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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JESUS CULEBRO, Defendant and Appellant.	B229396 (Los Angeles County Super. Ct. No. GA077460)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Affirmed.

Law Offices of Allmeroth, Garner & Fly and Jonathan P. Fly for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Paul M. Roadarmel, Jr. and Dana M. Ali, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Jesus Culebro appeals from his robbery conviction. He contends that the trial court violated his constitutional right to confrontation by excluding impeachment testimony during cross-examination, and that the court erroneously refused two of his special jury instructions. We reject defendant's contentions, find no error, and affirm the judgment.

BACKGROUND

1. Procedural background

Defendant and codefendant Jose Javier Madrigal (Madrigal)[1] were charged in count 1 with the first degree robbery of Jonathan Ramirez (Ramirez), in violation of Penal Code section 211.[2] The information specially alleged as to count 1 that in the commission and attempted commission of the robbery, defendant personally used a deadly and dangerous weapon, a knife, within the meaning of section 12022, subdivision (b)(1). Count 2 charged defendant and Madrigal with the second degree robbery of Michael Garcia (Garcia) in violation of section 211, and count 3 charged them with the attempted second degree robbery of George Delgado (Delgado) in violation of sections 664/211. Count 4 alleged assault with a deadly weapon against Ramirez in violation of section 245, subdivision (a)(1), and count 5 alleged assault with a deadly weapon against Garcia.

The jury convicted defendant in count 1 of the lesser offense of second degree robbery and found not true the special allegation that he had personally used a knife in connection with the offense. The jury found defendant not guilty of assaulting Garcia with a knife, as charged in count 5, and was deadlocked as to counts 2, 3, and 4 to which the court declared a mistrial.

At the sentencing hearing defendant agreed to plead no contest to a new charge of grand theft (count 6) from victim Garcia, in violation of section 487, subdivision (c), in

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1 Madrigal is not a party to this appeal.

2 All further statutory references are to the Penal Code, unless otherwise indicated.

exchange for the dismissal of counts 2, 3, and 4, with a sentence of eight months to run consecutively to the term imposed on count 1. The trial court dismissed counts 2, 3, and 4, and sentenced defendant to the midterm of three years, plus eight months in prison. The trial court awarded presentence credits totaling 534 days, imposed mandatory fines and fees, awarded $20 in restitution, and ordered defendant to provide a DNA sample. Defendant filed a timely notice of appeal from the judgment.

2. Prosecution Evidence

On July 24, 2009, at approximately 11:00 p.m., Ramirez left his place of employment, Fresh and Easy Neighborhood Market in Alhambra, and walked to the bank across the street to use the ATM, where he withdrew $20. At the bank Ramirez noticed a black car with tinted windows and custom rims parked close to the ATM, and although it was dark, Ramirez could see at least two people inside. As Ramirez waited at a red light to cross back to the market, he saw the black car traveling in the same direction on Raymond Avenue. As Ramirez crossed the street while texting on his cell phone, he noticed that two men were also crossing. Ramirez identified the two men in court as defendant and Madrigal.

Defendant and Madrigal approached Ramirez in the market parking lot. As defendant displayed a knife, both defendant and Madrigal told Ramirez to give them his "stuff." Ramirez testified that while defendant pressed the knife against Ramirez's stomach, Madrigal searched Ramirez's pockets. Either defendant or Madrigal took Ramirez's cell phone from his hand, but then tossed it back to him. Ramirez felt Madrigal remove from his pocket the pink homemade wallet that contained his identification, credit card, and ATM card. Defendant and Madrigal walked away while Ramirez went into the market and called 911. When Ramirez checked his pockets, his pocket knife and wallet were missing and he could not find the $20 he had withdrawn from the ATM.

A few minutes later, defendant and Madrigal approached Delgado and Garcia who were walking nearby. Madrigal displayed a pocket knife, held Garcia by the shoulder, and said, "Give me your stuff." Madrigal took Garcia's gray backpack from him and

jogged away with defendant. Delgado and Garcia then followed defendant and Madrigal while Delgado called 911. Delgado observed defendant and Madrigal enter a dark green Mitsubishi automobile and drive away. About one minute later, Delgado saw a police car following the Mitsubishi, lights flashing.

Alhambra Police Officer Dany Fuentes soon stopped Madrigal's car, which he described as a gray Mitsubishi Galant with chrome rims. Officer D. Fuentes detained defendant and Madrigal along with their three female companions. The detainees were searched. Garcia's backpack and Ramirez's pocket knife were found in the car. Inside the backpack the officers found a blue bag containing a substance resembling marijuana, along with a scale and plastic bags, among other things. A dagger and Ramirez's pink wallet were found in Madrigal's pocket. No $20 bill was found. Police Officer Andrea Fuentes transported each of the victims separately to where defendant and Madrigal had been detained. The victims identified defendant and Madrigal as the robbers.

3. Defense Evidence

Madrigal testified that he, defendant, Madrigal's wife and her friends were on their way to a party and stopped at the Fresh and Easy Market to use a restroom. Madrigal and defendant approached Ramirez to borrow his cell phone. Ramirez refused and while Ramirez was using it to compose text messages, Madrigal "just grabbed it" from Ramirez's hand, using "slight force." Madrigal claimed that he returned the telephone because he thought a call was incoming. Without answering the call Ramirez ran away. When Ramirez was about 35 feet away his wallet fell out of his pocket. Madrigal retrieved it, but was unable to return it because Ramirez was by then out of sight. Madrigal kept the wallet to show his wife because he was amused that it was pink.

Madrigal testified further that after leaving the Fresh and Easy Market he parked two blocks away to discuss directions with his wife. When she began arguing with her friends, he and defendant left them in the car and walked toward a nearby 7-Eleven store. It was then that they encountered Delgado and Garcia who engaged them in conversation and offered to sell them marijuana. When Garcia opened his backpack and removed some marijuana Madrigal thought he saw a gun so he grabbed the backpack and ran with

defendant back to the car. Madrigal claimed that he took the backpack to protect himself and ran just to escape Garcia.

No other defense testimony was presented, but the parties entered the following stipulations:

> 1. "[O]n September 10th 2009, at a preliminary hearing, Jonathan Ramirez did not testify that a knife was shoved and pressed against his stomach but also that he was never asked how the knife was used and pressed against him"; and
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> 2. "[O]n July 29th, 2009, Detective Seki spoke with Mr. Ramirez and Mr. Ramirez did not tell Detective Seki that a knife was shoved and pressed against his stomach; what he did tell Detective Seki about the knife was that [defendant] had his right hand under the front of his shirt then brought his hand out from under his shirt and he could see that [defendant] was holding a knife with an exposed blade."

DISCUSSION

I. Limitation on cross-examination

Defendant contends that the trial court erroneously excluded a line of cross-examination intended to impeach Ramirez's testimony by exposing his misconduct during the preliminary hearing. Ramirez's preliminary hearing testimony was interrupted by a lunch recess. Before Ramirez left the witness stand the court admonished him not to discuss the case with anyone during the break. Back on the stand after lunch Ramirez admitted that he had spoken to the other alleged victims about the case. Ramirez testified, "It really was not a big discussion." He estimated that it had lasted less than 10 minutes.

At trial, Madrigal's counsel attempted to question Ramirez with regard to the incident in order to show that Ramirez had violated a court order. The trial court sustained the prosecutor's relevance objection. Now defendant contends that the trial court's ruling violated his constitutional rights to confrontation and due process.

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to

expose to the jury the facts from which jurors . . . could *appropriately* draw inferences relating to the reliability of the witness.' [Citation.]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, italics added, quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318.)

"It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . '[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]" (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679.) Thus, the admission of repetitive, irrelevant, or marginally relevant evidence is not mandated by the Constitution. (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690.)

Ramirez disobeyed the magistrate's order not to discuss the case during the lunch hour. *Willful* disobedience of a court order is a misdemeanor. (§ 166, subd. (a)(5).) "[I]f past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion . . . ." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) However, "the admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude." (*Id*. at p. 296, fn. omitted.) Defendant made no attempt at trial and makes no attempt here to show or even argue that misdemeanor contempt is a crime of moral turpitude. In any event, where there is no evidence that the disobedience was willful the trial court does not abuse its discretion in excluding conduct that *might* be shown to be misdemeanor contempt. (See *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1408-1409.) We conclude that there was neither constitutional error nor an abuse of discretion.

Moreover, curtailment of impeachment is harmless when there is ample other evidence admitted for that purpose. (*People v. Mincey* (1992) 2 Cal.4th 408, 463-464.) As defendant himself points out, cross-examination brought out many inconsistencies in Ramirez's testimony. When Ramirez called 911 he did not report that anyone had threatened him with a knife. Nor did he tell Officer Fuentes about the knife when she took his report. Ramirez testified on direct examination that he could feel his wallet and pocket knife being removed from his pockets, but on cross-examination, he stated that he did not realize his knife was gone until after he reentered the store and checked his pockets. Ramirez testified that Madrigal searched his pockets while defendant held the knife; later he could not remember which one searched him and took his property. Ramirez testified that he did not see defendant and Madrigal until he had crossed the street. He also stated that they crossed the street at the same time.

In summation, defense counsel argued these inconsistencies to attack Ramirez's credibility, apparently with some success, as the jury did not find true the allegation that defendant personally used a knife in connection with the robbery. Thus, had the trial court erred in excluding the impeachment attempt, defendant was not harmed by it. (See *People v. Mincey*, *supra*, 2 Cal.4th at pp. 463-464.)

II. Defendant's special jury instructions

Defendant contends that the trial court erred in refusing two requested jury instructions. The first special instruction read: "In order to find that the element of fear is proven, the prosecution must prove that the victim was *in fact afraid*."[3] The second instruction read: "The force required for robbery must be more than the incidental touching necessary to take the property."

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[3] The phrase, "*in fact afraid*" is italicized in the original instruction submitted by defendant.

The trial court instructed the jury with CALCRIM No. 1600.[4] Noting that the CALCRIM instruction adequately defined the elements of robbery, the court refused the special instructions. Defendant argues that the special instructions were necessary because CALCRIM No. 1600 did not inform the jury that the victim must actually be afraid and because it did not explain that the force used must be more than that necessary to accomplish the taking.

Nearly identical arguments were rejected in *People v. Anderson* (2007) 152 Cal.App.4th 919. There, the appellate court rejected the defendant's assertion that the trial court was required to instruct the jury on such aspects of the force and fear elements, explaining: "'The terms "force" and "fear" as used in the definition of the crime of robbery have no technical meaning peculiar to the law and must be presumed to be within the understanding of jurors.' [Citations.]" (*Id*. at p. 946, quoting *People v. Anderson* (1966) 64 Cal.2d 633, 640.) We agree and conclude that CALCRIM No. 1600 adequately instructed the jury on the elements of force and fear.

Moreover, the italicized phrase, "*in fact afraid*," renders defendant's fear instruction argumentative and unless clarified, the instruction could mislead the jury to

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[4] The portions of CALCRIM No. 1600 relating to force and fear as read by the trial court were the following: "To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant took property that was not his own; two, the property was taken from another person's possession and immediate presence; three, the property was taken against that person's will; four, the defendant used force or fear to take the property or to prevent the person from resisting; and five, when the defendant used force or fear to take the property, he intended to deprive the owner of it permanently. The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear then he did not commit robbery. . . . Fear as used here is fear of injury to the person himself or immediate injury to someone else present during the incident or to that person's property. Property is within a person's immediate presence if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear. An act is done against a person's will if that person does not consent to the act. In order to consent, a person must act freely and voluntarily and know the nature of the act."

conclude incorrectly that the victim's fear, or the fact he acted in fear, must be proven by direct evidence although fear may be inferred from the circumstances. (*People v. Iniguez* (1994) 7 Cal.4th 847, 857.) Evidence of actual fear is unnecessary "as fear may be presumed where there is just cause for it," even when the victim testifies that he was not in fear. (*Ibid*.) We conclude that the trial court properly refused the fear instruction as it was argumentative and potentially confusing. (See *People v. Moon* (2005) 37 Cal.4th 1, 30.)

Defendant also contends that because an instruction on assault was read just before CALCRIM No. 1600, the jury might have confused the force necessary to establish robbery with the force necessary to prove assault. In fact, the trial court did not instruct that force was necessary to prove assault. The court read CALCRIM No. 915, which instructed the jury, among other elements, that the People were required to prove that the "defendant did an act by its nature that would directly and probably result in the application of force." The court defined force for purposes of assault as "to touch in a harmful or offensive manner," and it instructed that "[t]he slightest touching can be enough if it is done in a rude or angry way."

To the extent that defendant suggests that a "slight touching" would always be insufficient to constitute the force necessary to accomplish a robbery, and that merely taking property from the victim's pockets, without shoving or pushing, cannot constitute force as a matter of law, we disagree. The degree of force utilized to commit a robbery is immaterial, and even a light "tap" on the shoulder of a robbery victim to cause her to move out of the way has been held sufficient. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved on another point in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 2; see also *People v. Jones* (1992) 2 Cal.App.4th 867, 871.) Force need not be substantial, so long as it "facilitated the act rather than being merely incidental to the act." (*People v. Bolander* (1994) 23 Cal.App.4th 155, 163-164.)

Defendant suggests that without a clarifying instruction, CALCRIM No. 1600 implied that no more force that a pickpocket would use would be sufficient for robbery. Defendant's analogy is inapt. Picking the pocket of an unsuspecting and unresisting

victim is not forcible because touching the victim's pocket bears no relation to overcoming the victim's will. (See *People v. Kelly* (1990) 220 Cal.App.3d 1358, 1369.) CALCRIM No. 1600 makes clear that more was required than an incidental touching, by instructing that to find robbery, the jury must find that the property was taken against the victim's will, and that force was used to prevent the person from resisting. Moreover, unless clarified, instructing that force must be more than the incidental touching necessary to take the property would suggest, as defendant argues here, that the law requires a minimum degree of force, when it does not. (See *People v. Garcia*, *supra*, 45 Cal.App.4th at p. 1246.) "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) As the record does not affirmatively demonstrate otherwise, we further presume that the jurors were able to correlate the instructions and that upon doing so, they followed them. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 851.) Furthermore, the trial court properly refused the force instruction, as it was potentially confusing. (See *People v. Moon*, *supra*, 37 Cal.4th at p. 30.)

III. No cumulative prejudice

Defendant contends that each assigned error was prejudicial, and considered together, the errors resulted in an unfair trial requiring reversal. Because we have rejected each of defendant's claims of error on the merits we must also reject defendant's claims of individual and cumulative prejudicial effect. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316.)

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD