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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD IVAN AVALOS,

Defendant and Appellant.

E058892

(Super.Ct.No. RIF1205233)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.

Affirmed.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Charles C. Ragland, and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

Ronald Pope, a taxi driver, picked up a female passenger, and based on her assurance that her friend would meet them to pay the fare, he drove her to the intersection of Magnolia and Pierce Streets in Riverside. Defendant Richard Ivan Avalos met them and agreed to pay the fare. Defendant gave Pope his credit card to pay for the fare but it was declined. Pope and defendant argued about the fare. Pope exited the taxi and defendant pulled out a knife and pointed it at Pope. Pope got back into the taxi and drove away without being paid.

Defendant was found guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹; misdemeanor petty theft (§ 488); and misdemeanor brandishing a weapon (§ 417, subd. (a)(1)). In a bifurcated proceeding, after waiving his right to a trial, defendant admitted that he had suffered one prior serious and violent offense (§§ 667, subds. (a), (c) & (e)(1) & 1170.12, subd. (c)(1)), and one prior conviction for which he had served a prior prison term (§ 667.5, subd. (b)).² Defendant was sentenced to 11 years in state prison.

Defendant makes the following claims on appeal:

1. His conviction for assault with a deadly weapon must be reversed because there was insufficient evidence he committed an act which would directly and probably result in application of force on the victim.

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

² The trial court later struck the punishment for the prison prior.

2. The trial court violated his state and federal Constitutional rights to due process, to a fair trial, and to have the jury determine every material issue when it failed to instruct on self-defense.

3. His conviction for misdemeanor petty theft must be reversed because there was no substantial evidence of theft by larceny.

4. The trial court violated defendant's state and federal constitutional rights to due process, to a fair trial and to have the jury determine every material issue when it failed to instruct on theft by false pretenses.

I

FACTUAL BACKGROUND

Ronald Pope was a taxi driver. On July 8, 2012, at about 3:30 a.m., he was dispatched to 11th Street in Riverside to pick up a female passenger. When he arrived at the location, the female passenger got into his taxicab. She advised Pope that she wanted to be taken to the intersection of Pierce and Magnolia Streets which was a distance of 11 miles. Pope was concerned about the distance and whether the female could pay him. He estimated the fare would reach \$30 to \$40.

The passenger told Pope that her friend with whom she was going to meet with at the location would pay him. She called the friend on her cellular telephone. The man assured Pope that he was going to pay the fare. Pope then drove her to the intersection of Magnolia and Pierce Streets.

Once they arrived at the location, defendant approached the taxi. Pope rolled down his driver's side window. The female passenger exited the taxi even though Pope

told her to wait. Defendant handed Pope a card to pay for the fare which was around \$40. It did not look like a normal credit card. Pope called in the number on the card to his dispatcher. The card was declined.

Pope told defendant that the card did not work and he needed to pay for the fare. Defendant assured Pope there was money on the card. Defendant did not offer to pay by another means. Defendant told Pope to go to a nearby 7-11 store to try the card. Pope refused. Pope and defendant continued to argue over Pope getting paid.

Pope got out of his car. The car door was between him and defendant and they were approximately three feet apart. Defendant reached around to his back and pulled out a knife. Pope could only see a portion of the handle of the knife which he believed was either black or dark brown. The blade on the knife looked about four to five inches. It appeared to be a switchblade. Defendant pointed the knife at Pope.

Defendant held the knife and “backed up a little bit.” Pope told defendant that he did not have to do this over a cab ride and he may have told him he was sorry. He said, “I don’t want to get cut for a cab fare.”³ Pope got back in his car. He rolled up the window and locked the doors. Defendant ran off. Pope called the police.

Pope was never paid the fare. Pope was six feet, four inches tall. Pope estimated that defendant was five feet, nine inches tall. Pope recalled that as he was back in the car, defendant asked him for the card. Pope refused to give defendant back the card because it was not working.

³ During Pope’s testimony, he stood up and demonstrated how defendant held the knife by holding a highlighter.

Defendant presented no evidence.

II

SUFFICIENT EVIDENCE OF ASSAULT WITH A DEADLY WEAPON

Defendant contends that despite the fact that he pulled a knife on Pope, since he took one step backward when Pope exited the car, he could not be convicted of assault with a deadly weapon because there was insufficient evidence of an “unlawful attempt” to commit a battery.

When the sufficiency of evidence is challenged on appeal, we must review “the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Davis* (2009) 46 Cal.4th 539, 606.) “We do not reweigh the evidence or revisit credibility issues, but rather presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. [Citation.]” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004.)

An assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) Assault with a deadly weapon (§ 245, subd. (a)(1)) requires proof of the crime of assault that was accomplished by the use of a deadly weapon. “The mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery.” (*People v. Colantuono* (1994) 7 Cal.4th 206, 214 (*Colantuono*).

“‘Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, *any other similar act*, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of *using actual violence* against the person of another, will be considered an assault.’ [Citations.]” (*Colantuono, supra*, 7 Cal.4th at p. 219.) “‘There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one’s hand upon his sword, would be sufficient.’ [Citations.]” (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.)

In *People v. Vorbach* (1984) 151 Cal.App.3d 425, the defendant disputed that the elements of assault with a deadly weapon were proved by the evidence because his mere display of a knife without an accompanying attempt to commit a battery, such as a lunge, was insufficient as a matter of law. (*Id.* at pp. 429-430.) The appellate court rejected the claim, finding that the victim’s testimony that the defendant “held the knife in a threatening manner and demanded money is sufficient to satisfy the requisite intent to use the knife. [Citations.] Nothing more is required.” (*Id.* at p. 429.)

Here, Pope merely exited his car and stood up when defendant refused to pay the taxi fare. Pope stood within three feet of defendant. Defendant immediately pulled out a knife and pointed it at Pope. Pope immediately told defendant he did not want to get cut over a cab fare. Defendant continued to hold the knife but stepped a little bit back. Pope got back in the car. When defendant pulled out the knife and pointed the knife at Pope,

this was enough to support the charge that he committed assault with a deadly weapon. (*Colantuono, supra*, 7 Cal.4th at p. 219.)

Defendant makes too much of Pope’s testimony that defendant “backed up a little bit” when he pulled out the knife. Pope was clear that defendant pulled out the knife and pointed it toward him. Defendant continued to aim the knife at Pope even if he moved back “a little bit.” Defendant held the knife at Pope and refused to pay the cab fare. “Nothing more [was] required” to support defendant’s conviction of assault with a deadly weapon. (*People v. Vorbach, supra*, 151 Cal.App.3d at p. 429.)

III

FAILURE TO INSTRUCT ON SELF-DEFENSE

Defendant claims the trial court should have instructed the jury on self-defense (CALCRIM No. 3470)⁴ for the assault with a deadly weapon and brandishing a weapon charges because he stepped back away from Pope while he held the knife because he was

⁴ CALCRIM No. 3470 provides in pertinent part: “Self-defense is a defense to _____. The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/[or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if: [¶] 1. The defendant reasonably believed that (he/she/[or] someone else/ [or] _____) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully]; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger.” It also provides, “When deciding whether the defendant’s beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant’s beliefs were reasonable, the danger does not need to have actually existed.”

in danger of physical harm. We need only briefly address the issue as it is totally devoid of merit.

Generally, “[a] party is not entitled to an instruction on a theory for which there is no supporting evidence. [Citation.]” (*People v. Memro* (1995) 11 Cal.4th 786, 868.)⁵ Thus, “[a] trial court is required to instruct sua sponte on any defense, including self-defense, only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant’s theory of the case. [Citation.]” (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49; see also *People v. Miceli* (2002) 104 Cal.App.4th 256, 267.)

We review the trial court’s determination de novo and independently decide whether there was substantial evidence in the record to support the requested instruction. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

Under the doctrine of self-defense, “one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury.” (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on another ground by *People v. Chun* (2009) 45 Cal.4th 1172; see also *People v. Oropeza* (2007) 151 Cal.App.4th 73, 82.) “[A] jury must consider what ‘would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. . . .’” (*People v. Humphrey* (1996) 13

⁵ Defendant did not request any special instructions, including the self-defense instruction. However, it is clear that the trial court must give the instruction if supported by the evidence.

Cal.4th 1073, 1082-1083.) “The justification of self-defense requires a double showing: that defendant was actually in fear of his life or serious bodily injury and that the conduct of the other party was such as to produce that state of mind in a reasonable person.’ [Citations.]” (*People v. Watie* (2002) 100 Cal.App.4th 866, 877.)

Here, the evidence was insufficient to require the giving of a self-defense instruction. The only evidence presented was that Pope exited his car and remained behind the car door. Pope made no movement toward defendant and did not make any threats to him. In fact, immediately upon defendant pointing the knife at him, Pope told him he was “sorry” and that he did not want to get cut over a taxi fare. Pope got in his car and drove away. The evidence presented does not support that defendant acted in self-defense.

Defendant claims he pulled the knife to protect himself from “physical harm,” he felt threatened by Pope, and believed he was in danger of physical harm, however there was no testimony by defendant to this conduct and the evidence simply does not support this contention. Pope stood up, next to his car, and made no movement or threat toward defendant. The trial court was not required to give an “instruction when, as here, no credible evidence supported it.” (*People v. Welch* (1999) 20 Cal.4th 701, 757.)

IV

THEFT BY LARCENY

Defendant essentially contends that there was insufficient evidence presented to support his conviction of misdemeanor petty theft on a theory of larceny because there was no substantial evidence of a trespassory taking or asportation.

A. *Additional Factual Background*

Defendant was charged in the amended information with a violation of section 488 (petty theft), a misdemeanor. The information alleged that he did “willfully and unlawfully steal and take and defraud money, labor, real and personal property of RONALD P., of a value not exceeding Nine Hundred Fifty Dollars (\$950.00) to wit: PAYMENT FOR SERVICES.”

The jury was instructed, “The defendant is charged in Count 2 with petty theft in violation of Penal Code section 484/488. To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1) The defendant took possession of property owned by someone else; [¶] 2) The defendant took the property without the owner’s consent; [¶] 3) When the 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, [¶] AND [¶] 4) The defendant moved the property, even a small distance, and kept it for any period of time, however brief.” They were further instructed, “For petty theft, the property taken can be of any value, no matter how slight.” It was also instructed, “For petty theft, property includes money, labor and real or personal property.”

The prosecutor explained during closing argument that the property involved was not a piece of property that could be touched. The prosecutor argued that Pope did “labor” and defendant agreed to pay for it. Defendant took the money he owed for someone else and kept it for himself. The prosecutor further argued defendant took the

money for the cab fare without the owner's consent because he pulled a knife on Pope and never gave him the money. Defendant intended to permanently deprive Pope of the money. The prosecutor argued as to asportation that, "Then, finally, the defendant moved the property even a small distance. He kept it for any period of time, however brief. Well, because it's not actually a piece of property, the - - at the point he moved the property is when he took the knife and pointed it at Mr. Pope and made Mr. Pope leave without receiving payment. Because the defendant took property which is a debt that he owed and without having any intention of ever paying it back, he is guilty of theft."

B. *Analysis*

"'Theft' is defined in section 484, subdivision (a), as follows: 'Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .'" (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 635.)

Section 484, subdivision (a) was amended in 1927 to consolidate the crimes of larceny, false pretenses, and embezzlement into the single crime of theft. (*People v. Williams* (2013) 57 Cal.4th 776, 785.) However, "the combination of 'several common law crimes under the statutory umbrella of "theft" did not eliminate the need to prove the

elements of the particular type of theft alleged.’” (*People v. Nazary* (2010) 191 Cal.App.4th 727, 741.)

“The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away. [Citations.] The act of taking personal property from the possession of another is always a trespass unless the owner consents to the taking freely and unconditionally or the taker has a legal right to take the property. [Citation.]” (*People v. Davis* (1998) 19 Cal.4th 301, 305, fns. omitted.)

“Cases and statutes define the term ‘property’ in the context of theft-based offenses as the exclusive right to use or possess a thing or the exclusive ownership of a thing. [Citations.]” (*People v. Kozlowski* (2002) 96 Cal.App.4th 853, 866.) “The term (property) is all-embracing, including every intangible benefit and prerogative susceptible of possession or disposition. [Citation.]” (*Ibid.*)

“[L]arceny requires a ‘trespassory taking,’ which is a taking without the property owner’s consent. [Citation.]” (*People v. Williams, supra*, 57 Cal.4th at p. 788.) “And if the taking has begun, the slightest movement of the property constitutes a carrying away or asportation. [Citation.]” (*People v. Beaver* (2010) 186 Cal.App.4th 107, 119.)

Based on the charging information, the argument by the prosecutor, and the evidence presented, the jury could reasonably conclude that defendant committed theft by larceny. Pope drove his female passenger to a deserted alley. Defendant met the taxi and agreed to pay for the taxi fare. The agreement to pay was evidenced by defendant giving

the card to pay for the fare. However, he provided a credit card that was declined. Defendant then refused to pay the fare in any other manner. At that point, the “fare” that was unpaid could reasonably be considered the “property” taken from Pope. (*People v. Kozlowski, supra*, 96 Cal.App.4th at p. 866.) Once defendant agreed to pay for the taxi, Pope had a right to collect the fare from defendant. As argued by the prosecutor, “[d]efendant took possession of property owned by someone else.” Pope did not consent to the non-payment of the fare.

Further, the evidence supported the asportation of the property. Pope exited his taxi in order to obtain the fare from defendant. Defendant then pulled a knife on Pope. Pope was forced to leave without the fare and defendant ran away. Defendant retained the property he owed to Pope and did not intend to pay it. As argued by the prosecutor, “[t]he point he moved the property is when he took the knife and pointed it at Mr. Pope and made Mr. Pope leave without receiving payment. Because the defendant took property which is a debt that he owed and without having any intention of ever paying it back, he is guilty of theft.” The elements of theft by larceny were supported by the evidence.

Defendant contends that larceny requires a “trespassory” taking which was not evident in this case. He insists that Pope consented to take the female passenger to defendant’s location based on defendant’s agreement to pay. There was no “trespassory” taking of the cab ride because Pope agreed to transport her. Moreover, he argues that if Pope was fraudulently induced to provide the cab ride by defendant’s promise to pay, the crime was not theft by larceny, but rather theft by false pretenses. Defendant relies on the

fact that Pope agreed to drive the female passenger to the location. As such, he voluntarily agreed to give the female passenger a free cab ride and that the “property” in this case was the “labor” of Pope giving the free cab ride. Defendant relies on a portion of the prosecutor’s argument as follows: “The different part of - - a different issue that we face in this case - - it’s not a piece of property you can touch; right? It’s not like, you know, a purse or something of that nature. The property we are talking about in this case is money that’s owed, and property does include money, labor, real or personal property. [¶] So in this case, it was labor. Mr. Pope did labor for the female that the defendant agreed to pay for and he owed the money. So with regard to Element No. 1, the defendant took possession of property owned by someone else. The defendant took possession of the money that he was supposed to pay and had not paid for it.”

This only provides an isolated portion of the prosecutor’s argument. As set forth *ante*, the entirety of the argument by the prosecutor was defendant agreed to pay for the taxi fare when Pope arrived with the female passenger and then did not give the money to Pope. Based on the entirety of the argument, the “property” that was taken by defendant was the money owed to Pope once defendant agreed to pay the fare. Pope did not consent to defendant keeping the fare and refusing to pay it. Defendant kept the fare, forced Pope to leave while pointing a knife at him, and then ran away himself. As such, the evidence was substantial that defendant committed theft by larceny.⁶

⁶ Since we uphold defendant’s conviction based on the theory of theft by larceny, we need not address the alternative argument that his conviction of petty theft was supported by the theory of theft by false pretenses.

V

DISPOSITION

We affirm the judgment in its entirety.

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RICHLI
Acting P. J.

We concur:

KING
J.

MILLER
J.