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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KURT A. CARR,

Defendant and Appellant.

A134689

(Contra Costa County
Super. Ct. No. 51113729)

Defendant Kurt A. Carr appeals a judgment entered upon a jury verdict finding him guilty of grand theft (Pen. Code, § 487 subd. (c)).¹ The trial court sentenced him to 240 days in the county jail’s electronic home detention program and three years of felony probation. Defendant contends the evidence does not support the conviction. We agree and shall reverse the judgment.

I. BACKGROUND

A. Prosecution Case

In the afternoon of December 20, 2010, Matthew Cardoza was standing outside the hospital where he worked, taking a ten-minute break. He was using his new iPhone 4 cell phone to exchange text messages with his fiancée. The cell phone was expensive, he had owned it for about a week, it was his only form of communication, and it was important to him.

¹ All undesignated statutory references are to the Penal Code.

About three to five minutes into his break, Cardoza had just hit “send” on the last text of a conversation with his fiancée. As Cardoza was about to turn his cell phone off, he heard defendant say, “Hey man, let me get that phone.” Before Cardoza could look to see who it was, defendant took the phone from Cardoza’s hand and quickly moved away. Defendant got approximately ten to 15 feet away before Cardoza went after him and caught him. He took hold of the back of defendant’s shirt, spun him around, and grabbed the phone.

While Cardoza and defendant struggled over the phone, defendant yelled, “Give me the phone, give me the phone. I’ll hurt you. Give me the phone.” Cardoza responded, “Give me my phone back,” and defendant continued to yell, “I want it, I want it. I’ll hurt you.” Defendant punched Cardoza on his head several times. Cardoza ducked to avoid getting hit directly on the face. He held on to defendant’s shirt while pulling on the phone.

After Cardoza got the phone back and put it in his pocket, defendant said, “I’ll pay you, I’ll pay you. I’ll pay you. I just want the phone.” Cardoza replied, “I don’t want your money. I just want my phone. Please leave me alone.” Then Cardoza told defendant he had to report the incident because he was a county employee. Defendant tried to apologize and told Cardoza he needed help because his mother had “just got her house on fire.”

B. The Defense Case

Defendant testified that on December 20, 2010, the mother of his fiancée drove him to the hospital for his doctor’s appointment and to pick up his blood pressure medication. During the drive, he got into an argument with his fiancée’s mother and jumped out of the car as it was still moving. He felt he had to call his fiancée immediately to tell her about his fight with her mother. He had already been agitated and distraught because his mother’s house had burned down a few days previously, and he believed the fire was caused by faulty repair work he had done.

He testified that as he walked down the street looking for a phone, he saw Cardoza standing with a phone to his ear. He asked Cardoza, “Man let me get the phone. Let me

use your phone Can I use your phone?” After Cardoza refused, he replied, “Man, I got to call my mother,” which was what he affectionately called his fiancée. Once again he told Cardoza, “I got to call Mommy right now man,” and, “Man just let me use the phone. I got to call Mommy.” After Cardoza said no a second time, defendant grabbed for the cell phone and the two wrestled over it. While they fought over the cell phone, neither one of them had control over it. Defendant testified that he never got away from Cardoza with the phone. After Cardoza gained control of the phone, defendant dropped to his knees and offered Cardoza \$50 to use the phone.

Shortly afterward, defendant went looking for a pay phone inside the hospital. He got change from the gift shop and used a pay phone to call his fiancée but became agitated because he could not hear her well on the phone. He tried another phone but became more agitated because it also did not work.

Jo-Ann Lee, a volunteer at the hospital, testified that after hearing an agitated and disturbed voice outside the gift shop, she saw defendant at the pay phones and came over to help him. Defendant kept saying, “I have to make a phone call.” Once Lee calmed him down, she took him to her office so he could use her phone. She was dialing the number for him when the police arrived and arrested him.

A deputy sheriff testified that shortly after arresting defendant, Cardoza told him that defendant had asked to use the phone. Cardoza shook his head, and defendant said, “I just need to call my mother,” then grabbed the phone and walked away.

C. Trial

The jury was instructed that to prove the crime of grand theft, the People must show, inter alia, that when defendant took the property, “he intended to deprive the owner of it permanently or to remove it from the owner’s possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property.” During deliberations, the jury asked the court, “Can you provide for us, if possible, a clarification on the legal meaning of ‘extended period of time’?” Defense counsel argued the jury should be instructed—pursuant to *People v. Avery* (2002) 27 Cal.4th 49, 56 (*Avery*)—with the example of “strawberries and diamonds,” that is, that

taking strawberries for two weeks might deprive the owner of a major portion of their value and enjoyment, whereas taking a diamond ring for the same time might not do so. Instead, the court gave the jury the following additional instruction: “An ‘extended period of time’ is satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment.”

The jury found defendant not guilty of one count of second degree robbery (§§ 211 & 212.5, subd. (c)), not guilty of one count of attempted second degree robbery (§§ 211, 212.5 subd. (c) & 664), and guilty of one count of grand theft from a person (§ 487 subd. (c)).

D. DISCUSSION

To prove the crime of theft, the People must show the defendant intended to deprive the victim of property either permanently or for an unreasonable period of time so as to deprive him of a major portion of its value or enjoyment. (*Avery, supra*, 27 Cal.4th at pp. 52, 58.) Defendant contends the record shows the jury found he committed theft under the second of those two theories, and that the evidence does not support such a finding.

In assessing a claim of insufficiency of evidence, we “review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, 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. [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) “Further, ‘the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ ” (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) When reviewing for sufficiency of evidence, “appellate courts must review ‘the whole record in the light most favorable to the judgment’ and decide ‘whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Hatch* (2000) 22 Cal.4th 260, 272.) The reviewing court does not, however, “ ‘limit its review to the evidence favorable to the respondent. . . . “[O]ur task . . . is twofold. First, we must resolve the issue in the light of

the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to ‘some’ evidence supporting the finding.” ’ ’ (*People v. Silvey* (1997) 58 Cal.App.4th 1320, 1325.)

Under California law, “theft by larceny requires the intent to *permanently* deprive the owner of possession of the property.” (*Avery, supra*, 27 Cal.4th 49 at p. 54.) Our Supreme Court has ruled, however, that this intent requirement is flexible and not to be taken literally. (*People v. Bell* (2011) 197 Cal.App.4th 822, 826 (*Bell*), citing *People v. Davis* (1998) 19 Cal.4th 301, 307 (*Davis*).) In certain cases, “ ‘the requisite intent to steal may be found even though the defendant’s primary purpose in taking the property is not to deprive the owner permanently of possession,’ such as ‘(1) when the defendant intends to “sell” the property back to its owner, (2) when the defendant intends to claim a reward for “finding” the property, and (3) when . . . the defendant intends to return the property to its owner for a “refund.” ’ [Citation.] In each of those exceptions, although the defendant does not intend to deprive the owner permanently of possession of the property, the defendant does intend to appropriate the value of permanent possession of the property.” (*Bell, supra*, at pp. 826–827.)

This flexibility was further expanded in *Avery*. Our high court explained, “ ‘[T]he intent to deprive an owner of the main value of his property is equivalent to the intent to permanently deprive an owner of property’ ” (*Avery, supra*, 27 Cal.4th at p. 57), and held that the requirement, “although often summarized as the intent to deprive another of the property permanently, is satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment” (*id.* at p. 58). In reaching this conclusion, the court discussed examples given by commentators of temporary takings that amounted to larceny: “ ‘taking cut flowers from a florist without consent, with intent to return them in a week’ ” and “ ‘ taking a neighbor’s lawn mower without consent for the summer, with intent to return it in the fall.’ ” (*Id.* at p. 56.) According to these commentators, the court noted with approval,

“ ‘much depends upon the nature of the property and its expected useful life, for to deprive the owner of the property for so long a time that he has lost a “major portion of the economic value’ . . . is to deprive him for an unreasonable time. It is one thing to take another’s fresh strawberries with intent to return them two weeks later, another thing to take his diamond ring with a like intention.’ ” (*Ibid.*) “ ‘Thus the commentators agree there is an intent to steal when the *nature* of the property is such that even a temporary taking will deprive the owner of its primary economic value, e.g., when the property is dated material or perishable in nature or good for only seasonal use.’ ” (*Ibid.*)

Similarly, in *Davis*, the court noted that “it would not be larceny for a youth to take and hide another’s bicycle to ‘get even’ for being teased, if he intends to return it the following day.” (*Davis, supra*, 19 Cal.4th at p. 307.) Nor do joyriding or taking a car with the intent to deprive the owner of possession only temporarily constitute theft. (See *People v. Garza* (2005) 35 Cal.4th 866, 876 [distinguishing between joyriding and taking a vehicle with intent to steal it]; *People v. Orona* (1946) 72 Cal.App.2d 478, 484; see also 2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, §§ 25, 108, pp. 49, 149.)²

The evidence shows that defendant approached Cardoza saying, “Hey man, let me get that phone,” and walked quickly or jogged a few feet away. When Cardoza followed and tried to recover his phone, defendant tried to keep him from taking it back, said he wanted the phone, and punched Cardoza. After Cardoza took the phone back, defendant offered to pay him, then tried to apologize and said he needed to call either his mother or his fiancée. His urgent desire to make the call is reflected by his actions in the hospital immediately afterward, when he was noticeably upset as he tried unsuccessfully to do so. The Attorney General argues that this evidence supports an inference that defendant, in

² Joyriding may, of course, constitute a different offense. Taking a bicycle without the owner’s permission for the purpose of using it temporarily is a violation of section 499b, subdivision (a), and taking a vehicle without the owner’s consent with the intent to temporarily deprive the owner of his or her possession, “whether with or without intent to steal the vehicle,” is a violation of Vehicle Code section 10851. The issue before us here is solely whether defendant’s actions were properly found to have constituted theft.

his agitated state, was so consumed with desire for the phone that he could not distinguish between temporary and permanent possession, and that “his overwhelming desire to have the phone left no room for an intent to return it.”

At trial, however, the prosecutor never argued to the jury that defendant intended to deprive Cardoza of his phone permanently. In his closing argument, the prosecutor told the jury what the People had to prove to show defendant committed robbery: “Now, in addition, when the Defendant used force or fear to take the property, he intended to, one, deprive the owner of it permanently or, two, remove it from the owner’s possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property. [¶] *Of these two options, it is that second that I’m going to be focusing on right here that at the time that he used the force or fear, he intended to remove it from the owner’s possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property.*” (Italics added.) He went on to argue that defendant “was trying to deprive Mr. Cardoza of the value or enjoyment of that property for some period of time,” that during that time Cardoza was “deprived of a major portion of the value or enjoyment” of the phone, that although defendant “really wanted to make a phone call,” he was not entitled to decide whether his actions would deprive Cardoza of the value or enjoyment of his property, and that defendant “knew that he was depriving Mr. Cardoza of the value and enjoyment of that property. He knew that the period of time, no matter how short it was, was extensive enough that it was depriving Mr. Cardoza of the value and enjoyment of that property.” The prosecutor finished his rebuttal argument by telling the jury: “[Y]ou need to use your common sense here and when we’re talking about this depriving of property for so extended a period of time that it would interfere with the use and enjoyment and value of this property, I mean, where would the line be drawn? [¶] This phone call being one minute, being five minutes, it’s a 15-minute phone call. When we get in here and start talking about cell phone minutes and how many got used up? No. That’s absurd because it doesn’t matter. Doesn’t have to be that he took the phone across the country and smashed it before he returned it. It simply has to be the fact that Mr.

Cardoza was gonna be deprived of that property of the value and enjoyment and it was crystal clear no matter how long that phone was out of his possession in these circumstances, that's exactly what was happening. Mr. Carr does not get to make that choice." At no point did the prosecutor argue that the evidence showed defendant intended to deprive Cardoza permanently of his phone or that his state of mind was such that he could not distinguish between temporary and permanent possession.³

Thus, the prosecution presented its case to the jury not on the theory that defendant intended to deprive Cardoza of his property permanently, but that defendant intended to deprive him of a major portion of its value and enjoyment, and that a deprivation of *any* length of time could accomplish that. Further, the record indicates that the jury relied on that theory because, during deliberations, the jury posed the question: "Can you provide for us, if possible, a clarification on the legal meaning of 'extended period of time'?"⁴ On this record, the jury's verdict could not have been based on the theory that defendant intended to deprive Cardoza of the phone permanently. Clearly, the jury convicted defendant on the theory that he took the phone intending to make a phone call and thereby to deprive Cardoza of a "major portion of its value and enjoyment."

The governing precedents persuade us that, as a matter of law, defendant's act, committed with such an intent, does not constitute theft. The phone was neither perishable in nature nor good for only seasonal use. (See *Avery, supra*, 27 Cal.4th at

³ The only hint of such a theory was the prosecutor's statement during argument to the jury, "[Defendant's] intent at that point [when he was hitting Cardoza], *even if you want to believe that when he initially grabbed the phone he wasn't intending to steal it but only use it*, at the point that he was trying to wrestle with that phone, there is no other explanation [] from his actions: The grabbing of that phone, the pulling of that phone, the punching of Mr. [] Cardoza in the head. The only thing that can be drawn from that is that when he was doing that, he was still intending to take that phone and deprive Mr. Cardoza of the value and enjoyment of that property. [¶] What did he intend to do? [¶] He intended to remove it from Cardoza's possession. Mr. Carr intended to take that phone so that he, not the owner, would have the value or enjoyment of that property." (Italics added.)

⁴ The court's response to the question only substituted the term "unreasonable" for the phrase "so extended a period of time."

p. 56 [commentators' examples of temporary taking as theft included taking cut flowers with intent to return them in a week or taking lawn mowers for the summer].) Taking a phone for temporary use is far more akin to "joyriding" or taking a bicycle with intent to return it the next day, which do not constitute theft. (See, e.g., *Davis, supra*, 19 Cal.4th at p. 307.) While such a temporary taking may constitute a tort (see *People v. Turner* (1968) 267 Cal.App.2d 440, 444) or a separate crime (see § 499b [taking bicycle temporarily]; Veh. Code, § 10851 [temporarily taking motor vehicle]), it does not meet the definition of larceny. No reasonable jury could conclude that using a cell phone long enough to make a call would deprive an owner of a *major portion* of its value or enjoyment.

The deputy attorney general makes no effort to argue otherwise on appeal. Rather, he argues that the jury could have found from the evidence that defendant intended when he took the phone to keep it indefinitely. We need not decide, however, whether the evidence would support such a finding, because on this record, it is evident that the jury made no such finding. It is well established that "[w]here the jury considers both a factually sufficient and a factually insufficient ground for conviction, and it cannot be determined on which ground the jury relied, we affirm the conviction unless there is an affirmative indication that the jury relied on the invalid ground." (*People v. Thompson* (2010) 49 Cal.4th 79, 119 (*Thompson*), citing *People v. Marks* (2003) 31 Cal.4th 197, 233.) Such an affirmative indication may be found in "the facts and the instructions, *the arguments of counsel, any communications from the jury during deliberations, and the entire verdict.*" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130 (italics added); see also *Thompson*, 49 Cal.4th at p. 119 [look to entire record to determine whether there was affirmative indication].) Thus, "reversal might be necessary if the record affirmatively demonstrates there was prejudice, that is, if it shows that the jury did in fact rely on the unsupported ground. . . . We may, for example, hypothesize a case in which the district attorney stressed only the invalid ground in the jury argument, and the jury asked the court questions during deliberations directed solely to the invalid ground. In that case, we might well find prejudice. The prejudice would not be assumed, but affirmatively

demonstrated.” (*Guiton*, 4 Cal.4th at p. 1129.) This is such a case. The evidence showed defendant was agitated and anxious to make a call; the prosecutor’s argument was based on the theory that he intended to take the phone for an unreasonable period of time that would deprive Cardoza of the phone’s value and enjoyment; and during deliberations the jury asked for “clarification on the legal meaning of ‘extended period of time.’ ” On this record, we can only conclude the jury found that defendant intended a temporary taking of a sort that, as a matter of law, did not constitute theft. We must therefore reverse the judgment.

E. DISPOSITION

The judgment is reversed.

Rivera, J.

We concur:

Ruvolo, P.J.

Humes, J.