOTWOOD,

Defendant and Appellant.

A131770

(San Mateo County
Super. Ct. No. SC070018)

Defendant Demariae Spotwood appeals from a judgment convicting him of attempted robbery. He contends the court erred in failing to give the jury a unanimity instruction. We affirm.

Background

On December 22, 2009, defendant was charged with one count of attempted robbery (Pen. Code,¹ §§ 664, 212.5, subd. (c)). It was further alleged that the offense was a serious felony (§ 1192.7, subds. (c)(19), (c)(39)).

At trial, the victim testified that on November 24, 2009, around 10:50 p.m., as he was walking home from a bus stop, defendant and two accomplices jumped at him from behind a dumpster and demanded he give them his money and cell phone. When the victim refused, defendant punched him in the face. The other two men also hit him and he was knocked to the ground. Then defendant kicked and hit him again. While the victim was on the ground, defendant was grabbing at the hand in which the victim was holding

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

the cell phone. The men ran without taking anything after a red car began circling the area. The victim called the police once he got home. A short time later, defendant and his accomplices were detained by police. The victim positively identified defendant at an in-the-field lineup as the person who hit him in the face and demanded his cell phone and money.

The jury found defendant guilty as charged. Defendant filed a motion for a new trial, which was denied. Thereafter, imposition of sentence was suspended and defendant was placed on probation for three years with various terms and conditions, including that he serve six months in county jail. Defendant filed a timely notice of appeal.

Discussion

Defendant contends the trial court erred by denying his request that the jury be given a unanimity instruction pursuant to CALCRIM No. 3500.² A unanimity instruction is required when there is evidence of more than one discrete crime but defendant is charged with only a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) “This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ ” (*Ibid.*) “ ‘The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count.’ ” (*Ibid.*) However, “ ‘[t]he unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction.’ ” (*People v. Benavides* (2005) 35 Cal.4th 69, 98.) Put another way, a unanimity instruction is not

² CALCRIM No. 3500 reads: “The defendant is charged with _____ <insert description of alleged offense> [in Count ____] [sometime during the period of _____ to _____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.”

required where the criminal acts constitute a “continuous course of conduct.” (*People v. Diedrich* (1982) 31 Cal.3d 263, 282.)

Defendant asserts that the evidence in this case showed two distinct acts of attempted robbery. The first occurred when he demanded the victim surrender his cell phone and money and the second when he grabbed the victim’s hand while participating in the physical attack. He argues that a unanimity instruction was required because reasonable jurors could have disagreed about which of the two acts formed the basis for the conviction. The trial court rejected defendant’s request for a unanimity instruction, finding that defendant’s acts were so closely connected that they form a single criminal transaction. We agree.

The evidence at trial undoubtedly establishes a single course of conduct. Moreover, defendant’s argument on appeal is inconsistent with his defense at trial. At trial, defendant’s attorney conceded that defendant assaulted the victim. He denied, however, that defendant took any steps toward commission of a robbery. He argued that the victim lied about the attempted robbery or, at a minimum, misinterpreted defendant’s motivation for assaulting him because the victim is prejudiced against African-Americans. The jury was left to believe either the victim’s claim that defendant tried to rob him or defendant’s claim that he and his friends assaulted the victim for no apparent reason. The evidence presented no basis to differentiate between the initial demand for money and the subsequent attempt to grab the phone from the victim’s hand. No unanimity instruction was required.³

³ In light of this conclusion, the court properly denied defendant’s motion for a new trial based on the same asserted error.

Disposition

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.