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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.

AARON SANCHEZ,

Defendant and Appellant.

E059188

(Super.Ct.No. FWV1200519)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jon D. Ferguson,
Judge. Affirmed.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Charles C. Ragland, Scott Taylor and Amanda E. Casillas, Deputy Attorneys General, for
Plaintiff and Respondent.

A jury convicted defendant and appellant Aaron Sanchez of one count of second degree robbery. (Pen. Code, § 211.)¹ The trial court found true the allegations that defendant had suffered a prior conviction for a serious and/or violent felony. (§ 1170.12, subds. (a)-(d).)

Defendant contends that the trial court erred in failing to instruct the jury on the lesser included offense of petty theft. In the alternative, he asserts that counsel was ineffective for failing to request such an instruction. We affirm.

FACTS

Dat Huynh, a former Lieutenant in the South Vietnamese Army, owned a video rental store in Ontario. On March 3, 2012, he was the only one working in the store. He was helping a female customer when he noticed defendant bending down in front of the cash register. Defendant was wearing a hooded sweatshirt with the hood pulled up covering his head. Defendant stood up and went behind the counter, placing himself between Huynh and the cash register. Defendant pointed a gun straight at Huynh's chest and said, "I rob you." Huynh raised his hands, and said, "What are you doing, man?"

Huynh testified that defendant had placed the gun against Huynh's body and, at this point, he thought the gun was real and he was very afraid. Defendant then tried to open the cash register, still holding the gun. He managed to open the cash register and took approximately \$150 out of it. Huynh grabbed the nozzle of the gun and hit defendant three times with it. Defendant dropped some of the money.

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

Defendant then started to run out of the store, but Huynh pursued him. Huynh pulled defendant down to the ground and a fistfight ensued. Later, Huynh went back into his store and put defendant's gun down on a stool.

Officers Andrew Taylor and Brandon Schnebly of the Ontario Police Department were dispatched to Huynh's store. Officer Taylor observed defendant on the ground in the parking lot in front of the store with money lying around him. Officer Schnebly located a large simulated handgun on a stool inside Huynh's store, and saw money scattered around an open cash drawer with money inside it.

The prosecution indicated that its exhibit 1, the gun defendant allegedly used, was a fake gun. A photograph of the gun Officer Schnebly found on the stool was the prosecution's exhibit 8. Officer Schnebly testified that exhibit 1 was the same fake gun depicted in exhibit 8. At trial, Huynh was shown exhibit 8, but he insisted that the gun depicted was not defendant's gun.

Huynh testified that he believed the gun was real at the time he grabbed it and hit defendant with it, although he expressed uncertainty at one point. Officer Andrew Taylor of the Ontario Police Department stated that Huynh told him at the scene that he did not think the gun was real, and grabbed it. When defense counsel asked Huynh whether he told the officer he knew the gun was not real when he grabbed it, he replied, "Yeah, that's correct. When the police came, I already knew it was not real gun."

DISCUSSION

Defendant contends that the trial court erred in failing to instruct the jury on the lesser included offense of petty theft. In the alternative, he asserts that counsel was ineffective for failing to request such an instruction.

California courts have long held that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser offense. However, the doctrine of invited error still applies if the court accedes to a defense attorney's tactical decision to request that lesser included offense instructions not be given. Such a tactical request presents a bar to consideration of the issue on appeal. (*People v. Prince* (2007) 40 Cal.4th 1179, 1265.) The record here clearly shows that the court acceded to defense counsel's tactical decision not to give a petty theft instruction as a lesser included offense of robbery. Prior to jury selection, and again after the presentation of evidence, defense counsel expressly advised the court that she was not requesting any instructions on lesser included offenses. This was a tactical decision, as made clear during her closing argument when she told the jury that if defendant was guilty of anything, he was guilty of theft, but not robbery because he did not use force or fear to obtain the money. She predicated this conclusion on her assertion that Huynh realized the gun was not real when defendant's hand was in the cash register; thus, the "force or fear" element of robbery had ceased to exist.

Even after closing argument, the trial court asked counsel to confirm that she was making a tactical decision not to request an instruction on a lesser included offense

because she wanted the jury to base it all on robbery or not guilty. Defense counsel responded that the trial court was correct. “It was a tactical decision on our part. It was all or none.” Here, the defense strategy was to admit that defendant had committed a theft but not a robbery because Huynh realized the gun was not real before defendant took any money. Thus, it could not be clearer that defense counsel made a purposeful decision to forego a lesser included offense instruction as part of this strategy.

Defendant contends that the doctrine of invited error does not apply because the record shows that the trial court did not accede to defense counsel’s tactical choice. Based on the trial court’s comment that it would have given an instruction on petty theft if requested, defendant claims that the trial court was not aware that it should give an instruction on petty theft sua sponte. The distinction defendant tries to draw is irrelevant in light of defense counsel’s clear and repeated statements that she was foregoing instructions on lesser included offenses as a tactical choice. The invited error doctrine applies in these circumstances to preclude defendant from complaining about the failure to give an instruction that he told the trial court he did not want given.

Defendant next argues he received ineffective assistance from trial counsel because of the latter’s decision that a lesser included offense instruction not be given. A reviewing court will reverse a conviction on this basis only if the record affirmatively discloses that counsel had no rational tactical purpose for his act or omission. (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Moreover, it is settled law that a trial counsel’s tactical decisions are accorded substantial deference, and a reviewing court will not

second-guess reasonable tactical decisions. (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 97.) Here, trial counsel could reasonably believe that sufficient doubt as to the force and fear element of robbery was raised in the jury's mind based on Huynh's somewhat confusing testimony regarding the point at which he realized the gun was not real. We cannot conclude that counsel's all or nothing strategy was not, therefore, a rational strategy. The fact that the tactic did not succeed does nothing to derogate from the plain fact that it was a rational tactical choice.

To prevail on an ineffective assistance of counsel claim, a defendant must not only show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, but also that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Price* (1991) 1 Cal.4th 324, 440.) Defendant has not demonstrated prejudice, assuming trial counsel erred. The jury was given a clear choice either to find defendant guilty of robbery or acquit him if it believed he only committed theft. Thus, there is no reasonable probability that the result of the proceeding would have been different had the lesser included offense instruction been given.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.