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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DAVID URBANO,

Defendant and Appellant.

C067579

(Super. Ct. No. CRF10-
2734)

On December 19, 2008, Kathy Groth and Priscilla Dixon were working at a JoAnne's store in Woodland when a man walked in and asked directions on how to get on the freeway. The man later returned to the store, picked up a roll of wrapping paper, and told Groth he wanted to buy it.

Dixon waited on the man at her cash register. After she rang up the purchase, the man said, "this is a robbery." Dixon told the man he must be kidding; he told her that he was not,

pulled a gun out of his left coat pocket, and showed it to her. After Dixon complied with defendant's demand, defendant ran out of the store. About \$150 was taken that night.

Numerous latent fingerprints were found on the wrapping paper roll. Ten of the prints belonged to defendant Anthony Urbano.

Dixon identified defendant as the perpetrator at a photographic lineup but Groth was not able to identify a perpetrator in the lineup. At trial, both Groth and Dixon identified defendant as the robber.

Defendant had a player's card at Cache Creek Casino which recorded his financial transactions and playing times there. On December 19, 2008, defendant used the card from 5:06 p.m. to 5:34 p.m., and had \$.03 at the end of the session. His card was used again between 9:34 p.m. and 10:36 p.m., and he had \$100 on the card at the start of the session.

Defendant was charged with second degree robbery (Pen. Code, §§ 211/212.5)¹ with an enhancement for personal use of a firearm (§ 12022.53, subd. (b)). Defendant's first jury trial ended in a hung jury. Defendant discharged counsel and represented himself at the second trial. Following the second jury trial, defendant was convicted of second degree robbery and the personal use of a firearm enhancement. The trial court denied defendant's motion for a new trial and sentenced

¹ Subsequent undesignated statutory references are to the Penal Code.

defendant to a 13-year prison term, imposed various fines and fees, and awarded 461 days of presentence credit, consisting of 401 days' custody and 60 days' conduct credit.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief requesting we conduct an independent review of the case as well as raising several issues of his own.

Defendant contends double jeopardy barred retrial on the gun enhancement after the first trial. He argues that since there is no evidence in the record that the jury was unable to reach a verdict on the enhancement in his first trial, the jury must not have made any finding on the enhancement, which operates as an acquittal. (*People v. Huffman* (1967) 248 Cal.App.2d 260, 261.)

Here, the jury reached no verdict on the substantive count. Therefore, it had no reason to address the enhancement. Contrary to defendant's assertion, the failure to address the enhancement does *not* operate as an acquittal under these particular circumstances.

Next, defendant contends there is insufficient evidence to support his robbery conviction, asserting there was no evidence that money was in fact taken from the store.

The test for sufficiency of the evidence to support an enhancement is whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the elements of the enhancement beyond a reasonable doubt. (*People v. Alvarez* (1996) 14 Cal.4th 155, 225.) Dixon testified that while the register was open, a man later identified as defendant told her "this is a robbery," that she complied with his demand, and that about \$150 was taken. Substantial evidence supports defendant's conviction.

Defendant's third contention is that the trial court applied the wrong standard to his motion for new trial based on insufficient evidence.

"On a motion for a new trial, a trial court must review the evidence independently, considering the proper weight to be afforded to the evidence and then deciding whether there is sufficient credible evidence to support the verdict.

[Citation.] 'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. [Citation.]'

[Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 364.)

The trial court did not abuse its discretion by denying defendant's motion for new trial on the basis of the sufficiency of the evidence. It independently weighed all of the evidence,

resolved conflicts in light of the record, and satisfied itself that the verdict was supported by sufficient credible evidence. At trial, two eyewitnesses identified defendant as the robber, and one of the witnesses also identified defendant at a photographic lineup. That is more than sufficient evidence to support the verdict, and it was not an abuse of discretion for the trial court to deny defendant's motion.

Defendant's next contention is against the trial court's use of CALCRIM No. 3146, which reads as follows: "If you find the defendant guilty of the crime charged in Count 1, second-degree robbery, you must then decide whether the People have proved the additional allegation that the defendant personally used a firearm during the commission of that crime. You must decide whether the People have proved this allegation for the crime and return a separate finding for that crime. [¶] A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting. A firearm does not need to be loaded. [¶] Someone personally uses a firearm if he or she intentionally does any of the following: One, displays the weapon in a menacing manner; two, hits someone with the weapon; or three, fires the weapon."

Defendant contends the trial court's use of the term "weapon" presumes the weapon used by defendant was a firearm and thus removes an element from the enhancement.

Because defendant did not object, he has forfeited any claim that the instruction was erroneous unless the instruction affected his substantial rights. (§ 1259; *People v. Christopher* (2006) 137 Cal.App.4th 418, 426-427.) Substantial rights are equated with a miscarriage of justice, which results if it is reasonably probable the defendant would have obtained a more favorable result had the instruction not been given. (Cal. Const., art. VI, § 13; *People v. Christopher, supra*, 137 Cal.App.4th at pp. 426-427; *People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

The trial court properly instructed the jury on the elements of the offense -- defendant personally using a firearm in the commission of the crime. The jury was also properly instructed on the definition of a firearm. Taken in the context of the entire instruction, the use of the term "weapon" in the last clause of the instruction was not likely to cause the jury to presume defendant's weapon was a firearm. Defendant's contention is without merit.

Defendant's final contention is that applying the firearm enhancement of section 12022.53 to his robbery conviction violates section 654 and the double jeopardy provision of the Fifth Amendment. In defendant's view, application of the enhancement to a robbery conviction violates section 654 because robbery requires a taking through force or fear while the firearm enhancement involves the display of the weapon in a menacing manner.

Section 654 states in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

However, "[a] statute which provides that a defendant shall receive a sentence enhancement in addition to any other authorized punishment constitutes an express exception to section 654. [Citation.]" (*People v. Ramirez* (1995) 33 Cal.App.4th 559, 573; see also *People v. Ahmed* (2011) 53 Cal.4th 156, 163 [specific exception to section 654 enhancement controls over section 654].) Section 12022.53, subdivision (a)(4) provides the enhancement applies to robbery, and subdivision (b) provides that the enhancement applies "[n]otwithstanding any other provision of law[.]" Since the firearm enhancement contains a specific exception, section 654 does not prevent it from being applied to defendant's robbery conviction.

Defendant's double jeopardy contention is likewise without merit. Double jeopardy protects "against multiple punishments for the same offense" (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [23 L.Ed.2d 656, 665]; overruled in part on other grounds in *Alabama v. Smith* (1989) 490 U.S. 794, 802 [104 L.Ed.2d 865, 874]), but does not prohibit the Legislature from providing cumulative punishment under two statutes. (*Missouri v. Hunter* (1983) 459 U.S. 359, 368-369 [74 L.Ed.2d 535, 544].)

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.