

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE FRANCISCO RODRIGUEZ,

Defendant and Appellant.

G047279

(Super. Ct. No. 11CF3455)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

*

*

*

An information charged Jose Francisco Rodriguez with second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))¹ and second degree burglary (§§ 459, 460, subd. (b)), and alleged he had six strike priors consistent with the “Three Strikes” law (§§ 667, subds. (d), (e)(2)(A) & 1170.12 subds. (b), (c)(2)(A)), two prior serious felony convictions (§ 667, subd. (a)(1)), and had served one prior prison term (§ 667.5, subd. (b)). The trial court dismissed five of the six strike priors before trial. (§ 1385.) A jury found Rodriguez guilty of both charged offenses, and Rodriguez admitted the truth of the prior conviction allegations. The trial court dismissed the remaining strike prior conviction (§ 1385) at sentencing and imposed a total term of 12 years, consisting of the two-year low term for the robbery (§ 213, subd. (a)(2)), plus five years for each prior serious felony conviction (§ 667, subd. (a)(1)).

Rodriguez appealed and we appointed counsel to represent him. Counsel filed a brief which set forth the facts of the case and the disposition. He did not argue against Rodriguez, but advised us he had not found any issues to argue on Rodriguez’s behalf. (*People v. Wende* (1979) 25 Cal.3d 436.) He suggested the following four issues to assist in our independent review: (1) the trial court erroneously gave CALCRIM No. 403 concerning the natural and probable consequences theory of aiding and abetting; (2) omitted an instruction on jury unanimity; (3) denied Rodriguez probation; and, (4) the evidence is insufficient to sustain the verdict.

Rodriguez was given 30 days to file written argument on his own behalf. That period has passed, and we have received no written communication from him. We examined the entire record to determine if any arguable issues were present, including those suggested by counsel, and found none. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442; *People v. Johnson* (1981) 123 Cal.App.3d 106, 111-112.) Therefore, we affirm the judgment.

¹ All further statutory references are to the Penal Code.

FACTS

One evening Rodriguez and an unidentified cohort entered a 7-Eleven store. Rodriguez was wearing a New York Yankees sweatshirt with a hood pulled over his head. Rodriguez and his cohort each went to the back of the store, picked up a 24-pack case of Corona beer, and left with the beer but without paying. As Rodriguez left the store, the handle of a mop held by the store clerk caught in the hood of his sweatshirt, but he pulled away without touching the clerk. When the cohort left the store, he pushed the clerk out of the way and there was a brief struggle. A surveillance video recorded these events and a Santa Ana police officer made photographs from the video. The photographs were later used to generate fliers. Patrick Morrissey positively identified Rodriguez from one of these fliers.

DISCUSSION

1. Natural and Probable Consequences Instruction

Rodriguez argues the natural and probable consequences theory does not apply to minor crimes such as petty theft, citing *People v. Prettyman* (1996) 14 Cal.4th 248 and *People v. Solis* (1993) 20 Cal.App.4th 264. However, neither *Prettyman* nor *Solis* offer any support for the argument that the natural and probable consequences doctrine does not apply to petty theft as distinguished from more serious crimes.

2. Unanimity Instruction

Rodriguez claims the court should have given a unanimity instruction. In the context of a conviction under the natural and probable consequences doctrine, “the jury need not unanimously agree on the particular target crime the defendant aided and abetted.” (*People v. Prettyman, supra*, 14 Cal.4th at pp. 267-268.)

3. Denial of Probation

Rodriguez contends the trial court abused its discretion by denying probation. However, “[t]he grant or denial of probation is within the trial court’s

discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]” (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) Here, the court carefully considered probation, but opted for the imposition of the minimum state prison sentence. This disposition is consistent with the general objectives in sentencing and the criteria affecting probation set out in California Rules of Court, rules 4.410 and 4.414(b), particularly in light of the fact that the court dismissed six prior convictions, any two of which could have resulted in a mandatory state prison sentence of 25 years to life.

4. *Sufficiency of Evidence – Robbery*

“Our role in considering an insufficiency of the evidence claim is quite limited. . . . [W]e endeavor to determine whether ““any rational trier of fact”” could have been persuaded of the defendant’s guilt. [Citations.]” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) A defendant who takes merchandise from a store and, when confronted by a store employee, uses force or fear to prevent the store employee from retaking property and to facilitate escape is guilty of robbery. (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.) Here, the surveillance video alone (People’s exhibit No. 22) is sufficient to support the robbery conviction.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O’LEARY, P. J.

ARONSON, J.