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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY LYNN KILBOURN,

Defendant and Appellant.

B271746

(Los Angeles County
Super. Ct. No. PA083282)

APPEAL from a judgment of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed.

Morgan H. Daly, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gary Lynn Kilbourn robbed a small bank. There were only three tellers there: Jessica Shields, Courtney Gibbs, and Chanee Pangan. The jury convicted Kilbourn of robbing Shields and Gibbs, and of *attempting* to rob Pangan, who unlocked her cash drawer and was preparing to give Kilbourne her money when Kilbourn took the cash from the other two tellers and fled. Kilbourn thus suffered three convictions: two for second degree robbery (Pen. Code, § 211) and one for attempted second degree robbery. (*Id.*, §§ 211, 664.) (All statutory references are to the Penal Code.) Kilbourn does not dispute his two robbery convictions. He challenges only the attempted robbery conviction. He contends we should reverse for insufficient evidence. We affirm.

FACTS

We summarize the evidence in the light most favorable to the prevailing party at trial.

The bank Kilbourn robbed was inside a grocery store. This bank was very small. There were no security guards. No barrier separated the tellers from the public. The only thing between the tellers and the public was a counter.

Shields is five feet four inches tall. She was at the middle teller station when she saw a disheveled-looking Kilbourn come into the bank. Kilbourn gave Shields a robbery note with one hand. Kilbourn hid his other hand. Kilbourn told Shields, "Give me all the cash that you have. No alarms and no dye packs." Kilbourn spoke aggressively. His words were very rushed. He sounded intoxicated. He said, "Hurry up. I don't want any

problems.” Shields was “petrified.” She opened her cash drawer and got about \$850.

Kilbourn went to Gibbs, who is five feet six. Gibbs was two or three feet away from Shields. Kilbourn said to Gibbs, “Hurry up. You too. Give me your cash.” As the robbery progressed, Kilbourn’s tone became more aggressive: louder and more angry. Gibbs was scared. She scrambled to get the cash from her drawer. Gibbs gave Kilbourn \$1430 because she was afraid of what Kilbourn might do.

Pangan is five feet seven. Pangan had seen Kilbourn rushing towards the bank in a hurry. Pangan was about four feet from Shields when Pangan heard Kilbourn yell, “I’m fucking serious.” Pangan thought Kilbourn shouted these words at her. Pangan and Kilbourn made eye contact. Pangan saw Shields and Gibbs holding their hands in the air. Pangan went to her cash register because she realized what was going on.

At this point, Pangan’s fear slowed the robbery. Pangan by now was “[p]retty terrified.” Pangan kept three to eight keys attached to her belt loop. As she walked to her cash drawer, Pangan fumbled with her keys, trying to find the cash drawer key. Pangan finally found the right key and unlocked her cash drawer. She opened her cash register to give Kilbourn her cash and simultaneously triggered the silent alarm.

As Pangan unlocked her cash drawer, Kilbourn said, “Hurry. Quickly. It’s not a joke.” Shields and Gibbs had already been in the process of putting their money out onto the counter. Kilbourn said, “Give me the note.” As Pangan opened her cash drawer, before she could touch the cash, Kilbourn leaned over the counter, grabbed all the cash, and took off. Kilbourn left before Pangan touched the money in her open cash drawer.

After Kilbourn left, Shields and Gibbs were terrified. They grabbed each other and started crying.

DISCUSSION

Kilbourn challenges his conviction for attempted robbery of Pangan on the ground of insufficient evidence.

Robbery is the taking of personal property in the possession of others from their person or immediate presence, against will, accomplished by means of force or fear. (§ 211.)

The crime of attempt occurs when there is a specific intent to commit a crime and a direct but ineffectual act done towards its commission. (§ 21a.) An attempt connotes the intent to accomplish its object, both in law and in ordinary language. The required act must be more than mere preparation. It must show Kilbourn was putting his plan into action. (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764.) That act need not, however, be the last or ultimate step in the commission of the crime. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.) If Kilbourn clearly showed his intent to commit robbery, doing an act toward the commission of robbery can suffice, even though that same act would be insufficient if the intent is not as clearly shown. (*People v. Bonner, supra*, 80 Cal.App.4th at p. 764.)

Kilbourn argues the evidence was insufficient to establish either his specific intent or a direct act to rob Pangan. In evaluating this claim, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The record must contain reasonable and credible evidence such that a reasonable trier of fact could find Kilbourn guilty beyond a

reasonable doubt. We review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. Testimony that is subject to justifiable suspicion does not justify the reversal of a judgment, because it is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. We resolve neither credibility issues nor evidentiary conflicts. We merely look for substantial evidence. A reversal for insufficient evidence is unwarranted unless it appears that upon no hypothesis is there sufficient substantial evidence to support the jury's verdict. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The undisputed evidence would allow a reasonable jury to conclude that Kilbourn specifically intended to rob Pangan and that he took a direct but ineffectual step towards that goal. Kilbourn has not challenged his two convictions for robbing Pangan's coworkers. Nor is there dispute about the evidence that, after robbing the other tellers, Kilbourn yelled at Pangan, "I'm fucking serious." A reasonable jury could conclude Kilbourn intended to rob Pangan and had ordered her to comply with his announced intention.

The prosecution argued Pangan's fumbling with keys created delay, which prompted Kilbourn to abort his plan in favor of exit.

This inference was reasonable. The evidence supported it. The jury was entitled to accept it.

Viewing the evidence in the light most favorable to the verdict, there is sufficient evidence to support the jury's verdict.

DISPOSITION

The judgment is affirmed.

WILEY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.