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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN RICARDO SALAZAR,

Defendant and Appellant.

G045549

(Super. Ct. No. 09CF1886)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed in part, reversed in part, and remanded.

Gregory Marshall, 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, Assistant Attorney General, Melissa Mandel and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Jonathan Ricardo Salazar guilty of conspiracy to commit aggravated assault (count 4), assault with a deadly weapon (count 5), robbery (count 6), assault by means of force likely to commit great bodily injury (count 7), conspiracy to commit vandalism (count 8), gang-related vandalism (count 9), active participation in a criminal street gang (counts 10 and 13), first degree burglary (count 11), and gang-related vandalism (count 12). The jury also found true great bodily injury enhancements and gang enhancements related to the above counts. It found Salazar not guilty of commercial burglary (count 2), the prosecution withdrew count 1, and the court dismissed count 3 (which were charges relating to the burglary).

On appeal, Salazar challenges the sufficiency of the evidence for the robbery and burglary convictions (counts 6 and 11), and he claims there was instructional error regarding count 6. We find these contentions lack merit and we affirm the convictions. However, we conclude there was error with respect to sentencing and the judgment must be reversed in part and remanded for resentencing.

I

Salazar is an active participant in the “Orange County Criminals” (also known as OCC or Criminals) street gang. He goes by the gang moniker “Cougar.” OCC and Orange Varrio Cypress (OVC) gang are rivals.

July 14, 2009—Relating to Counts 4, 5, 6, 7, 8, 9 & 10

At 10:00 p.m., Ariana Pena and Oscar Arriola walked from Arriola’s residence to Pena’s residence in the City of Orange. A group of three to five men exited their vehicle and approached Pena and Arriola. Pena recalled she saw the men walk from the direction where she earlier saw a gold four-door car make a U-turn and stop.

One of the men demanded Pena hand over her purse. Pena refused, and the man replied, “Give me your purse or else I am going to get it from you.” As the group of men walked closer, Pena could hear spray cans rattle in their pockets. They also “threw up” the hand sign “C” proclaiming their affiliation with the OCC street gang.

One of the men asked Arriola where he was from and specifically if he was from the OVC gang. Arriola responded, "Please don't disrespect. I am with my lady right now." The man replied, "I don't give a fuck." Then, one of the men hit Arriola in the face. The others joined in kicking and punching Arriola, and one of the attackers yelled out, "Criminals." During the assault, Arriola fell to the ground, where the men continued to punch and kick him.

When Pena saw one of the men holding a knife start towards Arriola, she entered the fray. First, she grabbed the knife-wielding man's shirt and pulled him towards her until his shirt ripped. Pena recalled she dropped her purse as she continued her efforts to get the men away from Arriola. She later testified her purse was taken when "they were on [Arriola]. And I don't remember who grabbed it. All I remember was trying to get the guys away from him." After the attack, most of the men returned to the vehicle and drove away. Pena saw that one of the men stayed at his lookout position on the nearby street corner, as he had during the assault. Pena's purse was no longer where she had set it down during the fight.

Arriola suffered various injuries, including cuts to his face that required stitches, and a long knife cut to his arm. He did not want to report the incident to the police. He told police he thought things could get worse for him if he went to the police. Arriola did not want to view a photographic line up of suspects because he feared he would be labeled a snitch. However, Pena was willing to testify about the incident. At trial Pena recalled she was afraid "[o]f getting stabbed myself or [Arriola getting] stabbed. I mean[] my boyfriend. I care about him. I was just scared." Pena also reiterated the story she told the police: She confirmed the man asked for her purse several times before the fighting began, she was afraid of the men, and she did not want to give them her purse.

That same evening, a City of Orange police officer, Brian Chambers, responded to a citizen's report of three men spraying graffiti on city property. The

citizen, who wished to remain anonymous due to fear of gang retaliation, provided Chambers with a license plate number. Chambers saw the graffiti was freshly painted and depicted three gang monikers (“Cougar,” “Slim,” and “Panther”) and the words “OCC” and “Criminals.” Later that night, Chambers stopped and searched a gold Buick driving nearby that had a similar license number to the one the citizen provided. There were cans of black spray paint under the front passenger seat and in the back seat. Salazar was seated in the front passenger seat, and after officers asked him to exit the vehicle, Salazar fled. Officers failed to apprehend Salazar that day.

July 26, 2009—Relating to Counts 11, 12 & 13

Jeffrey Estevez lived in an upstairs apartment (Unit 6) in an apartment complex on Wilson Street with his two brothers, Rodrigo Estevez and Victor Estevez¹. Jeffrey and Victor were affiliated with the OVC gang. Jeffrey saw Salazar outside his window, and Jeffrey began taunting him with a derogatory term for OCC. Salazar yelled “Criminals,” waved the OCC gang hand sign, and challenged Jeffrey to fight.

Rodrigo later told the police he heard Salazar challenging his little brother to a fight and yell he was going to come into their house. Salazar, clad in a burgundy T-shirt over a tank top, came up the stairs, punched a hole through the window with his fist, and entered the Estevez apartment. Salazar acknowledged giving Jeffrey a “couple of socks” once he got inside the apartment. Victor corroborated these events, and added that Rodrigo helped push Salazar back out through the window and out of the apartment.

When officers arrived at the apartment they saw a broken window and shards of glass in the hallway next to the apartment. They also discovered blood on the window and the staircase leading down from the unit. They found a burgundy T-shirt and white tank top nearby.

¹ We refer to the Estevez brothers by their first names for ease of reading and to avoid confusion, not out of disrespect. (*In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1.)

July 29, 2009—Relating to Counts 1, 2, & 3

Salazar, accompanied by two OCC gang members, entered a Sears store in Tustin. One of the men stole a pair of pants from Sears by concealing the pants under his own pants. The events were caught on tape.

Salazar's Interview

On July 30, 2009, police officer Miguel Cuenca interviewed Salazar and the recording of their conversation was played for the jury. Salazar admitted being a member of OCC and being involved in the tagging incident, Arriola's assault, and Jeffrey's assault. He admitted he and his fellow gang members were looking for OVC gang members to "hit up." As for the assault against Arriola, Salazar admitted hitting and punching Arriola. He heard Pena yelling at them and trying to intervene. He denied knowing anything about Pena's purse.

Salazar recounted he was very angry with Jeffrey and described the victim as a "little wanna be" who consistently disrespected Salazar. He explained this was not the first time Jeffrey had taunted him from inside the apartment. When Jeffrey called him "nalga," a derogatory term OVC members use to call OCC members, Salazar admitted this "pumped [him] more" and it was time to give Jeffrey a warning. Salazar therefore challenged Jeffrey to a fight and threatened to come upstairs to his apartment and "do something about it." Salazar stated Jeffrey had "pushed him to the limit" so he "smashed the window and . . . just broke in there and . . . gave [Jeffrey] a couple of socks." Salazar explained he quickly left the apartment because he heard his mother calling for him.

The Trial

At trial, a gang expert testified about the nature of the crimes and Salazar's involvement in the OCC gang. Several of the victims also testified, but some of them recanted their statements previously given to police and claimed to no longer remember the offenses. The prosecution built its case-in-chief primarily upon the police officers' recollections of the victims' statements.

The jury found Salazar guilty of counts 3 through 13 and not guilty of count 2. It found true the great bodily injury enhancements on counts 5 and 7, and the gang enhancements on counts 4, 6, 7, 8, 9, 11 and 12. The prosecution withdrew count 1 (relating to the Sears theft), which caused the court to dismiss count 3. Salazar received a total prison sentence of 18 years and 4 months.

DISCUSSION

1. Sufficiency of the Evidence to Support the Pena Robbery Conviction

Salazar contends his conviction for robbery must be reversed because there was insufficient evidence the taking was accomplished by force or fear. Specifically, he asserts Pena was a victim of only a theft because her purse was not directly taken via force or fear. As will be shown, there is sufficient evidence Pena felt fear during the taking.

Sufficiency of the evidence is reviewed by examining the entire record in the light most favorable to the prosecution. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128 (*Kipp*)). The evidence must be “reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*Ibid.*)

Robbery is the felonious taking of personal property in the possession of another, from his or her immediate presence, against his or her will, and accomplished by means of force or fear. (Pen. Code, § 211.)² Theft, however, does not require force, threats of violence, or the victim’s presence. (§ 484, subd. (a).) Thus, evidence of either force or fear elevates a taking from a theft to a robbery.

Section 212 provides, “The fear mentioned in section 211 may be 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

² All further statutory references are to the Penal Code.

unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.” And “[a]lthough the victim need not explicitly testify that he or she was afraid in order to show the use of fear to facilitate the taking [citation], there must be evidence from which it can be inferred that the victim was in fact afraid, and that such fear allowed the crime to be accomplished.” (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709, fn. 2 [fear did not facilitate the perpetrator’s initial taking].) “Further, the requisite force or fear need not occur at the time of the initial taking. The use of force or fear to escape or otherwise retain even temporary possession of the property constitutes robbery.” (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771-772 (*Flynn*).)

Salazar contends Pena did not feel fear during the taking because the gang’s threats and assault were directed to Arriola. We find the *Flynn* case instructive. In that case a five-foot, four-inch female victim was surrounded by six male gang members while walking alone at night. (*Flynn, supra*, 77 Cal.App.4th at p. 770.) Defendant grabbed a bag hanging on the victim’s left shoulder, causing her to be pulled backwards. After defendant took the bag, he removed a gun and some money and showed them to the other gang members. The victim said she felt angry, shocked, and afraid of being attacked. Defendant argued he did not create the fear expressed by the victim and could not be found guilty of robbery. The appellate court disagreed, holding that although defendant made no verbal threats and did nothing to instill fear prior to the taking, the victim’s fearful perception of the circumstances was reasonable. (*Id.* at p. 773.) It explained there was sufficient evidence of robbery because, “defendant used fear to accomplish the robbery just as surely as if he had verbalized the threats inherent in the surrounding circumstances. Defendant’s argument concerning his passivity and all the things he did not do ignores the fact that his snatching of the bag, not to mention his subsequent display of the stolen weapon, immediately changed what might have been an innocuous set of circumstances into one of significant fear for the victim. To the extent

that it was the victim's perceptions of her circumstances that directly caused the fear, those perceptions were reasonable and a reasonable jury could have found that defendant took advantage of them in a calculated fashion." (*Ibid.*)

Stated another way, the *Flynn* case highlights that intimidating circumstances, without "specific words or actions designed to frighten," can be sufficient to satisfy the required fear element for a robbery. (*Flynn, supra*, 77 Cal.App.4th at p. 772.) In the case before us, the circumstances surrounding the taking of Pena's purse were certainly intimidating and frightening for Pena. Like the victim in *Flynn*, Pena was outnumbered and confronted by a group of violent and armed gang members. It is reasonable to conclude Pena felt fear, being faced with the possibility of injury to herself, having witnessed the terrible assault and injuries to Arriola. Her testimony at trial supports this conclusion: After seeing one gang member brandish a knife, Pena stated she was afraid "[o]f getting stabbed myself or [Arriola] to get stabbed." Pena set down her purse to enter the fray and protect her boyfriend. The circumstances and testimony shows she relinquished her property out of fear for her own safety and that of her boyfriend.

Salazar also contends there was no evidence Pena was overcome by fear because she voluntarily set down her purse to restrain the knife-wielding attacker. We disagree. As stated in *People v. Davison* (1995) 32 Cal.App.4th 206, 217, there are sufficient grounds for a robbery even if the victim gives chase or stands her ground because a victim may "experience[] emotions *in addition* to fear" In that case, defendant approached the victim at night while she withdrew money from an ATM. (*Id.* at pp. 209-210.) The victim immediately retreated 20 to 30 feet from the ATM. (*Id.* at p. 210.) The court reasoned, "The extent of the victim's fear 'do[es] not need to be extreme for purposes of constituting robbery. [Citations.]' [Citation.] On the record in this case, the jury could not have failed to find that [the victim] retreated from the ATM because [defendant's] conduct caused her to be afraid. [Defendant] bases his contrary

argument on evidence that ‘it just took a matter of seconds for the taking of the money to have occurred’ and that [the victim’s] ‘response was to yell obscenities [*sic*] at the men and chase after the men’ Although this evidence permits an inference that [the victim] experienced emotions *in addition* to fear, it does not alter our conclusion that the record overwhelmingly establishes that [the victim] stepped back from the ATM because [defendant’s] conduct induced fear in her.” (*Id.* at pp. 216-217.)

In this case, the fear Pena felt for her boyfriend’s immediate safety prompted a bold response. Her feelings of protectiveness and aggression were *in addition* to the fear she described feeling when her purse was first demanded and when the assailant brandished a knife. As acknowledged in the *Davison* case, a victim need not passively respond to a taking in order for it to be a robbery.

Alternatively, Salazar claims the gang violence was directed at Arriola and that any ensuing force or fear did not affect Pena. Not so. But for the knife and the threat of injury to her boyfriend, Pena would have retained her property. People “do not ordinarily give up their hard-earned cash to a stranger who threatens them with a gun, except for fear of bodily injury in the event of a refusal to do so.” (*People v. Borra* (1932) 123 Cal.App. 482, 485). For an unarmed victim, a knife engenders the same fear of bodily injury as a firearm. Pena was just a few feet away from her boyfriend as a gang member approached with a knife primed for attack. There was no reason to doubt her testimony she felt fear for herself, as well as Arriola, under these dire circumstances.

2. *No Instructional Error*

Salazar contends the trial court erred by not instructing the jury about theft and attempted robbery as lesser included offenses of robbery. A sua sponte duty to instruct on lesser included offenses arises when it is doubtful all elements of the charged offense were met and evidence justifying a conviction on the lesser included offense exists. (*People v. Hughes* (2002) 27 Cal.4th 287, 365.) Theft is a necessarily included offense of robbery because the greater statutory offense of robbery contains all the

elements of theft. (*Id.* at pp. 365-366.) If either the force or fear requirement for robbery was not proven, an instruction for theft would be required. (*People v. Webster* (1991) 54 Cal.3d 411, 443.) Attempted robbery is a lesser included offense of robbery. (*People v. Pham* (1993) 15 Cal.App.4th 61, 67.) Under the *Watson* test, the failure to instruct on a lesser included offense is harmless error and reversal is not required unless “it is reasonably probable the jury would have returned a different verdict absent the error” (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868, citing *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

Salazar’s argument regarding instructional error is based largely on his contention the evidence was insufficient to affirm the robbery conviction. As explained in more detail above, the circumstances of the taking, Pena’s testimony, and the presence of a deadly weapon all amply proved the fear element of robbery. Pena was confronted by three to five men while walking home with her boyfriend at night. The men demanded her purse and assaulted her boyfriend. Pena testified she felt afraid when the men attacked. One of the men brandished a knife during the assault. Pena testified she felt afraid for her own safety and that of her boyfriend upon seeing the knife. Based on such overwhelming evidence, a reasonable jury would not find the taking was not accomplished by fear. The element of fear was not in doubt. The trial court did not err in failing to instruct on theft or attempted robbery as lesser included offenses.

3. Sufficiency of the Evidence to Support the Estevez Burglary Conviction

Salazar claims there is no evidence he entered the Estevez dwelling with the specific intent to commit a felony and therefore we must reverse his conviction for first degree burglary. Specifically, Salazar asserts it was speculative to infer he entered the dwelling intending to commit assault with force likely to produce great bodily injury. He argues the evidence only proves he had the intent to commit a simple assault (a misdemeanor). We conclude this contention lacks merit. There was sufficient evidence of Salazar’s felonious intent necessary for first degree burglary.

First degree burglary requires unlawful entry into a residence “with intent to commit grand or petit larceny or any felony.” (§ 459.) Because Salazar did not commit grand or petit larceny his felonious intent is an issue. “[S]uch intent, as a mental fact, must usually be proved by circumstantial evidence. ‘[Such] intent must usually be inferred from all the facts and circumstances disclosed by the evidence, rarely being directly provable.’ [Citation.]” (*People v. Smith* (1978) 78 Cal.App.3d 698, 704.)

“Although in the typical case, the intent of the burglar is to commit theft (whether felony or misdemeanor), the relevant statute provides, and the decisional law establishes, that the intent to commit *any* felony will sustain a conviction of burglary. (§ 459; see, e.g., *People v. Hicks* (1993) 6 Cal.4th 784, 787-788 [intent to commit rape, sodomy and penetration by foreign object]; *People v. Goldsworthy* (1900) 130 Cal. 600, 602 [intent to commit arson]; . . . *People v. Schwab* (1955) 136 Cal.App.2d 280, 286 [intent to commit murder or felonious assault].)” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042, fn. 8.) As stated above, a claim of insufficient evidence is reviewed by this court using the substantial evidence test. (*Kipp, supra*, 26 Cal.4th at p. 1128.)

Salazar contends he intended to assault Jeffrey with minimal force because the evidence only shows a simple assault was committed. Indeed, Salazar admitted giving Jeffrey “a couple of socks.” We agree Salazar’s actual assault on Jeffrey was brief and did not reach the level of aggravated assault. However, actual great bodily injury was not necessary to prove Salazar’s felonious intent. Salazar’s completed offense is not at issue. The question is whether there are facts and circumstantial evidence Salazar *intended* to complete an aggravated assault upon entry into the residence.

Based on all the evidence presented, we conclude the jury could reasonably conclude Salazar intended to commit an aggravated assault. Salazar was extremely angry with Jeffrey. Before the assault, Jeffrey had a history of taunting Salazar with slurs against Salazar’s gang. On the day of this incident, Jeffrey called Salazar a derogatory name, which Salazar admitted “pushed [him] to the limit.” The verbal attack prompted

Salazar to challenge Jeffrey to a fight, and he threatened to come upstairs to “do something about it.” Salazar and Jeffrey belonged to rival gangs, and thus Salazar’s statement he intended to give Jeffrey a “warning” must be viewed in this context. The statements uttered by a member of a gang (whose primary activities include attempted murder and assaults with deadly weapons) demonstrate Salazar planned to violently retaliate against Jeffrey as a means of forcibly gaining respect for himself and the gang. He gained entry into the apartment by smashing a window. The jury could reasonably infer Salazar would issue a gang-type “warning” by aggressively assaulting Jeffrey in a manner most likely to achieve a greater status for the gang. That the actual assault was limited to a few punches is reasonably explained by the presence of Jeffrey’s two brothers who pushed him back out the window and/or Salazar’s claim to have been interrupted by Jeffrey’s mother.

It was not reasonable to conclude Salazar would injure himself by punching his fist through a pane of glass to give Jeffrey a few playful punches. Indeed, given the facts surrounding Salazar’s self-destructive method of entry, there is ample reason for the jury to infer Salazar had a violent temper and due to his high level of anger that day he fully intended to inflict an aggravated assault. Based on the entire record, we conclude there is substantial evidence to support the burglary conviction.

4. Sentencing Error

Salazar contends, and the Attorney General concedes, the trial court’s sentence on the burglary conviction (count 11) was erroneous and the case should be remanded for resentencing. Section 186.22, subdivisions (b)(1)(A) and (b)(1)(C) provides a defendant convicted of a felony with a gang enhancement is subject to different punishments depending on the severity of the felony. The court must add a consecutive 10-year term for violent felonies (as defined in § 677.5, subd. (c)). (§ 186.22, subd. (b)(1)(C).) First degree burglary qualifies for a violent felony only where it is charged and proved another person (other than an accomplice) was present

when the defendant burglarized the residence. (§ 667.5, subd. (c)(21). This fact was not charged or proved and therefore Salazar's conviction is not subject to the 10-year enhancement. However, as pointed out by the Attorney General, Salazar's other crimes are considered violent felonies within the meaning of section 677.5, subdivision (c). Because the trial court may decide to impose the enhancement on one of the other offenses, we remand the case for resentencing.

Salazar also maintains the trial court erred in imposing sentence on count 12 (vandalism for breaking the window to gain entrance to Jeffrey's apartment) because it was the same act that constituted the burglary in count 11. The Attorney General agrees the two crimes were subject to section 654 [bars multiple punishment for separate offenses arising out of a single occurrence and incident to one objective.] (see *People v. Lewis* (2008) 43 Cal.4th 415, 519.) "A trial court must impose sentence on every count but stay execution as necessary to implement section 654. [¶] . . . [¶] [T]he correct procedure is to impose sentence on each count and stay execution as necessary." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1472 (*Alford*).)

However, as correctly pointed out by the Attorney General, in this case the court stayed imposition of the sentence on count 12 (vandalism), although it cited a reason other than section 654. Thus, Salazar is mistaken in his assertion the sentence needs to be stayed. That the court gave a different reason makes no difference. We find no error.

5. Further Instructions on Remand

Finally, we note the court selected count 11 (burglary) as the principal term and imposed the middle term of four years. It imposed a consecutive 10-year term for the gang enhancement. On count 6 (robbery), the court imposed a consecutive term of one-third the middle term (one year), with a separate term of three years and four months for the gang enhancement (one-third of 10 years). It imposed and stayed the prison terms on counts 5, 7, and 8.

The Attorney General correctly points out the court did not impose a sentence on counts 4 (assault), 9 (gang-related vandalism), 10 (active participation in a criminal street gang), or 13 (active participation in a criminal street gang). The court stated it would not impose sentence due to section 654. As noted above, the court should have imposed a sentence on those counts and then stayed the terms. (*Alford, supra*, 180 Cal.App.4th at p. 1472.) On remand, we direct the court to resentence on these counts as well.

DISPOSITION

The sentence is reversed and the matter is remanded for resentencing consistent with this opinion. In all other respect, the judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

ARONSON, J.