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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.

STEVE BROWN,

Defendant and Appellant.

2d Crim. No. B264297
(Super. Ct. No. 2014031987)
(Ventura County)

Steve Brown appeals his conviction by jury of two counts of second degree robbery (Pen. Code, §211)¹ and resisting a peace officer (§ 148, subd. (a)(1).) The trial court suspended imposition of sentence and granted probation with one year county jail. We affirm.

Facts and Procedural History

On October 27, 2014, appellant and a woman were browsing in a Target store with an empty shopping bag. It caught the attention of George Sanchez, a Target loss prevention officer, because shoplifters commonly use store bags to steal merchandise from the store. Sanchez saw appellant put merchandise in an empty bag and leave the store without paying.

¹ All statutory references a to the Penal Code.

Loss prevention officer Gambino Villareal waited for appellant outside the store. Sanchez followed appellant out the front door as Villareal loudly said "Stop, loss prevention." Appellant tried to leave but Villareal grabbed his forearm to detain him. Appellant twisted, pulled, kicked and swung his arms, as he fell to the ground with Sanchez and Villareal. During the struggle, appellant knocked Villareal's glasses off and struck him in the chest. Sanchez was hit in the neck.

Fearing for their safety, Sanchez and Villareal disengaged because appellant was so aggressive. Appellant tried to flee with the bag but Villareal grabbed at it and it ripped open. More than \$200 in store merchandise spilled out.

Responding to the call, Ventura Police Dispatch Sergeant Thomas Higgins chased appellant behind the store. Sergeant Higgins drew his handgun, ordered appellant to stop, and pulled appellant off a roof type structure.

At trial, appellant defended on the theory that he abandoned the property before the struggle. Appellant argued that "[i]f you abandon something, a subsequent use of force doesn't make it a robbery." The prosecution argued that appellant committed a robbery by using force to resist the loss prevention officers' attempts to regain the property.

Sufficiency of the Evidence

Appellant argues that the evidence does not support the robbery convictions because he abandoned the merchandise and ran. As in every sufficiency of the evidence case, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) We do not reweigh the evidence, resolve factual conflicts, or determine witness credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by

means of force or fear. (§ 211; *People v. Nguyen* (2000) 24 Cal.4th 756, 761.) "[M]ere theft becomes robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while carrying away the loot. [Citations.] In order to support a robbery conviction, the taking, either the gaining possession or the carrying away, must be accomplished by force or fear. (See § 211.)" *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn 8.)

In *People v. Pham* (1993) 15 Cal.App.4th 61 (*Pham*), defendant stole items from a car and was chased and caught by the victim. Defendant put the property down and fought. The Court of Appeal held that the asportation was still in progress when defendant struggled with the victim to prevent the victim from recovering the goods. (*Id.*, at p. 65; see Levenson & Ricciardulli, Cal. Criminal Law (The Rutter Group (2014) § 6:99, p. 6-125.) "[T]heft becomes robbery when . . . force or fear is used for the first time during asportation." (*People v. Gomez* (2008) 43 Cal.4th 249, 257.)

In *People v. Estes* (1983) 147 Cal.App.3d 23, 28, a robbery occurred when the defendant used force to prevent a store security guard from retaking the stolen property and to facilitate his escape. That is the case here. Appellant kicked and struggled with Sanchez and Villareal to prevent them from retrieving the stolen merchandise. A surveillance video was shown to the jury but most of the struggle was out of the camera's view. In the video, appellant breaks free, grabs the Target bag, and tries to leave as Villareal reaches for it. The fact that appellant dropped the bag (what appellant claims is an "abandonment") is inconsequential. "The asportation continued while [appellant] struggled with the victims and prevented them from immediately recovering their goods. Contrary to [appellant's] contention, robbery does not require that the loot be carried away *after* the use of force or fear." (*Pham, supra*, 15 Cal.App.4th p. 65.) Appellant's use of force to retain temporary possession of the property constitutes a robbery. (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771-772.)

Appellant argues that the video shows that he was "attacked" and no one asked or ordered him to hand over the merchandise. After Sanchez and Villareal disengaged, appellant claims that he picked up the shopping bag to "hand it" to Villareal.

The argument focuses on a brief part of the video without taking account the testimony of Sanchez and Villareal. Villareal stated that he stepped back and appellant "tried to flee again by grabbing the merchandise. [¶] . . . I attempted to take away the bag, but it ripped open." Substantial evidence supports the finding that appellant used force or fear. "A single photograph of two sumo wrestlers engaged in combat may give the impression they are dancing a pas de deux. One must witness the entire match to appreciate its meaning and significance." (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 351.) Appellant's interpretation of the surveillance video carries no weight in a sufficiency of the evidence appeal. Within reason, the interpretation and weight given to the testimony were matters for the jury and supported by the evidence. (*People v. Melton* (1988) 44 Cal.3d 713, 744.)

Attempted Robbery

Appellant argues that the trial court erred in not instructing on attempted robbery as a lesser included offense. When appellant picked up the bag and tried to run, Villareal reached for the bag and tore it open. Appellant argues that it was attempted robbery because Villareal was not intimidated. The argument fails because appellant completed the robbery before attempting to flee. (*Pham, supra*, 15 Cal.App.4th at p. 68.) "[A] robbery occurs when a defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*People v. Estes* (1983) 147 Cal.App.3d 23, 27-28.)

Appellant's reliance on *People v. Lopez* (2013) 31 Cal.4th 1051, a carjacking case, is misplaced. There, the defendant failed to drive the car away. (*Id.*, at pp. 1062-1063.) The crime of carjacking, like robbery, requires asportation or movement of the vehicle. (*Id.*, at p. 1055.) Appellant took the merchandise out of the store (i.e., the asportation) before Sanchez and Villareal fought him to regain possession of the property. There was no evidence to support an instruction on attempted robbery. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) Assuming, arguendo, that the trial court erred in not instructing on attempted robbery, the error was harmless. (*People v.*

Breverman (1998) 19 Cal.4th 142, 165.) Appellant's guilt was clearly established by the testimony of Sanchez and Villareal, which was corroborated by the store surveillance video.

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jerold L. Turner, Judge
Superior Court County of Ventura

Dave Linn, under appointment by the Court of Appeal, for Defendant and Appellant.

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