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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.

JEREMY MATTHEW MITCHELL,

Defendant and Appellant.

G046858

(Super. Ct. No. 11HF2728)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed as modified.

Ann Bergen, 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, A. Natasha Cortina and Sean M. Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Jeremy Matthew Mitchell appeals from a judgment after a jury convicted him of aggravated assault and attempted second degree robbery. Mitchell argues insufficient evidence supports his conviction for attempted second degree robbery, the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of attempted theft, the court erred in failing to stay the sentence on his conviction for attempted second degree robbery, and the abstract of judgment must be corrected. Although we agree the sentence on his attempted robbery conviction must be stayed and the abstract of judgment must be corrected, none of his other contentions have merit. We affirm the judgment as modified.

FACTS

A Costa Mesa motel, the Regency Inn, was the home of Ricky.¹ Ricky's parents would arrive each week and pay the \$324 rent.² Gary Hallum was also an intermittent tenant of the motel, and on occasion would stay with Ricky.

One October morning at the motel, Hallum met with Ricky and his parents to sell Ricky a pair of steel toe boots. After Ricky's father inspected the boots, Ricky's mother gave Ricky \$60 (three \$20 bills) and Ricky gave the money to Hallum. Hallum sold the boots to Ricky at a steep discount; he thought the boots were worth \$200. Mitchell, who stood nearby, observed the transaction.

As Ricky returned to his room, Mitchell approached Hallum and stated, "make sure you stop by the room and kick Ricky down." Hallum understood this to mean Mitchell thought Hallum should give Ricky a portion of the transaction price. Hallum replied he did not intend to give Ricky any money because he could have sold the

¹ The record does not include Ricky's last name.

² The motel's day manager testified the motel was home to many homeless people who would rent a room for 28 days, move out for one day, and move back in for 28 days. At the time of the offenses here, Ricky had lived at the motel for about six months on that cycle. The manager explained this was to avoid the city's ordinance banning motel stays for longer than 28 days so residents could not claim city residency.

boots for \$125 and he already discounted the price. Mitchell lunged at Hallum and said, ““You don’t understand, old man. I’m not fooling around.”” Although Hallum thought Mitchell was joking because Ricky’s parents were sitting in their car watching, Hallum moved away from Mitchell.

Mitchell told Hallum “[he] wasn’t treating him with the respect he . . . deserved[.]” and to “move [his] ass over to the carport area.” Once inside the carport area, Mitchell told Hallum that he did not want to hear “any lip[.]” “he was running the show,” and the motel owners had hired him as a security guard. Mitchell pulled out a knife and told Hallum to keep moving. Mitchell repeatedly hit Hallum on the shoulder with the side of the knife blade. Mitchell said, ““It’s nothing to me at all for me to stick you.””

Mitchell continued to hit Hallum with the knife as he led him to a curb and told him to sit down and be quiet. Mitchell told Hallum to ““shut [his] old mouth”” and “get [his] ass up.” Mitchell lunged at Hallum and forced him backwards until Hallum had his back against a fence. Mitchell thrust at Hallum with the knife in his hand. Hallum was scared Mitchell was going to stab him as he missed Hallum by only one inch.

When two other men appeared on the scene, Mitchell became distracted and walked away. Hallum ran next door where he saw his friend James Gerke. After Hallum told Gerke what had happened, Gerke went to find Mitchell. When Gerke found Mitchell, he asked him, ““What are you doing hitting my friend with a knife?”” Mitchell pulled the knife from his waistband and waived it around. Mitchell said, ““This is my city. I own this place.”” He added, ““I will stab who I want to[.]”” Mitchell threw the knife.

The motel day manager heard the commotion and gave Gerke a plastic bag to recover the knife. She called 911. When the day manager encountered Mitchell, he told her the motel owners hired him as a security guard.

Officer Andres Sepulveda responded to the motel and spoke with Hallum, who was visibly distressed. Sepulveda took possession of the knife.

Officer Larry Fettis responded to the area and found Mitchell riding a bicycle. Fettis stopped Mitchell and told him that he matched the description of a person who was involved in a fight at a nearby motel. Mitchell replied, “He never went to that place, that there were too many drug dealers there and he just road by it.”

At an in-field lineup, Hallum and Gerke identified Mitchell as the perpetrator. Sepulveda transported Mitchell to jail. On the way, Mitchell said, “the other man had a knife and a stick.”

An amended information charged Mitchell with aggravated assault (Pen. Code, § 245, subd. (a)(1))³ (count 1), and attempted second degree robbery (§§ 664, subd. (a), 211, 212.5, subd. (c)) (count 2). The amended information also alleged Mitchell suffered two prior prison terms within the meaning of section 667.5, subdivision (b).

The jury convicted Mitchell of both offenses. The trial court sentenced Mitchell to five years in prison: three years on count 1 and two one-year terms on the prior prison term allegations. The court imposed a concurrent two-year term on count 2. The court explained it “[did not] feel there are [section] 654 issues because the elements of the crime are so different.” The court imposed a \$200 restitution fine (§ 1202.4) and a \$200 parole revocation fine (§ 1202.45). The minute order and the abstract of judgment, however, indicate those fines were both in the amount of \$240.

DISCUSSION

I. Attempted Robbery

Mitchell raises numerous contentions concerning his attempted robbery conviction. We will address each in turn.

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All further statutory references are to the Penal Code.

A. *Sufficiency of the Evidence*

Mitchell argues insufficient evidence supports his conviction for attempted robbery (he claims it was extortion if a crime at all) because there was no evidence he intended to take Hallum's property or that he used force or fear. We disagree.

““To determine the sufficiency of the evidence to support a conviction, an appellate court reviews 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 trier of fact could find the defendant guilty beyond a reasonable doubt.”” [Citations.] ““If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.] The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

“An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission. [Citations.] Under general attempt principles, commission of an element of the crime is not necessary. [Citation.] As such, neither a completed theft [citation] nor a completed assault [citation], is required for attempted robbery. [Citations.]” (*People v. Medina* (2007) 41 Cal.4th 685, 694-695.) “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.’ [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 24.)

1. *Taking*

“The taking element of robbery has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot.’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 852, overruled on other grounds in *Price v.*

Superior Court (2001) 25 Cal.4th 1046, 1069, fn. 13.) “Robbery does not necessarily entail the robber’s manual possession of the loot. It is sufficient if he acquired dominion over it, though the distance of movement is very small and the property is moved by a person acting under the robber’s control, including the victim. [Citations.]” (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 (*Martinez*).

Here, sufficient evidence supports the taking element. Analogizing to carjacking and possession of controlled substance cases, Mitchell contends the evidence must establish he exercised dominion and control over the money. Indeed, it must. And we conclude the evidence here demonstrated Mitchell attempted to exercise dominion over the money by demanding Hallum give the money to Ricky. (*Martinez, supra*, 274 Cal.App.2d at p. 174.) After Mitchell witnessed Ricky give Hallum \$60 in exchange for the boots and Ricky walked away, Mitchell approached Hallum and said “make sure” to give Ricky part of the money. When Hallum indicated he was not going to give Ricky any money, Mitchell lunged at Hallum and said he was “not fooling around.” Thus, based on this evidence the jury could reasonably conclude Mitchell had the specific intent to gain dominion and control over the money by ordering Hallum to give the money to Ricky.

2. *Force or Fear*

“When *actual* force is present in a robbery, at the very least it must be a quantum more than that which is needed merely to take the property from the person of the victim, and is a question of fact to be resolved by the jury taking into account the physical characteristics of the robber and the victim. [Citations.] The force need not be applied directly to the person of the victim. [Citation.] . . . [¶] Generally, ‘the force by means of which robbery may be committed is either actual or constructive. The former includes all violence inflicted directly on the persons robbed; the latter encompasses all . . . means by which the person robbed is put in fear sufficient to suspend the free exercise of . . . will or prevent resistance to the taking.’ [Citation.] This ‘constructive

force' means 'force, not actual or direct, exerted upon the person robbed, by operating upon [a] fear of injury' [Citation.] . . . [¶] As we have noted, 'force' is not an element of robbery independent of 'fear'; there is an equivalency between the two. "[T]he coercive effect of fear induced by threats . . . is in itself a form of force, so that either factor may normally be considered as attended by the other." [Citation.]” (*People v. Wright* (1996) 52 Cal.App.4th 203, 210-211.)

“The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for his property.’ [Citations.] It is not necessary that there be direct proof of fear; fear may be inferred from the circumstances in which the property is taken. [Citation.] [¶] If there is evidence from which fear may be inferred, the victim need not explicitly testify that he or she was afraid. [Citation.] Moreover, the jury may infer fear “‘from the circumstances despite even superficially contrary testimony of the victim.’” [Citations.] [¶] The requisite fear need not be the result of an express threat or the use of a weapon. [Citations.] Resistance by the victim is not a required element of robbery [citation], and the victim’s fear need not be extreme to constitute robbery [citation]. All that is necessary is that the record show “‘conduct, words, or circumstances reasonably calculated to produce fear’” [Citation.] [¶] Intimidation of the victim equates with fear. [Citation.] An unlawful demand can convey an implied threat of harm for failure to comply, thus supporting an inference of the requisite fear. [Citation.]” (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775.)

Here, sufficient evidence also supports the force or fear element. Although the evidence established that Hallum thought Mitchell was joking when Mitchell initially demanded Hallum give Ricky part of the money, Hallum’s demeanor quickly changed from one of disbelief to one of terror. The evidence demonstrated that after Mitchell demanded Hallum give Ricky money and ordered him to the carport area, Mitchell pulled out a knife and repeatedly hit Hallum with the blade. Mitchell led Hallum at knifepoint

first to a curb and then backed him against a fence while poking at him with the knife. Hallum testified that at this point he was afraid Mitchell was going to stab him. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1319 [fear necessary for robbery subjective in nature].) This was certainly evidence of force, although Mitchell's demand Hallum turn over the money was not temporally simultaneous with the brandishing of the knife. Based on the entire record, the jury could reasonably conclude Mitchell first threatened Hallum and then escalated the violence by using the knife with the specific intent to intimidate Hallum and exercise dominion and control over the money by demanding Hallum give money to Ricky. Therefore, sufficient evidence supports Mitchell's conviction for attempted robbery.

B. Lesser Included Offense-Attempted Theft

Mitchell contends the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of attempted theft. We disagree.

Theft is a lesser included offense of robbery. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1331.) “[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present.” (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) By contrast, “it has long been settled that the trial court need not, even if requested, instruct the jury on the existence and definition of a lesser and included offense if the evidence was such that the defendant, if guilty at all, was guilty of the greater offense. [Citations.]” (*People v. Kelly* (1990) 51 Cal.3d 931, 959.)

Mitchell's argument regarding the instructional error is based solely on his contention the evidence was insufficient to prove he used force or fear. As we explain above, the record includes sufficient evidence from which the jury could reasonably conclude Mitchell brandished the knife after Hallum failed to comply with Mitchell's demand to turn over the money to Ricky. Mitchell demanded Hallum give Ricky money. When Hallum did not comply with Mitchell's demand, Mitchell first lunged at him and

then led him to a more secluded area where he pulled out a knife and threatened to stab him. This was not a situation where Mitchell's intent to steal arose after the assault. To the contrary, Mitchell's exercise of dominion and control preceded his use of a weapon, and based on all the facts, the element of force or fear was not in doubt. Contrary to Mitchell's assertion otherwise, we conclude this was a situation where the evidence was such that if Mitchell was guilty, he was guilty of attempted robbery or nothing at all. Finally, Mitchell's federal constitutional rights were not implicated by the lack of an instruction on attempted theft. (*People v. Breverman* (1998) 19 Cal.4th 142, 165.)

C. Section 654

Mitchell asserts the trial court erred in failing to stay his sentence on count 2 pursuant to section 654. We agree.

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.” (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) The purpose of the statute is “to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose a sentence for only one offense--the one carrying the highest punishment.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) The protection of the statute also extends to cases in which a defendant engages in an indivisible course of conduct comprising different acts punishable under separate statutes. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Thus, “[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.’ [Citation.]” (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.)

Where an assault is committed to facilitate a robbery, section 654 may prohibit separately punishing a defendant for both offenses. (E.g., *People v. Miller* (1977) 18 Cal.3d 873, 886, overruled on other grounds in *People v. Oates* (2004) 32 Cal.4th 1048, 1067-1068, fn. 8; *People v. Ridley* (1965) 63 Cal.2d 671, 678; *People v. Flowers* (1982) 132 Cal.App.3d 584, 588-590; *People v. Medina* (1972) 26 Cal.App.3d 809, 823-824.) “A defendant’s criminal objective is ‘determined from all the circumstances and is primarily a question of fact for the trial court, whose findings will be upheld on appeal if there is any substantial evidence to support it.’ [Citation.]” (*People v. Braz* (1997) 57 Cal.App.4th 1, 10.) We view the evidence in a light most favorable to the court’s express or implied factual determinations and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

As we explain above, the assault was part of the robbery. When Hallum refused to comply with Mitchell’s demand to give Ricky money, Mitchell became agitated, lunged at Hallum, forced him into a secluded area, pulled out a knife, and ultimately pinned him against a fence at knifepoint. We conclude this evidence demonstrates both the offenses were incident to one objective—Hallum giving Ricky money. This conclusion is supported by the prosecutor’s closing argument. The prosecutor stated Mitchell bullied Hallum in an effort to take the money and the jury could infer Mitchell’s intent by what he did *after* Hallum failed to comply with Mitchell’s demand. Consequently, we disagree with the Attorney General’s assertion Mitchell harbored independent intents and objectives, first the intent to commit robbery and then the separate intent to commit aggravated assault, when committing the offenses. Thus, the trial court should have stayed the sentence on count 2 pursuant to section 654.

II. Abstract of Judgment

Mitchell argues the abstract of judgment incorrectly states the restitution and parole revocation fines were \$240 each. The Attorney General concedes the error.

Where there is a discrepancy between the oral pronouncement of judgment and the clerk's minute order, the oral pronouncement of judgment controls. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) We order the abstract of judgment be corrected to reflect the restitution and parole revocation fines were in the amount of \$200 each. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 [court of appeal may correct clerical error in abstract of judgment].)

DISPOSITION

We affirm the convictions but modify the judgment as follows: The two-year term imposed on count 2, attempted robbery, is ordered stayed pursuant to section 654. The clerk of the superior court is directed to prepare an amended abstract of judgment consistent with this opinion and forward it to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.