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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

BEVELYN PATRICK,

Defendant and Appellant.

B255046

(Los Angeles County
Super. Ct. No. GA089230)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Jared Moses, Judge. Affirmed.

Greg Demirchyan, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney
General, Zee Rodriguez and Mary Sanchez, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

Defendant and appellant Bevelyn Patrick (defendant) was convicted of second degree robbery (Pen. Code, § 211¹). On appeal, defendant contends that the trial court erred in refusing her request to instruct the jury on theft as a lesser included offense. We affirm the judgment.

BACKGROUND

A. Factual Background

On March 17, 2013, defendant entered a Rite Aid store located in South Pasadena carrying two plastic bags. Benito Cinto, a store employee, was at the front cash register; at that time, he was the only employee at a cash register. Assistant manager Jade Cooper saw defendant walk out of the store with a shopping cart. The alarm went off, indicating that a sensor on an item had not been deactivated at the cash register, as should have occurred if the customer had paid for the item.

Cinto followed defendant out the exit door of the Rite Aid. Cinto saw “clear bags” in defendant’s cart, which cart was about five feet from the entrance to the store. Defendant had not paid for any items at Cinto’s register. Cinto asked defendant for a receipt. Defendant said she had a receipt and began looking for it.

Cooper, who had followed after Cinto “to see if everything was okay,” saw defendant appearing to look for a receipt, and that in defendant’s shopping cart there was a “Ready Freddy” survival kit from Rite Aid. Cooper went back inside the store.

When defendant did not give Cinto a receipt, Cinto went back inside the store and told Cooper that defendant did not have one. Cooper went outside the store again. Defendant appeared to still be looking for a receipt, but then told Cooper that she did not have the receipt in her possession. Cooper told defendant that she could not take the

¹ All statutory citations are to the Penal Code unless otherwise noted.

merchandise without a receipt. Defendant told Cooper that it was her merchandise, but at no time did she give him a receipt for the items in the cart.

Cooper told defendant that he was going to take the “Ready Freddy” survival kit back into the store, and if she found the receipt, she could come back and he would return the merchandise to her. Cooper took the survival kit back into the store, and then went outside the store again. As defendant started to walk away, Cooper looked down at the cart and noticed “a bag full of merchandise” from Rite Aid. The bag, that looked like a “clear trash bag”—and not a Rite Aid bag—was filled with about 20 items from Rite Aid, including shampoo, lotion, and soap. Defendant stated that the items belonged to her, and Cooper told defendant she could not take the items unless she had a receipt. Cooper “grabbed” and held onto defendant’s shopping cart, and an altercation ensued. Defendant hit Cooper “multiple times,” tried to bite him, and scratched him on his neck. Cooper ultimately went to the doctor to obtain antibiotics to prevent the wounds from becoming infected.

City of Pasadena Police Department Officer Avick Manukian arrived at the incident scene, intervened in the altercation between defendant and Cooper, placed defendant in handcuffs, and examined the contents of the shopping cart. Inside the shopping cart was “a plastic bag filled with Rite Aid products” consisting of “toiletry items, creams, [and] nail polish.” The items appeared to be “new” and had “Rite Aid logo stickers on them.” There also was a bag inside the cart containing a “cooked chicken,” and “another bag” containing clothes. The retrieved items were taken back to the store and scanned. The receipt showed 30 items were scanned, with a total value of \$365.65. Officer Manukian never found in defendant’s possession a receipt for the purchase of those items from Rite Aid.

When defendant was booked, she had in her possession a handbag, purse, and \$12 in cash. There were clothes and a wallet inside the handbag and purse. Defendant did not have any credit or debit cards in her possession. Officer Manukian testified that there was only one Rite Aid in South Pasadena.

B. Procedural Background

Following trial, the jury found defendant guilty of second degree robbery, in violation of section 211. The trial court found true that defendant had a prior strike conviction within the meaning of sections 1170.12 and 667, subdivisions (b) through (j), and a prior serious felony conviction pursuant to section 667, subdivision (a). The trial court sentenced defendant to state prison for a term of 11 years. Defendant filed a timely notice of appeal.

DISCUSSION

A. Standard of Review

We review de novo the question of whether the trial court improperly failed to instruct on a lesser included offense. (*People v. Banks* (2014) 59 Cal.4th 1113, 1160.)

B. Applicable Law

The trial court must instruct the jury on the “principles of law relevant to the issues raised by the evidence [citations]” and also must “‘refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence’ or have the effect of ‘confusing the jury or relieving it from making findings on relevant issues.’ [Citation.]” (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) The obligation to instruct on the general principles of law relevant to the case “includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.)

A trial court has no duty to give a requested instruction on a lesser included offense unless substantial evidence supports the instruction. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1327.) Substantial evidence “required to trigger the duty to instruct on such lesser offenses is not merely ‘any evidence . . . no matter how weak’ [citation omitted], but rather “‘evidence from which a jury composed of reasonable [persons]

could . . . conclude[]” that the lesser offense, but not the greater, was committed.” (*People v. Cruz* (2008) 44 Cal.4th 636, 664.)

All degrees of theft are necessarily included in the crime of robbery because robbery is an aggravated form of theft with the additional element of force or fear. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1256; *People v. Sanchez* (2003) 113 Cal.App.4th 325, 333.) Petty theft is a necessarily included offense of robbery. (*People v. Ortega* (1998) 19 Cal.4th 686, 694-695; §§ 211, 484.)

C. Background Facts

Defendant’s counsel requested of the trial court that it give the jury a lesser included instruction on theft “with respect to the Ready Freddie emergency kit that was pushed out of the store and ultimately retrieved before the physical encounters.” The prosecutor objected, because, “The issue is a struggle over a cart full of items.” The trial court stated, “[A]ccording to . . . Cooper . . . in his attempt to retrieve that property, there clearly was, if believed, a physical altercation initiated by the defendant. [¶] And so in my view, there’s really no room to say well, could be a lesser of just theft. Either it is a robbery or it’s not a robbery, but I don’t see any middle ground on this one given the way the evidence played out, and the way the witness testified. I just don’t see any middle ground here.”

Defendant’s counsel asked the trial court whether it considered that Cooper “actually took one of the property [*sic*], retrieved it, went back into the store and placed it next to the cash register without any altercation?” The trial court responded, “[T]he problem I have is that it’s essentially a unitary set of facts. . . . [I]t’s one set of circumstances. [¶] So the fact that he may have taken one item and returned that item and then gone out to get the rest of the items, and then according to his testimony that is when the altercation began, I don’t see that as being any type of significant difference. [¶] Again, I see it as one course of conduct. And his testimony, if believed, makes it a robbery. . . . And I don’t see anything that will justify the giving of the necessary included instruction under these facts. I just don’t see it.”

D. Analysis

Defendant contends that the trial court erred in refusing her request to instruct the jury on theft as a lesser included offense. Defendant argues that the theft instruction was appropriate because there is evidence from which a jury reasonably could find she committed theft by stealing the “Ready Freddy” emergency kit from the South Pasadena Rite Aid without force or fear. Defendant also argues that she had not committed a robbery of all of the other Rite Aid items recovered from her cart because it was not established that those items were taken from the South Pasadena Rite Aid store; they could have been acquired at another Right Aid store. Thus, defendant argues, a jury reasonably could have found that the force or fear necessary for a robbery (§ 211) only occurred with respect to items that were not stolen.

Defendant was properly convicted of robbery. There is no evidence that the Rite Aid items recovered from her cart had been purchased at a different Rite Aid store. There is evidence that when defendant entered the subject Rite Aid she was carrying two bags, and Officer Manukian testified that after defendant had exited the Rite Aid she had three bags in her shopping cart: a bag “filled with [new] Rite Aid products” consisting of “toiletry items, creams, [and] nail polish;” a bag containing a “cooked chicken;” and a bag containing clothes. The bag containing the Right Aid items was a “clear trash bag,” not a Rite Aid bag.

Although the Rite Aid employees asked defendant to provide them with a receipt for the Rite Aid items recovered from her cart, she was unable to produce it. In addition, Officer Manukian never found in defendant’s possession a receipt for the purchase of those items from Rite Aid, and when defendant was booked, she had only \$12, and did not have any credit or debit cards in her possession. The subject Rite Aid was the only Rite Aid located in South Pasadena. There is no evidence of the location of the Rite Aid where defendant purportedly purchased the Rite Aid items recovered from her cart. There is no question that “force or fear” was involved in the taking of these items. Thus, there is not sufficient evidence to support a theft instruction.

Even if the trial court erred by declining to instruct on the lesser included offense of theft, the error was harmless. “[I]n a noncapital case, error in failing . . . to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818]. A conviction of the charged offense may be reversed in consequence of this form of error only if, ‘after an examination of the entire cause, including the evidence’ (Cal. Const., art. VI, § 13), it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred ([*People v.*] *Watson*, *supra*, 46 Cal.2d [at p.] 836).” (*People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. omitted.) The evidence was overwhelming defendant stole the items in the bag and used force or fear to retain them. It is not reasonably probable that defendant would have obtained a more favorable outcome had the alleged error not occurred. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836).

DISPOSITION

The judgment is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

GOODMAN, J.*

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