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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY ROBERT GRABAR,

Defendant and Appellant.

A132691

**(Contra Costa County
Super. Ct. No. 51103712)**

Anthony Robert Grabar (Grabar) appeals from a judgment of conviction and sentence imposed after a jury found him guilty of second degree vehicle burglary (Pen. Code, §§ 459, 460, subd. (b)) and possession of burglar’s tools (Pen. Code, § 466). He contends the trial court erred by failing to instruct sua sponte on the lesser included offense of tampering with a vehicle (Veh. Code, § 10852). We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

An information charged Grabar with second degree vehicle burglary (Pen. Code, §§ 459, 460, subd. (b)) and possession of burglar’s tools (Pen. Code, § 466). As a sentence enhancement, it was further alleged that Grabar had served four prior prison terms for purposes of Penal Code section 667.5.

The prior sentence enhancement allegations were set for a bifurcated hearing, and the charged offenses proceeded to a jury trial.

A. Prosecution Case

Around 6:00 a.m. on February 4, 2011, Juan Carlos Escobedo, an employee with Cintas Fire Protection, arrived at a church on Hilltop Drive in Richmond and began working on the fire alarm system inside the church.

At approximately 7:00 a.m., Escobedo went out of the church to retrieve some parts from his work vehicle in the parking lot. From about 50 yards away, he noticed a man (Grabar) “stashing a bicycle in the bushes near a car that was pretty much the only car in the parking lot.” After getting the parts, Escobedo looked at Grabar again and saw him “kind of like on the side of the car, like on the hood, looking the opposite direction.”

Escobedo reentered the church. Through a window, Escobedo saw Grabar look around and then peer inside the vehicle’s passenger-side window. Escobedo called the police.

While on the phone with the police, Escobedo watched Grabar “kneeling down near the—the passenger door” and “doing something to the lock or handle” for five to ten minutes. Escobedo then heard a piece of metal hitting the ground, and watched Grabar open the vehicle’s passenger-side door and enter the car.

Grabar was “leaning on the seat or pretty much his whole body was in there except his legs sticking out of the car.” Now and then Grabar peeked out, looked around, and lowered his head again, until the police arrived after another five or ten minutes.

Richmond Police Officer Parker arrived at the church at approximately 8:10 a.m. She approached the subject vehicle on foot, with her service weapon drawn. She noticed the passenger-side door was open and someone (Grabar) was inside.

Officer Parker ordered Grabar out of the vehicle. At the time, Grabar’s head was down and his hands were in the center console area, as if he was “attempting to pry something from the vehicle in the center console area.” Grabar had a screwdriver in his hands.

Grabar complied with Officer Parker’s orders. She handcuffed him, helped him up, and searched him for contraband or weapons. Grabar told her, “I was looking for

you guys. I've been breaking into cars for the last two days because I need to go to County to get my teeth fixed. They're fucking killing me.” He also said, ““Nothing in the vehicle belongs to me”” and ““I'm sorry.””

In her search of Grabar's person, Officer Parker found the car's door handle and the faceplate to the car stereo, in addition to his screwdriver. Grabar admitted to the officer, ““The stereo does not—this face does not belong to me, it belongs to the vehicle.”” The door handle of the front passenger-side door of the Camry had been “ripped from” the door.

In a subsequent search of the vehicle's interior, police found a “Leatherman” in the center console area and a bag containing the rest of the car radio and the car's ashtray and coins. The police also found a “Slim Jim” near the bicycle that Grabar had left in the bushes.¹

The car, a 1995 or 1996 Toyota Camry, was determined to be owned by Zulda Linares and her husband. Linares testified that her husband had parked the Camry in the church parking lot the previous evening. When she last saw the vehicle on the evening of February 3, 2011, the door handle and stereo were still intact. Linares did not know Grabar, and he did not have permission to be in her car or have possession of her items.

B. *Defense Case*

As of February 3, 2011, Grabar was homeless and living in the bushes in the canyon behind the church in Richmond. Grabar testified: “I had been in excruciating pain for like, three days and where—I mean, it was just —my—my hair hurt, and it was just I was at the bottom, and jail was—jail was a step up.”

On the morning of February 4, 2011, Grabar was wandering around the church parking lot when he saw Escobedo. He knew Escobedo had noticed him as well.

¹ Officer Parker testified that a “Slim Jim” is a “device used to open up vehicle doors.” (Cf. *People v. Duarte* (2000) 24 Cal.4th 603, 609 fn. 1 [“Slim Jims” are “tools for breaking into locked vehicles”].) She described a “Leatherman” as something that opens up to reveal “many different tools, miniature, reduced size, so that you can, . . . essentially gain access or use this in a compact way without having a lot of different tools.”

Because of his prior job, Grabar had worked with “[a]ll sorts of tools,” although the “Slim Jim” was not one of them.

Even though he had the Slim Jim, Grabar decided to remove the door handle of the Linares’ Camry. He did so, in his words, with the intent “to get inside the car.” He explained: “It was warm, it was sitting there, I was in pain, and I—it was a lot of stuff in the car, I thought maybe I might find something there that was useful.” Inside the car, Grabar removed the radio, put it in a bag, and “sat there . . . enjoying the warmth of the inside of the car.”

Grabar testified: “I was hoping the man [Escobedo] would call the police. I mean, I said I sat there for—for—I sat in the car probably 15 minutes after—after I took the radio and I was just sitting there.”

When Grabar saw Officer Parker park her police vehicle across the street from the church, he remained seated in the car “and just waited for her.” Grabar explained that he was “somewhat relieved” because “I knew I was going to be—have a roof over my head, something to eat, and get my tooth taken care of.”

Dr. Scott Faivre, a dentist, testified that he treated Grabar in March 2011 for a badly broken bicuspid and a badly decayed crowned molar. Both teeth were abscessed, and Dr. Faivre extracted them for him. Dr. Faivre opined that the teeth were likely very painful for Grabar.

Grabar’s trial testimony was inconsistent when asked whether he had an intent to steal anything when he broke into the Camry. He first responded (in reply to his attorney’s leading question), “Not really.” He later testified that when he decided to remove the car’s door handle, he did not intend to steal anything from the car, but was essentially trying to get Escobedo to call the police. On cross-examination, however, Grabar testified that he was *not* denying committing vehicular burglary: “Q. . . . But in order to get to jail, you got to commit a crime, right? [¶] A. Yes. [¶] Q. And that’s why you committed that burglary that day, right? [¶] A. To be honest with you, yes. [¶] Q. So you don’t deny committing the burglary? [¶] A. No, I don’t.” Lastly, he testified that he did indeed enter the Camry with the intent to take something out of it:

“Q. So when you entered that car, you had to take stuff out there, intend to take it?
[¶] [Objection overruled.] [¶] A. Yes.”

C. Jury’s Verdict and Sentence

The jury found Grabar guilty on both counts. The court found the allegations as to all four prior prison terms to be true.

The court imposed an aggregate sentence of five years in state prison, comprised of the two-year midterm for second degree vehicle burglary plus three consecutive years for three of the prison priors. The court struck the other prison prior for sentencing purposes and stayed imposition of sentence on the remaining conviction.

This appeal followed.

II. DISCUSSION

At trial, defense counsel informed the court that Grabar’s defense was that he had no intent to steal any of the items in the car, but that he needed to go to jail to get his teeth fixed. Defense counsel did not, however, request an instruction on the lesser included offense of tampering with a vehicle. (Veh. Code, § 10852; see CALCRIM No. 1821.) The trial court instructed the jury with, among other instructions, CALCRIM No. 1700 pertaining to vehicle theft.²

Grabar now argues that the court should have instructed the jury sua sponte with CALCRIM No. 1821 on the offense of vehicle tampering as a lesser included offense.

² The court instructed: “To prove that the Defendant is guilty of this crime, the People must prove that, number one, the Defendant entered a locked vehicle, and number two, when he entered the locked vehicle, he intended [to] commit theft. [¶] To decide whether the Defendant intended to commit theft, please refer to the following definition of theft: to commit theft, a person must, number one, take possession of property owned by someone else, and number two, take possession without the owner or owner’s agent’s consent. Number three, intend on taking the property to deprive the owner of it permanently or to remove it from the owner’s possession for an extended time, that the owner would be deprived of the major portion of the value or instrument of the party. Number four, move the property, even a small distance, and keep it for any period of time however brief. The property can be of any value, no matter how slight. [¶] A burglary was committed if the Defendant entered with the intent to commit theft. The Defendant does not need to have actually committed theft as long as he entered with the intent to do so.”

He contends the court's failure to give the instruction inappropriately left the jury with an all-or-nothing decision to either convict Grabar of second-degree burglary or acquit him altogether.

There is no dispute that the offense of vehicle tampering, in violation of Vehicle Code section 10852, is a lesser-included offense of burglary of a vehicle. (*People v. Mooney* (1983) 145 Cal.App.3d 502, 505-506 (*Mooney*)). Nor is there any dispute that a trial court must instruct the jury on a lesser included offense, even without request, if there is substantial evidence that would absolve the defendant of the greater offense, but not of the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733 (*Waidla*); see *People v. Birks* (1998) 19 Cal.4th 108, 112 [court should instruct on lesser included offense if there is substantial evidence that only the lesser crime was committed]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*)).

The preliminary question, therefore, is whether there was substantial evidence that Grabar committed the offense of tampering with the vehicle but did not commit vehicle theft. If so, we must next consider whether the error was prejudicial. We apply the de novo standard of review. (*Waidla, supra*, 22 Cal.4th at p. 733.)

A. *Substantial Evidence*

Grabar contends the trial court should have instructed on vehicle tampering because there was substantial evidence that he did not have a specific intent to commit theft when he entered (i.e., after tampering with) the locked vehicle, and thus did not commit vehicle burglary. According to the arresting officer, Grabar said he had been breaking into cars for days because he needed to go to jail to get his teeth fixed. Grabar testified that he had been in “excruciating pain” for days. Grabar urges that he broke into vehicle not to steal anything, but because “[i]t was warm, it was sitting there, [he] was in pain.”³ There was also evidence that Grabar hoped Escobedo would call the

³ Grabar's citation to this testimony is misleading. It is true that he testified: “It was warm, it was sitting there, I was in pain.” But his appellate briefs ignore the rest of that sentence: “and I – it was a lot of stuff in the car, *I thought maybe I might find something there that was useful.*” (Italics added.) In short, Grabar admitted that he broke

police, and when the police arrived, Grabar made no effort to run away and was purportedly relieved because he would have a “roof over [his] head, something to eat, and get [his] tooth taken care of.” Dr. Faivre confirmed that Grabar had abscessed teeth that were likely very painful.

Respondent points out that there was contrary evidence, even from Grabar’s own testimony at trial, that Grabar had the specific intent to commit theft. For example, Grabar testified that he intended to commit a criminal offense when he broke into the Camry: “Q. But in order for you to get to jail, you have to commit the crime, right? [¶] A. Yes.” While Grabar’s inconsistency on the point might give rise to a question as to the sufficiency of the evidence to support the instruction on tampering with a vehicle, we will assume this requirement was met and proceed to the next issue of prejudice.

B. *Prejudice*

In noncapital cases, error in failing sua sponte to instruct on a lesser included offense supported by the evidence is reviewed for prejudice under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Breverman, supra*, 19 Cal.4th at p. 178, fn. omitted.) Reversal is therefore inappropriate unless there is a reasonable probability that the instructional error affected the outcome. (*Ibid.*) In other words, we must affirm the judgment unless, after examining the entire cause including the evidence, we conclude that it is “reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Watson, supra*, 46 Cal.2d at p. 836.)

In the matter before us, there is no reasonable probability that, if the jury had been instructed on vehicle tampering, it would have returned a guilty verdict on this lesser charge rather than on the charge of vehicular burglary.

into the car because he thought he might find something he could use – the inference being that he intended to take it. Only after his attorney asked, “And while you were breaking into the car, you didn’t intend to steal anything,” did Grabar contradict himself and claim, “[n]ot really.”

In the first place, the evidence was overwhelming that Grabar had the specific intent required for vehicular burglary. Notwithstanding his denial of an intent to steal when he broke into the Camry – questionable testimony given his prior convictions for vehicular burglary and vehicle theft – at other points in his testimony he admitted facts from which it could readily be inferred that he *did* have an intent to steal.⁴ Grabar testified: “I was in pain, and I—*it was a lot of stuff in the car, I thought maybe I might find something there that was useful.*” (Italics added.) In addition, Grabar had this exchange with the prosecutor: “[THE PROSECUTOR]: Q. In that case, when you say, and you said it today, that you saw some stuff in the car you thought might be useful— [¶] A. Yeah. [¶] Q. —that means that you thought there was some stuff in the car that would be useful for you to have? [¶] A. As far as I—I seen the bag and I thought it might be some—some aspirin, ibuprofen, anything in there that I might— it be useful, and I was in extreme pain. [¶] Q. But you also had no money? [¶] A. No. [¶] Q. So— [¶] A. Or very little. [¶] Q. I mean, you took the coins out of the ashtray and put them in the bag because—I mean, you were going to take the pennies, right? [¶] A. The ashtray had to come out to get the radio out. [¶] Q. Okay. But you were going to take the radio? [¶] A. I had the bag, yes. [¶] Q. And you had the face in your pocket? [¶] A. Yes. [¶] Q. So you went in that car to take those items with you? [¶] A. Not necessarily, no. [¶] Q. What do you mean? [¶] A. I mean, I had—I—I—I was—I was hoping the man would call the police. I mean, I said I sat there for—for—I sat in the car probably 15 minutes after I took the radio and I was just sitting there. [¶] Q. *But in order for you to get to jail, you have to commit the crime, right?* [¶] A. Yes. [¶] Q. *Okay. So you had to commit a burglary?* [¶] A. Yes. [¶] Q. *So when you entered that car, you had to take stuff out there, intend to take it?* [¶] [Defense Counsel]: Objection— [¶] THE WITNESS: Yes. [¶] [Defense Counsel]: —calling for a legal conclusion. [¶] THE

⁴ The jury was informed that Grabar was convicted of vehicle burglary in January 2002 and June 2006, and vehicle theft in September 2004. The court instructed the jury that it could use this information only for purposes of evaluating the credibility of Grabar’s statements and not for any other purpose, including his propensity to commit a crime.

COURT: Overruled. [¶] THE PROSECUTOR: *Q. Is that a yes?* [¶] A. *Yes.* [¶] Q. *Okay. And you've done this before?* [¶] A. *Yes.*" (Italics added.)

Circumstantial evidence also supported the conclusion that Grabar had an intent to steal. Grabar arrived at the scene with burglary tools in his possession, including a screwdriver and a Leatherman, with a Slim Jim nearby, and he told Officer Parker that he had been breaking into cars for the past two days. Moreover, once Grabar broke into the Camry, he did not just wait in the car and keep himself warm, but instead started working immediately in the center console area, removing the car's radio, placing it in a bag along with the car's ashtray and the coins from that ashtray, and stashing the radio faceplate in one of his pockets. He did not need to do any of those things if he only wanted to enter the car to stay warm and be captured by police so he could get his teeth fixed in jail; but he *did* have to do those things if he intended to take items from inside the car. The plain inference is that Grabar entered the car with the intent to steal and accomplish the crime of vehicular burglary.

Grabar argues that the court's failure to instruct sua sponte was prejudicial because it deprived him of having his theory of the case considered by the jury. Not so. The jury was free to consider the defense theory that Grabar did not intend to steal; indeed, the jury had to consider it, since intent is an element of the offense of vehicular burglary. Grabar even argues in his opening brief in this appeal, "The only contested element at trial was *the specific intent element* under CALCRIM 1700, whether he intended to commit a theft at the moment he entered the vehicle." (Italics added.) At trial, defense counsel argued specifically that Grabar had had no such intent and should therefore be acquitted of the charge. Among other things, Grabar's attorney told the jury: "He is innocent of burglary. He did not break into that car with the intent to deprive anyone of their property. He broke in with the intent to go to county jail, to get caught, to linger in a car for 15 minutes when he—people were watching on a busy street."

Quite obviously, the jury rejected Grabar's argument that he had no intent to steal. The trial court had instructed the jury that it could not convict Grabar of vehicular burglary unless the prosecution proved, beyond a reasonable doubt, that when Grabar

entered the locked Camry “he intended to commit theft.” (See CALCRIM 1700.) Jurors are presumed to follow the instructions. (*Francis v. Franklin* (1985) 471 U.S. 307, 324-325, & fn. 9; *People v. Burgener* (2003) 29 Cal.4th 833, 874.) By convicting Grabar of vehicular burglary, the jury implicitly found that Grabar intended to commit theft; with that finding of intent, there is no reasonable probability that the jury would have convicted him of vehicular tampering rather than vehicular burglary, even if it had been instructed as Grabar now urges.⁵

Grabar also relies on the following language in *Mooney*: “Failure to give the [] instruction placed the jury in the position of having to make that ‘unwarranted all or nothing choice’ which tends to produce verdicts either more lenient or more harsh than the evidence merits.” (*Mooney, supra*, 145 Cal.App.3d at pp. 506-507.) In *Mooney*, the defendant claimed that he had entered a vehicle that was unlocked, which was consistent with the lack of damage or forced entry to the vehicle. (*Id.* at pp. 504-506.) If the jury believed the defendant, he could not have been lawfully convicted of vehicle burglary, which was the only offense charged. (*Id.* at pp. 504-505.) In that context, the failure to instruct on vehicle tampering constituted error, because it placed the jury in the position of having to decide whether to acquit him altogether (notwithstanding his entry into the vehicle and tampering with its contents) or to convict him of a crime that he did not commit under the law. *Mooney*, however, did not address whether the error was *prejudicial*, as now required by our Supreme Court’s more recent decision in *Breverman*. (*Breverman, supra*, 19 Cal.4th at p. 178.) Because there is no reasonable probability the jury would not have convicted Grabar of vehicle burglary, Grabar fails to establish prejudicial error.

⁵ Nor is there any reason to conclude the jury found that Grabar intended to steal from the Camry merely because it did not want him to go unpunished. As mentioned, jurors are presumed to follow the instructions. Moreover, Grabar would not have gone unpunished even if the jury had acquitted him on the vehicular burglary charge, since it convicted him on the charge of possession of burglary tools.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.