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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN HERNANDEZ*,

Defendant and Appellant.

F067434

(Super. Ct. No. BF143220A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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* Defendant is also known as Jesus Hernandez, and is apparently so known in California Department of Corrections and Rehabilitation records.

Defendant Juan Hernandez was charged with carjacking (Pen. Code,¹ § 215, subd. (a); count 1), robbery (§ 212.5, subd. (c); count 2), evading a pursuing peace officer (Veh. Code, § 2800.2; count 3), grand theft from an elder (§ 368, subd. (d)(1); count 4), attempting to deter or prevent an officer in the performance of duty by threat or violence (§ 69; counts 5 & 6), resisting, delaying, or obstructing an officer (§ 148, subd. (a)(1); count 7), and driving a motor vehicle without a valid license (Veh. Code, § 12500, subd. (a); count 8). The information further alleged that he previously sustained a strike conviction (§§ 667, subds. (c)-(j), & 1170.12, subds. (a)-(e)), was convicted of a serious felony (§ 667, subd. (a)), and served a separate prison term (§ 667.5, subd. (b)). The jury convicted defendant as charged with regard to counts 1 through 4, 7, and 8. As to counts 5 and 6, it found him guilty of the lesser included offense of resisting, delaying, or obstructing an officer. In a bifurcated proceeding, the trial court found true each of the special allegations. Defendant was sentenced to 24 years four months in state prison.²

On appeal, defendant contends: (1) the evidence did not sufficiently show that he accomplished a carjacking or robbery by means of force or fear; and (2) the evidence on which the prosecutor predicated count 7 was not offered at the preliminary hearing. We conclude: (1) substantial evidence established the use of force in connection with counts 1 and 2; and (2) count 7 should have been dismissed. The judgment shall be modified accordingly and, as so modified, affirmed.

STATEMENT OF FACTS

On July 26, 2012, Linda Crane, then 66 years of age, drove her disabled daughter Debra to the Bakersfield Prosthetics and Orthotics Center at 2023 Truxtun Avenue in Bakersfield, California. At approximately 2:30 p.m., Linda parked her gold 2006 Chevy

¹ Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

² The court imposed: (1) 18 years plus a five-year enhancement for prior conviction of a serious felony on count 1; (2) 16 months on count 3, to be served consecutively; and (3) four 180-day terms in county jail on counts 5 through 8, to be served concurrently. It stayed execution of punishment on counts 2 and 4.

Silverado pickup truck in a handicapped space. She and Debra, who used a wheeled walker, then headed for the building. About 10 feet away from the truck, defendant approached Linda and asked her for a dollar. When Linda stated that she did not carry cash on her person, defendant snatched her keys from her hand and hurried to the truck.³ He entered the vehicle, locked the doors, and started the engine before Linda could catch up with him. Meanwhile, Linda pounded on the windows and cursed. Before defendant sped away, he backed the truck into Debra's walker, which, in turn, rolled over and injured Debra's foot. Linda, who was "hysterical," talked to the 911 operator.⁴

At 2:43 p.m., Officer Ryan Maxwell spotted the stolen truck at the intersection of Oak Street and 24th Street and followed it in a marked patrol car. When defendant ran a red traffic light, Maxwell activated the car's lights and siren and gave chase. At some point, at least nine other officers joined the high-speed pursuit, which spanned nearly 20 miles. Defendant was eventually cornered in the parking lot of an abandoned restaurant on the 400 block of Union Avenue. One of the officers, John Billdt, exited his car, approached the passenger side of the truck with his weapon drawn, and ordered defendant to park. Defendant kept the engine running. After Officers Colby Earl and Christopher Messick dragged defendant out of the driver's seat, Billdt entered and parked the truck.

DISCUSSION

I. Substantial evidence established defendant's use of force in connection with counts 1 and 2

a. Standard of review

"To determine the sufficiency of the evidence to support a conviction, we 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

³ Linda testified that defendant injured her hand, "but not for very long." She did not sustain a "bruise or nothing."

⁴ The jury listened to a recording of the call.

trier of fact could find that the elements of the crime were established beyond a reasonable doubt.” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955; see *People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1511 [“For evidence to be ‘substantial[,]’ it must be of ponderable legal significance, reasonable in nature, credible[,] and of solid value.”].) “We must draw all reasonable inferences in support of the judgment.” (*People v. Tripp, supra*, at p. 955.) “We may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis what[so]ever is there sufficient substantial evidence to support the conviction.” (*Ibid.*; see *People v. Aispuro, supra*, at p. 1511 [“If the circumstances reasonably justify the jury’s finding, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.”].)

“Although we must ensure the evidence is reasonable, credible, and of solid value, ... it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.” (*People v. Jones* (1990) 51 Cal.3d 294, 314.) “Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.” (*Ibid.*)

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.) “‘Carjacking’ is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.” (§ 215, subd. (a).) A person can be convicted of both robbery and carjacking based upon

the same conduct (*People v. Ortega* (1998) 19 Cal.4th 686, 700), but can be punished only for the offense which carries the greater penalty (see § 215, subd. (c)).

Robbery and carjacking vary in three important respects: (1) a robbery requires an intent to permanently deprive; a carjacking requires an intent to either permanently or temporarily deprive; (2) a robbery requires a taking from the person or the immediate presence of the possessor; a carjacking requires a taking from the person or the immediate presence of the possessor or any passenger; and (3) a robbery may involve any type of personal property; a carjacking is limited to motor vehicles. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1058.) “Nevertheless, the carjacking statute’s language and legislative history ... demonstrate that carjacking is a direct offshoot of robbery and that the Legislature modeled the carjacking statute on the robbery statute.” (*Id.* at p. 1059.) Apart from the aforementioned distinctions, “the Legislature intended to treat carjacking[] *just like robbery* ...” (*In re Travis W.* (2003) 107 Cal.App.4th 368, 376, quoting *People v. Alvarado* (1999) 76 Cal.App.4th 156, 160.)

Both robbery and carjacking are ““accomplished by means of force or fear.”” (*People v. Lopez, supra*, 31 Cal.4th at p. 1059, quoting *In re Travis W., supra*, 107 Cal.App.4th at p. 373; see *People v. Hays* (1983) 147 Cal.App.3d 534, 541 [“There is no need to prove both force *and* fear.”]; but see *People v. Wright* (1996) 52 Cal.App.4th 203, 211 [“[F]orce’ is not an element of robbery independent of ‘fear’; there is an equivalency between the two.”].) “The terms ‘force’ and ‘fear’ ... have no technical meaning peculiar to the law and must be presumed to be within the understanding of jurors.” (*People v. Anderson* (1966) 64 Cal.2d 633, 640.)

“‘Force’ is a relative concept.” (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709.) “However, it is established that something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property.” (*People v. Morales* (1975) 49 Cal.App.3d 134, 139; see *People v. Church* (1897) 116 Cal. 300, 303 [“Grabbing or snatching property from the hand has often been held to be grand larceny,

and not robbery.”]; *People v. Burns* (2009) 172 Cal.App.4th 1251, 1259 [“An accepted articulation ... is that “[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim’s resistance””].)

Fear refers to either (1) the fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; 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 offense. (§ 212.) Fear “is subjective in nature, requiring proof ‘that the victim was in fact afraid, and that such fear allowed the crime to be accomplished.’ [Citation.]” (*People v. Anderson* (2007) 152 Cal.App.4th 919, 946.) “However, the requisite fear need not be the result of an express threat.” (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771 (*Flynn*); see *People v. Morehead* (2011) 191 Cal.App.4th 765, 775 [“[F]ear may be inferred from the circumstances in which the property is taken.”].) “So long as the perpetrator uses the victim’s fear to accomplish the [crime], it makes no difference whether the fear is generated by the perpetrator’s specific words or actions designed to frighten, or by the circumstances surrounding the taking itself.” (*Flynn, supra*, at p. 772.)

“A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery [or carjacking] if he uses force or fear to retain it or carry it away in the victim’s presence.” (*People v. McKinnon* (2011) 52 Cal.4th 610, 686.) A robbery or carjacking “is not completed at the moment the [perpetrator] obtains possession of the stolen property. The[se] crime[s] ... include[] the element of asportation, the [perpetrator]’s escape with the loot being considered as important in the commission of the crime as gaining possession of the property.... [A] robbery [or carjacking] occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner’s immediate presence regardless of the means by which defendant originally acquired the property.” (*Id.* at pp. 686-687, quoting *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28; see *Flynn, supra*,

77 Cal.App.4th at p. 771 [a taking of property is accomplished by means of force or fear when the perpetrator forces or frightens the victim into leaving the scene or deters said victim from preventing the theft or attempting to immediately reclaim the property].)

We conclude that substantial evidence established defendant's use of force in connection with counts 1 and 2. The record shows that defendant grabbed Linda's keys from her hand, ran 10 feet to her truck, and entered the vehicle. Although he obtained possession of the truck at this point, he remained in close proximity to Linda and Debra. "A robbery [or carjacking] is not complete until the perpetrator reaches a place of temporary safety" (*People v. Young* (2005) 34 Cal.4th 1149, 1177.) "The scene of the crime is not such a location, at least as long as the victim remains at hand." (*Flynn, supra*, 77 Cal.App.4th at p. 772.) Linda tried to regain possession of the truck, but defendant locked her out and started the engine in preparation for asportation. Moreover, while Linda pounded on the windows and cursed in a futile attempt to impede the theft, defendant backed the truck into Debra and then fled the scene. (Cf. *People v. Anderson* (2011) 51 Cal.4th 989, 994-996 [the defendant's running over of the victim with the stolen car in order to retain said car and facilitate the escape constitutes a requisite forcible act for the purpose of robbery]; *People v. Wright, supra*, 52 Cal.App.4th at p. 210 ["The force need not be applied directly to the person of the victim."].) A rational trier of fact could find that these collective actions exceeded the "quantum of force" needed to simply seize the truck (see *People v. Morales, supra*, 49 Cal.App.3d at p. 139) and constituted the force "“actually sufficient”" to overcome Linda's resistance (see *People v. Burns, supra*, 172 Cal.App.4th at p. 1259).⁵

⁵ A reasonable jury could also infer that defendant's collision with Debra caused or contributed to Linda's ensuing panic, compelling her to abandon her attempt to stop the theft in order to tend to her injured daughter. (See *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1132 [theft of victim's truck became carjacking when the defendant resorted to use of fear to retain possession of said truck].)

II. Count 7 should have been dismissed

a. Background

At the October 22, 2012, preliminary hearing, Messick testified that several officers, including Billdt, tried to subdue defendant once the pursuit ended. Messick recalled that Billdt “placed his body weight on top of [defendant]’s legs” on the ground and “was able to successfully gain control of [defendant’s] legs ...” Billdt did not testify and the prosecutor did not introduce any evidence that defendant did not comply with Billdt’s order to park the truck.

Thereafter, the October 31, 2012, information, alleged:

“Count[7:] on or about July 26, 2012, [defendant], did willfully and unlawfully resist, delay, or obstruct a peace officer, and/or emergency medical technician, who was then and there attempting to or discharging the duty of his/her office or employment, in violation of ... section 148[, subdivision](a)(1), a misdemeanor.”⁶ (Some capitalization omitted.)

On May 10, 2013, the prosecutor indicated that count 7 was based on defendant’s failure to heed Billdt’s command. Defense counsel did not object. The court subsequently instructed the jury:

“[D]efendant is charged in [c]ount 7 with resisting or obstructing or delaying a peace officer in the performance or attempted performance of his duties in violation of ... [s]ection 148[, subdivision](a). [¶] To prove ... defendant is [guilty of this crime, the People must prove that,] one, John Billdt was a peace officer cooperatively performing or attempting to perform his duties as a peace officer. Two, ... defendant willfully resisted, obstructed[,] or delayed John Billdt in the performance or attempted performance of those duties. And, three, when ... defendant acted, he knew or reasonably should have [k]now[n] that John Billdt was a peace officer performing or attempting to perform his duties. Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else[,] or gain any type of advantages. [¶] ... The People allege that ... defendant resisted,

⁶ By contrast, the information specified that the charges on counts 5 and 6 involved Earl and Messick, respectively.

obstructed[,] or delayed John Billdt by doing the following[:] [f]ailing to put the vehicle in park.”

In summation, the prosecutor argued:

“Count 7 is the [section] 148 [violation], resisting Officer Billdt’s command to put the car in park. [Defendant] resisted and delayed the command to park the car.... You heard Officer Billdt testify. He stood there. He yelled at [defendant] to put it in park and [defendant] refused to do anything. [Defendant] just sat there. And that’s resisting and delaying Officer Billdt’s commands.”

b. *Analysis*

“Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.” (*People v. Jones, supra*, 51 Cal.3d at p. 317.) “Under modern pleading procedures, notice of the particular circumstances of an alleged crime is provided by the evidence presented to the committing magistrate at the preliminary examination” (*People v. Jennings* (1991) 53 Cal.3d 334, 358.) “[A] preliminary hearing transcript affording notice of the time, place[,] and circumstances of charged offenses “is the touchstone of due process notice to a defendant.” [Citation.]” (*People v. Pitts* (1990) 223 Cal.App.3d 606, 908, superseded by statute on another ground as stated in *People v. Levesque* (1995) 35 Cal.App.4th 530, 536-537.) “Where ... the particulars are *not* shown by the preliminary hearing transcript, the defendant is *not* on notice in such a way that he has the opportunity to prepare for a meaningful defense.” (*People v. Pitts, supra*, at p. 905.) “Thus, it is the rule that ‘a defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing’ [Citations.]” (*People v. Graff* (2009) 170 Cal.App.4th 345, 360; accord, *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1531.)

We find—and the Attorney General concedes—that the evidence on which the prosecutor predicated count 7 was not offered at the preliminary hearing. As such, count 7 should have been dismissed.

DISPOSITION

The judgment is modified to dismiss count 7 and, as so modified, is affirmed. The trial court is directed to amend the abstract of judgment accordingly and to transmit certified copies thereof to the appropriate authorities.

DETJEN, J.

WE CONCUR

POOCHIGIAN, Acting P.J.

PEÑA, J.