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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.

MALCOLM GRAHAM,

Defendant and Appellant.

A136998

(San Francisco City & County  
Super. Ct. No. 218221-2)

Defendant Malcolm Graham (hereinafter “defendant”), along with codefendant Moses Legesse, faced charges including several counts of robbery and false imprisonment stemming from a string of cell phone robberies; defendant was also charged with one count of deterring an officer in the performance of his duties by threats or violence (Pen. Code, § 69). Two charges (robbery and false imprisonment) relating to one victim were severed prior to trial. After a lengthy jury trial, defendant was convicted of only one count of grand theft person (Pen. Code, § 487, subd. (c)), a lesser-included offense of the robbery charge of which he was acquitted in count 1. He was acquitted of an additional charge of robbery (and its lesser-included offense of grand theft person) in count 2; the jury was unable to reach a verdict on the Penal Code section 69 charge (count 3).<sup>1</sup> Defendant was placed on felony probation for three years and ordered to serve 175 days in county jail, with credit for time served of 175 days. Defendant’s

<sup>1</sup> Issues relating to codefendant Legesse are not before us in this appeal. Evidence relating to Legesse, as well as legal issues pertaining to his trial, will be discussed only as they are relevant to defendant Graham’s appeal.

counsel has filed an opening brief in which no issues are raised and has asked this court for an independent review of the record as required by *People v. Wende* (1979) 25 Cal.3d 436.

Defendant was convicted only of the lesser-included offense of grand theft person, relating to the theft of Emma Lowenstein's cell phone. The evidence relating to that offense (charged as a robbery) showed that on May 7, 2012, at approximately 7:45 in the evening, the victim had just left Whole Foods market near Franklin and California Streets in San Francisco. Her hands were full with her purse and various parcels. She took out her iPhone to take some photographs and was starting to call her mother, as she felt someone grab her biceps from behind. Someone grabbed her cell phone out of her hand and ran down California Street toward Van Ness Avenue. She yelled for someone to stop him. The incident occurred very quickly. She described the suspect as an African-American male; she could not describe his height and weight. She "jog[ged]" down California in the same direction the suspect had gone, and observed a person in plain clothes (later identified as a police officer) struggling with the person who had taken her phone, a short distance away.

Sergeant Brophy of the San Francisco Police Department, along with other officers, was investigating a series of cell phone robberies on the streets of the city of San Francisco; a suspect vehicle had been identified and was being followed by them. They observed the theft of Ms. Lowenstein's phone, and responded. They had been following the car that day and observed defendant get out of the car two times before the Lowenstein theft; once he looked around and the other time he approached a woman at a bus stop. On both occasions he returned to the vehicle without making contact with anyone. They saw him get out of the car a third time and approach a group of women, one of whom had a cell phone, but after the woman put the phone away, defendant again returned to the car without making contact. They continued to follow the vehicle, which was being driven by codefendant Legesse, to the area of Franklin and California, where the Lowenstein incident subsequently took place. Ultimately, Sergeant Brophy observed

defendant get out of the car again and walk down California in the direction of the victim. Defendant pulled the hood of his black sweatshirt up on his head.

Brophy could only observe the interaction between the victim and defendant from behind. He saw defendant walk up behind the victim; it appeared to him that defendant got so close to the victim that his chest was actually touching her from behind. He observed defendant stand behind the victim for three to five seconds, but his view of defendant's hands were blocked. He then saw defendant run off at a full sprint down California Street. Defendant ran into Sergeant Mason, another officer participating in the surveillance of the suspect vehicle. Sergeant Brophy observed a struggle ensue between defendant and Mason.<sup>2</sup>

Ultimately, defendant was subdued with assistance from Sergeant Brophy and a civilian.<sup>3</sup> Sergeant Brophy located a cell phone nearby, which the victim identified. Defendant later made a *Mirandized* statement (*Miranda v. Arizona* (1966) 384 U.S. 436), indicating that he only grabbed the victim's cell phone after she dropped it on the ground; he denied touching her. Defendant admitted that the theft of the cell phone was not a random act and that he had previously sold stolen phones to Mexicans in the area.

Defendant presented two character witnesses relating to the Penal Code section 69 charge, a charge that the jury was unable to reach a verdict regarding.<sup>4</sup> He presented no evidence relating to the robbery charge involving the Lowenstein cell phone.<sup>5</sup> Defense

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<sup>2</sup> As the jury was unable to reach a verdict on the Penal Code section 69 charge arising from this struggle, the lengthy testimony regarding it will not be detailed here.

<sup>3</sup> Inspector Maguire had followed the suspect vehicle and detained codefendant Legesse.

<sup>4</sup> Again, the evidence relating to this charge will not be detailed here, since defendant was not convicted of that charge or its lesser-included offense of resisting arrest (Pen. Code, § 148).

<sup>5</sup> Defendant was also charged with another cell phone theft, which was tried to this jury. Since he was acquitted both of the robbery charge, and its lesser-included offense of grand theft person, we will not detail the evidence relating to those crimes.

counsel conceded in closing argument that defendant had stolen the Lowenstein cell phone, but argued that he should only be convicted of grand theft person (which he was).

Upon our independent review of the record, we conclude there are no meritorious issues to be argued. We find no reversible error during the trial proceedings,<sup>6</sup> and defendant's conviction of grand theft person was supported by sufficient evidence. There was no error in sentencing. Defendant was represented by counsel throughout the proceedings.

### **Disposition**

The judgment is affirmed.

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<sup>6</sup> This was a fully litigated trial; defense counsel thoroughly and aggressively defended her client. There were many issues raised in pretrial motions, and evidentiary objections (many relating to charges of which defendant was not convicted) that were ardently argued and fairly decided. For example, one pretrial motion sought to exclude evidence of GPS tracking of the suspect vehicle, on *Kelly* grounds (*People v. Kelly* (1976) 17 Cal.3d 24); that motion was decided favorably to defendant. One issue which arose during trial and caused much concern was when a prosecution witness violated a pretrial motion ruling excluding certain evidence (mention of defendant's tattoo and "another case," etc.). Defense counsel moved for either a mistrial, or in the alternative admonishment of the jury to disregard the officer's testimony. The trial court denied the mistrial motion, but did admonish the jury. We see no arguable issue relating to this issue; even if there was error it was clearly harmless given the overwhelming evidence against defendant and the outcome of the trial.

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Sepulveda, J.\*

We concur:

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Dondero, Acting P.J.

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Banke, J.

\* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.