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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARQUIS DELANE JACKSON,

Defendant and Appellant.

F066957

(Super. Ct. No. F12903757)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Denise L. Whitehead, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On February 7, 2013, appellant Marquis Delane Jackson was convicted of one count of second degree robbery (Pen. Code,¹ § 211). Following trial, appellant admitted to one prior strike pursuant to section 667, subdivisions (b) through (i), one prior serious felony pursuant to section 667, subdivision (a)(1), one prior prison term pursuant to section 667.5, subdivision (a), and one prior prison term pursuant to section 667.5, subdivision (b). At sentencing, the trial court struck the enhancement pursuant to section 667.5, subdivision (a), and imposed an aggregate prison term of 10 years. The court also imposed various fines and fees.

On appeal, appellant argues that (1) the trial court erred by denying appellant's motion for self-representation, (2) there was insufficient evidence to support appellant's conviction for second degree robbery, (3) the trial court erred by denying appellant's motion for acquittal, (4) the jury instructions misstated the elements of second degree robbery, and (5) appellant was denied the effective assistance of counsel at trial. As we do not find these arguments to be persuasive, the judgment is affirmed.

FACTS

A. The Prosecution.

On May 20, 2012, Chong Xiong was working as a Wal-Mart loss prevention associate when he noticed appellant pushing a cart filled with unpackaged items and a computer that was missing its security tag. Xiong approached appellant, who then hit Xiong with his shopping cart and reached for his waistband. Xiong observed what

¹ Unless otherwise indicated, further undesignated statutory references are to the Penal Code.

appeared to be the shape of a firearm in appellant's waistband, and walked away for his safety.

Appellant then continued to the store exit without paying, and was stopped by the door guard, Ramon Marino. Marino asked appellant to provide a receipt for the merchandise, but appellant lifted his shirt to display what appeared to be the handle of a firearm, and told Marino, "it's not worth it." Marino noticed several customers in the area and, believing the weapon to be real, allowed appellant to exit the store with the stolen merchandise. Neither Xiong nor Marino correctly identified appellant from a photo array.

Once appellant was outside, Wal-Mart employees observed appellant loading the merchandise into a white SUV. The employees took down the license plate number, and police were able to determine that the vehicle was used by a woman by the name of Nicole Terjerian. According to Terjerian, she had driven a woman named "Yanna" and a man named "Arkansas" to Wal-Mart on the date of the robbery, and she waited in the car while Yanna and Arkansas went into the store and exited with merchandise that they loaded into Terjerian's SUV. Terjerian identified appellant in a photo array as the man she knew as "Arkansas," and led police to the tent he was living in.

Upon arriving at the tent, police located appellant inside and conducted a consensual search of the tent, which yielded clothing matching the security footage from the robbery and a replica handgun. After being arrested and charged with robbery, appellant made a recorded telephone call from the jail. In the call, appellant identified himself as "Arkansas" and made the following statements concerning his charges: "[T]hey gave me a bull shit ass robbery charge. It ain't no rob ... I had came up out of Wal-Mart with some shit and they tried to turn it into a robbery. Should have been like a ah ... petty theft or something but they, they gave me a robbery."

B. The Defense.

Defendant testified in his own defense and denied stealing any of the merchandise in question. He testified that, on the day of the robbery, he had ridden with Terjerian to Wal-Mart, but that he had stayed in the car while the robbery was committed by Yanna and Terjerian's boyfriend, a man named "Lala." According to appellant, Lala was also a Black male, and had a facial tattoo similar to appellant's.

Appellant further testified that the tent he was found in belonged to someone else, and that the clothes that were found inside the tent belonged to Lala. Defendant also testified that he believed the recording of appellant's telephone call from the jail had been altered by the prosecution. Additional information was entered into evidence that showed Xiong and Marino had described the perpetrator as 5'8" to 6'2" and between 200 and 220 pounds, while appellant is 6'1" and 270 pounds.

At the conclusion of trial, the jury found appellant guilty of second degree robbery. This appeal followed.

DISCUSSION

I. The Trial Court Did Not Abuse its Discretion by Denying Appellant's Motion to Represent Himself.

A. Standard of Review.

A trial court's decision to deny an untimely motion for self-representation is reviewed for an abuse of discretion. (*People v. Moore* (1988) 47 Cal.3d 63, 79-80.)

B. Discussion.

A criminal defendant has a constitutional right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806, 835.) That right, however, must be asserted within a reasonable period of time prior to trial. (*People v. Windham* (1977) 19 Cal.3d 121, 127-128.) "[A] defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial

without some showing of reasonable cause for the lateness of the request.” (*Id.* at p. 128, fn. 5.)

Here, appellant moved to represent himself on January 24, 2013, four days prior to the beginning of trial. Further, appellant stated that he needed a continuance of 30-60 days in order to prepare for trial, and stated no justification for the lateness of his request. Given the lateness of the appellant’s motion and request for continuance, the trial court was well within its discretion when it denied the motion as untimely.

On appeal, however, appellant asserts his request for continuance should not be dispositive, as appellant’s trial counsel requested a continuance as well. This argument relies on our Supreme Court’s opinion in *People v. Windham, supra*, 19 Cal.3d 121, where the Court stated that when “defense counsel himself seeks a continuance for the purpose of further trial preparation it would be illogical to deny a motion for self-representation under such circumstances simply because the motion is made in close proximity to trial.” (*Id.* at p. 128, fn. 5.) Here, however, trial counsel merely stated that he might need a continuance of 2-14 days, as opposed to appellant’s request for a continuance of 30-60 days. Given this vast discrepancy in the requested continuance by appellant and appellant’s trial counsel, it was not illogical for the trial court to rely on the lateness of appellant’s request when denying his motion for self-representation. Further, the trial court explicitly informed appellant that it would reconsider his motion for self-representation in the event of any further “lengthy continuance.”

Appellant also argues that his motion should not be considered untimely due to the fact that appellant made a prior motion for self-representation on November 20, 2012. Upon review of the record, however, it is clear appellant made his initial motion for self-representation due to his dissatisfaction with the number of attorneys that had been assigned to his case by the public defender’s office. Rather than grant appellant’s motion, however, the trial court suggested that appellant make a *Marsden* motion, which

the trial court then granted by removing the public defender's office from appellant's case and assigning the case to a different firm. After the trial court granted the *Marsden* motion, appellant withdrew his motion for self-representation. Therefore, as appellant's first motion for self-representation was a self-contained motion that was fully resolved to appellant's satisfaction, we do not find the date of that motion is relevant to the timelines of appellant's later, unrelated, and untimely motion for self-representation.

II. There Was Sufficient Evidence to Support Appellant's Conviction for Second Degree Robbery.

A. Standard of Review.

We view the record in the light most favorable to the conviction and presume the existence of every fact in support of the conviction the trier of fact could reasonably infer from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.). "Reversal is not warranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]" [Citation.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.)

B. Analysis.

"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.)

On appeal, appellant asserts that there was insufficient evidence to support a finding that the property in question was taken by means of "force or fear." Under California law, force may be either actual or constructive, with constructive force being defined as "force, not actual or direct, exerted upon the person robbed, by operating upon [a] fear of injury" [Citation.]" (*People v. Wright* (1996) 52 Cal.App.4th 203, 210.) Fear may be inferred from the circumstances under which the property was taken, even if the victim provides superficially contrary testimony. (*People v. Davison* (1995)

32 Cal.App.4th 206, 214-215.) Fear may refer to fear of unlawful injury to the person robbed, or of immediate unlawful injury to anyone in the company of the person robbed at the time of the robbery. (§ 212.)

Here, the evidence shows that, as appellant exited the store with the merchandise in question, appellant was stopped by one of the store's guards, Ramon Marino. Marino allowed appellant to pass after appellant displayed the handle of what appeared to be a handgun and told Marino, "[y]ou know what, man, it's not worth it." Given this evidence, it is manifestly obvious from the circumstances that appellant exerted constructive force against Marino that "operat[ed] upon [a] fear of injury" (*People v. Wright, supra*, 52 Cal.App.4th at p. 210) in order to allow appellant to exit the store with stolen merchandise. Further, Marino's testimony that there were customers in the area, and that he was concerned for the safety of those customers, was sufficient to establish fear of "immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (§ 212, subd. 2.)

Despite these facts, appellant asserts that Marino's testimony establishes that he was not afraid of appellant. While appellant is correct that Marino gave testimony to that effect, Marino also testified that he thought appellant had a real firearm, and a jury is entitled to make a finding of fear, "despite even superficially contrary testimony of the victim." (*People v. Davison, supra*, 32 Cal.App.4th at p. 215.) Indeed, "[p]rompt compliance with the commands of an armed person, who by words or demonstration threatens bodily harm for failure to do so, furnishes some evidence of fear." (*People v. Borra* (1932) 123 Cal.App. 482, 484.) Here, appellant used words and demonstration to threaten bodily harm to Marino if he failed to allow appellant to pass, and Marino promptly permitted appellant to pass. Accordingly, there was sufficient evidence for the jury to conclude that appellant applied constructive force to Marino, despite Marino's superficial testimony to the contrary.

Appellant also argues that it was store policy, and not fear of injury, that led Marino to allow appellant to pass after appellant threatened the use of force. While Marino testified that it was store policy to allow armed individuals to exit the store with stolen merchandise, the existence of such a policy does not nullify the circumstantial evidence establishing that appellant applied constructive force to Marino. In fact, if appellant's argument was accepted, then Wal-Mart's policy of nonconfrontation could be used to nullify any showing of force or fear, as all defendants could argue that it was store policy, and not establish actual or constructive force, that allowed the personal property to be acquired from the victim. Such an absurd result is clearly contrary to the intent of section 211.

Therefore, viewing the evidence in the light most favorable to conviction, we find there was sufficient evidence to support appellant's robbery conviction under either a theory of direct fear or a theory of fear for others, and appellant is not entitled to relief.²

III. CALCRIM No. 1600's Definition of Fear Did Not Violate Appellant's Right to Due Process.

A. Standard of Review.

"We review de novo whether a jury instruction correctly states the law. [Citations.]" (*People v. Franco* (2009) 180 Cal.App.4th 713, 720.)

B. Analysis

At trial, the trial court instructed the jury on the definition of fear by using the definition found in CALCRIM No. 1600. On appeal, appellant asserts that the definition

² Appellant also argues on appeal that the trial court erred by denying appellant's motion for acquittal following the presentation of the prosecution's case-in-chief. As we have already concluded that there was sufficient evidence to support appellant's conviction, we do not need to analyze appellant's argument further. (See *People v. Stevens* (2007) 41 Cal.4th 182, 200.)

of fear found in CALCRIM No. 1600 is more expansive than the definition of fear found in section 212 on the matter of third parties, and thus permitted the prosecution to obtain a conviction under a lesser standard of proof than is required under the controlling statute. We disagree.

Section 212 reads as follows, in relevant part: “[F]ear ... may be either: [¶] 1. The fear of an unlawful injury to the person or property of the person robbed ...; or, [¶] 2. *The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.*” (Italics added.)

CALCRIM No. 1600 reads as follows, in relevant part: “[Fear, as used here, means fear of (injury to the person himself or herself[,]/ [or] ... *immediate injury to someone else present during the incident ...*).]” (Italics added.)

According to appellant, the language of section 212 is limited to third parties in the immediate vicinity of the victim, while the language of CALCRIM No. 1600 is spatially unlimited in regard to third parties. Given the language above, however, we are not convinced that CALCRIM No. 1600 differs in any meaningful way from the language found in section 212. Even if the difference were meaningful, however, we find that any instructional error was harmless. “[I]nstructional error, affecting an element of the offense charged, warrants reversal unless it is harmless beyond reasonable doubt. [Citation.]” (*People v. Cooper* (1991) 53 Cal.3d 1158, 1171.)

Here, as noted above, there was ample evidence to support a finding that appellant committed robbery through the use of constructive force against Ramon Marino. Therefore, even if the trial court’s instruction concerning fear of injury to people in Marino’s company at the time of the robbery was incorrect, appellant was not prejudiced,

as his conviction was sufficiently supported under a different, properly instructed ground.³ Accordingly, we do not find that appellant is entitled to relief.

IV. Appellant Was Not Denied the Effective Assistance of Counsel at Trial.

A. Standard of Review.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. (*People v. Jones* (2010) 186 Cal.App.4th 216, 235.) We review the questions of law de novo, and “[t]he factual findings of a trial court are entitled to deference ‘only if substantial and credible evidence supports the findings.’ [Citations.]” (*Id.* at p. 236.)

B. Discussion.

“The test for determining whether a criminal defendant received ineffective assistance of counsel is well settled. The court must first determine whether counsel’s representation ‘fell below an objective standard of reasonableness.’ [Citation.] The court then inquires whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citations.]” (*People v. Jones, supra*, 186 Cal.App.4th at pp. 234-235.) “Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ [Citation.]” (*Strickland v. Washington* (1984) 466 U.S. 668, 689.)

In the instant case, appellant argues that he was denied the effective assistance of counsel due to remarks made by his trial counsel during closing arguments. During those closing arguments, while addressing appellant’s claim that the recordings of his jailhouse

³ Appellant does not assert that the jury was improperly instructed on the meaning of force, or on the meaning of fear as it applies to the victim of the robbery.

telephone calls had been edited, trial counsel said the following: “Now, [appellant] says the jail calls are edited. Okay. That’s difficult. He believes the jail calls are edited. We have no process--obviously, we don’t have any process that somebody edited the jail calls, but we did know there was missing recordings. We asked Officer Gebhart. Officer Gebhart took a recording of the misidentifications by Xiong and Marino. ‘Yeah, we took a recording, but gosh, darn it, we lost them.’ [S]o why wouldn’t [appellant] be suspicious? And don’t forget on that same menu that was--that menu popped up on the recording. There was an edit menu screen. Now, I’m going to do something kind of odd, but [appellant] says it’s editing and that’s his explanation, but is it normal for anybody to remember what they said in a recording nine months ago? I don’t know if anybody could. I’ll submit that if [appellant] said he thinks it’s edited. Maybe he’s forgot what he said, and maybe what he really believes is he’s thinking it’s edited because he really believes he didn’t commit the robbery.”

According to appellant, these comments amounted to abandonment by trial counsel. Taken as a whole, however, it is clear that counsel’s statements were a strategic attempt to divert the jury away from appellant’s unfounded accusations of evidence tampering and towards the defense’s stronger theory of the case: that appellant had not taken the property by means of force or fear. As such an approach constitutes a reasonable strategic decision, appellant cannot establish that his trial counsel’s performance fell below an objective standard of reasonableness.

Further, even if trial counsel’s statements were unreasonable appellant cannot establish prejudice. The evidence presented at trial established that appellant was positively identified as the perpetrator by the driver, Nicole Terjerian; appellant was found in possession of clothing matching the clothing worn by the perpetrator in the surveillance video; appellant was found in possession of a replica handgun; and appellant was recorded admitting to taking merchandise from a Wal-Mart. Given this

overwhelming evidence of guilt, appellant cannot establish that there is a reasonable probability, but for his trial counsel's closing arguments, that appellant would have been acquitted of his robbery charge. Accordingly, appellant is not entitled to relief.

DISPOSITION

The judgment is affirmed.

LEVY, Acting P.J.

WE CONCUR:

CORNELL, J.

FRANSON, J.