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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ROMAN GABRIEL SALAS,

Defendant and Appellant.

2d Crim. No. B233741
(Super. Ct. No. 2010042063)
(Ventura County)

Roman Gabriel Salas appeals a judgment following conviction of second degree robbery. (Pen. Code, § 211.)¹ We affirm.

FACTS AND PROCEDURAL HISTORY

In the early evening of November 24, 2010, James Bauer was lying on a bench near the Ventura pier. His bicycle and backpack were beside him. James had clothing, a blanket, medicine, and bicycle tools inside the backpack.

Salas and two other young men approached and sat on a bench near Bauer. After a few minutes, the three men walked over and one man struck Bauer in the face stating, "[T]his is a mugging." Salas grabbed Bauer's right arm as another man struck him.

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

Bauer then "took off running" across a pedestrian bridge. The three men gave chase and shouted that they would "kick [Bauer's] butt," and that they "need[ed] a wallet." Bauer realized that he could not outrun the men, so he reversed his direction and ran by them toward a nearby restaurant. The men continued to strike Bauer as he ran by them.

When the restaurant employees did not assist Bauer, he telephoned for police assistance using his cellular telephone. Within one minute, Ventura Police Officer Robert Lamborn responded. Bauer appeared "frantic" and "upset," and stated that three Hispanic teenagers struck him and took his backpack. Bauer stated that one man wore a gray hooded sweatshirt. Lamborn noticed that Bauer had a swollen eye and a cut lip.

Ventura Police Officer Mike Acquarelli was patrolling nearby when he received the dispatch call regarding three young men, one wearing a gray hooded sweatshirt, as robbery suspects. Within several minutes, Acquarelli saw Salas and two other men walking nearby. Salas was carrying a backpack and wore a gray hooded sweatshirt. Acquarelli detained the men. Salas informed him that he "found [the backpack] over there on the bench" and "picked it up." Acquarelli had not yet informed the men that he was looking for a stolen backpack.

Lamborn brought Bauer to the location of the three detainees. Bauer identified the men as the men who assaulted him and took his backpack. He later testified that he was "99.9 percent certain" that Salas was one of the three men who assaulted and robbed him that evening.

Following Salas's arrest and advisement of rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Lamborn interviewed him at the police station. Salas stated that the backpack appeared to be abandoned - "a lot of people leave shit." He stated that no one was near the backpack and he "found the backpack and picked it up." Salas also denied assaulting Bauer. The interview was recorded and the prosecutor played the recording at trial.

The jury convicted Salas of second degree robbery. (§ 211.) The trial court sentenced him to two years imprisonment and imposed a \$200 restitution fine, a \$200

parole revocation restitution fine (stayed), a \$40 court security fee, and a \$30 criminal conviction assessment. (§§ 1202.4, subd. (b), 1202.45, 1465.8; Gov. Code, § 70373.) The court awarded Salas 166 days of presentence custody credit.

Salas appeals and contends that the trial court erred by not instructing regarding the lesser-included offense of theft.

DISCUSSION

Salas argues that the trial court committed reversible error by its failure to instruct sua sponte concerning theft. He contends that substantial evidence supports the instruction, pointing out that he informed police officers that he took the abandoned backpack but did not assault Bauer. Salas adds that theft, not robbery, is committed when the intent to steal is formed after an assault. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351-352.)

It is well settled that the trial court must instruct on necessarily included offenses when the evidence raises a question whether all the elements of the charged offense are present and there is evidence that would justify conviction of a lesser offense. (*People v. Gray* (2005) 37 Cal.4th 168, 219 [insufficient evidence defendant committed theft as opposed to the greater offense of robbery].) Due process requires instruction with a lesser-included offense only when the evidence warrants the instruction. (*Ibid.*) "[M]ere speculation [that] the crime was less than that charged is insufficient to trigger the duty to instruct." (*Ibid.*) The existence of any evidence, no matter how weak, does not justify instruction regarding a lesser-included offense. (*People v. Moyer* (2009) 47 Cal.4th 537, 553.) In sum, there must exist substantial evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*; *People v. Barton* (1995) 12 Cal.4th 186, 201 [minimal and insubstantial evidence does not require instruction with lesser-included offense].)

Theft is a lesser-included offense of robbery. (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) Robbery, of course, includes the additional element of force or fear. (§ 211; *DePriest*, at p. 50.) "If intent to steal arose only after the victim was assaulted,

the robbery element of stealing by force or fear is absent.'" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1331.)

There is insufficient evidence that the offense is other than the charged offense of robbery. Bauer testified that Salas and other young men struck and threatened him and took his backpack. Officer Lamborn observed that Bauer had a cut lip and swollen eye. Officer Acquarelli soon found Salas - carrying Bauer's backpack - walking nearby with the other young men.

In a police interview, Salas denied assaulting Bauer and stated that he found the backpack and "there was nobody else around." Salas stated in essence that the backpack was abandoned - "[a] lot of people leave shit." Under this theory of the evidence, Salas did not commit theft because he believed the backpack had been abandoned. (*People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 11 [honest mistake of fact is defense negating intent required for theft].)

Salas's argument that the evidence supports an instruction regarding theft is based on speculation and we reject it. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.) "In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged." (*Ibid.*)

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Kent M. Kellegrew, Judge
Superior Court County of Ventura

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Defendant and Appellant.

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