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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.

LEE JAMES MCGRAIL,

Defendant and Appellant.

E064766

(Super.Ct.No. INF1302151)

OPINION

APPEAL from the Superior Court of Riverside County. Victoria E. Cameron, Judge. Affirmed with directions.

Mark D. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Randall D. Einhorn, Anthony Da Silva, and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Lee James McGrail threatened to kill his sister with a hammer. After she fled, defendant attacked her husband with the hammer, fracturing his skull and causing brain injury. Then defendant stole his sister's car keys and escaped in her car for almost two months.

A jury convicted defendant of multiple offenses.¹ The trial court sentenced defendant to a determinate term of six years eight months and a consecutive indeterminate term of seven years to life in prison.

Defendant's primary argument on appeal involves whether substantial evidence supports his robbery conviction on count 3. We conclude the evidence shows that defendant intended to deprive his sister permanently of her car keys and car. We agree with the parties that defendant's sentence for unlawful taking or driving a vehicle (count 5) should be stayed under section 654. (*People v. Bauer* (1969) 1 Cal.3d 368, 377-378.) Subject to that modification, we affirm the judgment.

II

STATEMENT OF FACT

A. *The Prosecution*

Defendant is about 6 feet, 2 or 3 inches tall and weighs 280 to 300 pounds.²

¹ All statutory references are to the Penal Code unless otherwise stated. The jury convicted defendant of second degree attempted murder (count 1, § 664/187), burglary (count 2, § 459), robbery (count 3, § 211), unlawful taking or driving of a vehicle (count 5, Veh. Code, § 10851, subd. (a), and aggravated mayhem (count 6, § 205).

Defendant is 20 years younger than his sister's husband, David Farrar. After the death of the siblings' parents, defendant was living in their condominium in Palm Springs. Lisa and David lived in Cathedral City about a 10-minute drive from defendant. Defendant and Lisa had a strained relationship involving their parents' estate.

At around 5:30 a.m. on June 25, 2013, Lisa was in her home's kitchen making tea and David was in bed. Defendant burst into the house, wielding a hammer and yelling at Lisa that he was going to kill her. Lisa was "scared to death" and believed that defendant was going to carry out his threat. Lisa called out to warn David that defendant was in the residence. David yelled for Lisa to call 911. Lisa ran out the back door to a neighbor's condominium where she called 911.

Defendant entered the bedroom and hit David with the hammer, knocking him out. When David regained consciousness, he was wandering around the backyard where Lisa and a police officer saw David naked, bloody from head to toe, and unresponsive.

Inside the residence, blood was smeared on the walls and in the bedroom, on the carpet in front of a chair, on an overturned stool, on the kitchen floor, on the edge of the front door, and on the interior of the front door knob. Lisa told police officers that defendant had taken the car keys to the residence and to her white Toyota Camry, and her pain medication.

Lisa accompanied David to the hospital in an ambulance. David underwent surgery for a skull fracture which had penetrated the brain causing a blood clot. David

² Defendant stated he was 6 feet tall.

could have died without the surgery. As a result of his injuries, David has difficulty speaking, his right arm is weak, and he suffers from headaches and has short-term memory loss.

A security video shows defendant at around 5:50 a.m. using a hammer on the entry gate to the Palm Springs condominium complex. The video also showed Lisa's white Toyota Camry passing through the entry.

At around 11:30 p.m. on August 15, 2013, in Seaside in Monterey County, a police officer found defendant asleep or passed out in Lisa's car with the engine running and the headlights activated. Defendant claimed he did not have a name and refused to provide any identification although the officer confirmed his identity.

B. The Defense

Defendant testified that, after his parents died there was animosity with Lisa about how to handle the condominium. Defendant testified that Lisa agreed to give him a check for his share of the parents' estate. On the morning of the incident, he had walked from his home to her condominium to receive the check.

Defendant claimed that he knocked on the front door and Lisa let him inside. Out of the corner of his eye, he saw David holding a hammer and coming towards him, wearing a towel. As defendant and David struggled over control of the hammer, they stumbled into the bedroom. While they were pushing and pulling, David loosened his grip on the hammer and defendant inadvertently struck David on the head with the hammer. David fell backwards into a seat in the bedroom. David was still breathing but defendant did not see any blood.

Defendant grabbed David's towel, Lisa's car keys, and the hammer. He took the hammer because he was scared. He knew he was stealing his sister's car to leave the area. Defendant did not intend to kill or hurt Lisa or David.

On cross-examination, he admitted he decided "the best way to leave would be to steal [his] sister's car." He also testified he "didn't know what [he] was thinking. I just wanted to get back and pick up my father's dog and my dad's ashes and leave." He explained he drove back to his home but he did not have a key to the entry gate so he used the hammer to try to open it. Finally, a neighbor let him in. He collected his dog, a suitcase, and his father's ashes and drove his sister's car to Santa Barbara.

III

ROBBERY CONVICTION

Defendant contends his robbery conviction is not supported by substantial evidence because there was no evidence he intended to steal Lisa's car keys until after his altercation with David. However, the evidence showed defendant's intent to deprive Lisa permanently of her car keys arose either before or during his attack on his sister and her husband. According to his own testimony, he came to his sister's house early in the morning because he planned to confront her and then leave town, a scheme that could only be accomplished if he had money and a vehicle.

A. Standard of Review

We conduct a substantial evidence review: "[S]ubstantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*

(1980) 26 Cal.3d 557, 578.) We “review the whole record in the light most favorable to the judgment.” (*Ibid.*) The reviewing court presumes in support of the judgment the existence of every fact that could reasonably be deduced from the evidence, direct or circumstantial. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Kelly* (2007) 42 Cal.4th 763, 788.) The appellate court may only reverse a conviction for lack of substantial evidence if it appears ““that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation].” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

B. Robbery

Robbery is the felonious taking of personal property in the possession of another, from his or her person or immediate presence, and against his or her will, accomplished by means of force or fear. (§ 211; *People v. Anderson* (2011) 51 Cal.4th 989, 994.) The evidence must show that the requisite intent to steal arose either before or during commission of the act of force, and the defendant must apply the force or fear for the purpose of accomplishing the taking: “the act of force or intimidation by which the taking is accomplished in robbery must be motivated by the intent to steal” (*People v. Green* (1980) 27 Cal.3d 1, 54.)” (*Anderson*, at p. 994.) If the intent to take the property arises only after force or fear is applied, the offense is theft. (*People v. Burney* (2009) 47 Cal.4th 203, 253.) The victim’s fear may be inferred from the circumstances in which the property is taken. (*People v. Clark* (2011) 52 Cal.4th 856, 944.)

The trial court instructed the jury, based on CALCRJM No. 1600, as follows:

“The defendant is charged in Count 3 with robbery. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took property that was not his own; [¶] 2. The property was in the possession of another person; [¶] 3. The property was taken from the other person or his immediate presence; [¶] 4. The property was taken against the person’s will; [¶] 5. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND, [¶] 6. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently or to remove it from the owner’s possession for so extended period of time that the owner would be deprived of a major portion of the value or enjoyment of the property. [¶] The defendant’s intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this intent until after using the force or fear, then he did not commit robbery. [¶] . . . [¶] Fear as used here, means fear of injury to the person himself or herself, or injury to the person’s family or property, or immediate injury to someone else present during the incident or to that person’s property.”

The prosecutor argued: “The defendant has to take property from David and Lisa, it has to be under their physical control, and he has to use force or fear to take the property or to prevent David and Lisa from resisting. Well, clearly force was used against David. The threat of force was used against Lisa. And but for that threat of force and that force that was used, the defendant would not have been able to take their car. The force used by the defendant prevented David and Lisa from resisting the taking of that car.”

Defendant argues that he spontaneously decided to steal the car keys in order to escape quickly. However, the evidence presented at trial was sufficient to prove defendant intended to deprive Lisa permanently of her car keys and car, and his intent to do so arose either before, or during, his threat to kill Lisa and his attack on David.

According to defendant, he walked to the condominium intending to get money from his sister that would allow him “to leave the desert and start fresh up in northern California.” The latter suggested he was already planning to steal Lisa’s car to accomplish his move north. Defendant apparently needed a car because he was also transporting his father’s dog. Lisa testified that, when defendant entered her residence, he was holding a hammer and repeatedly yelled, “I’m going to kill you.” Lisa was “scared to death” and believed defendant would carry out that threat. After Lisa left the residence to call police, defendant ran into the bedroom and struck David on the head with the hammer, rendering him unconscious. Defendant then took Lisa’s pain medication, car keys and car from her residence before fleeing to Santa Barbara. Defendant had Lisa’s car for seven weeks before he and the car were found by police in Seaside in Monterey County.

Robbery is a continuing offense and its elements do not have to occur in a particular order. (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255.) If a defendant uses force or fear to take or retain stolen property, the element “by means of force or fear” has been met. Here defendant had an early morning confrontation with his sister and her husband, planning to hurt them and certainly using force or fear to take the car keys and retain the stolen car for many weeks. (*Id.* at pp. 254, 255-258.) Sufficient circumstantial

evidence allowed the jury reasonably to infer that defendant intended permanently to deprive Lisa of her car keys and car before or during the time he threatened and attacked Lisa and David.

IV

SECTION 654

The parties agree that if there is sufficient evidence to support defendant's robbery conviction on count 3—for which he was sentenced to six years in prison—his eight-month sentence for unlawfully taking or driving a vehicle in count 5 should be stayed pursuant to section 654 because the robbery and vehicle theft constituted an indivisible course of action. Section 654 bars multiple punishment for both a single act that violates more than one criminal statute and multiple acts, where those acts comprise an indivisible course of conduct incident to a single criminal objective and intent. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

The California Supreme Court has held that when a defendant unlawfully takes a car during the commission of a robbery for the purpose of facilitating escape, the two crimes constitute one indivisible course of conduct justifying a single punishment. (*People v. Bauer, supra*, 1 Cal.3d at p. 372.) In *Bauer*, two men, including the defendant, robbed three elderly women in the home they shared and then drove away in the car that was parked in the garage. The Supreme Court held that the trial court erred in imposing punishment for both the robbery and the car theft. (*Id.* at p. 378.) The court rejected the People's argument that the robbery was complete before the defendant stole the car. Even if the second crime was an afterthought, a court may not impose punishment for

both crimes if they were part of an indivisible transaction. (*Id.* at p. 377.) The court also rejected the multiple victim exception to section 654. (*Id.* at p. 378.)

Defendant, like the *Bauer* defendants, committed an indivisible crime of robbery and car theft. Section 654 applies to count 5 for car theft.

V

DISPOSITION

We affirm the judgment but remand to the trial court for resentencing on count 5.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.