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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHESARE RENE REYES, Defendant and Appellant.	B277398 (Los Angeles County Super. Ct. No. GA098439)

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

Heather L. Beugen for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Deputy Attorney General, and Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Chesare Rene Reyes of one count of assault by means likely to produce great bodily injury, one count of second degree robbery, three counts of criminal threats, and one count of resisting a peace officer. On the robbery and criminal threats counts, the jury found true that defendant personally used a dangerous weapon in the commission of the crimes. On appeal, defendant contends that insufficient evidence supported his robbery conviction, the trial court erred in failing to sua sponte instruct jurors on the lesser included offense of attempted criminal threats, and the trial court erred in imposing full one-year sentences for the weapon enhancements on two of the three criminal threat convictions. The People agree that the court erred in its sentence and also point out that the abstract of judgment is incorrect in another respect. We order correction of the abstract. In all other respects, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In accord with the usual rules of appellate review, we state the facts supporting defendant's conviction in a manner most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

1. Defendant's Criminal Conduct

Three men named Salcido, Sanchez, and Carrillo were walking home when they saw defendant punching, hitting, pushing, and kicking a woman (who turned out to be defendant's girlfriend) outside an apartment building. They watched the woman flee into the building and defendant follow her. The three man walked to the glass door of the building and looked inside. They saw defendant standing over, punching, and kicking the woman, who was seated on the staircase and crying. The three men opened the door of the apartment building and asked if everything was okay.

Defendant walked outside the building towards the three men, and pulled a knife from his pocket.[1] The three men backed away. Standing about a foot away from the men and holding the knife at chest level, defendant asked "Do you want to fucking get cut today?" He repeated this at least four times. Defendant asked Salcido if he wanted to die. Defendant appeared intoxicated.

Defendant then told Salcido to empty his pockets, and demanded Salcido's money and phone. Fearing for his safety, Salcido handed defendant his phone. Defendant looked at the phone for a moment and threw it to the ground, saying he did not want it. Defendant then took five or six steps towards the three men and warned them that he would cut them if they did not walk away. The three men continued walking backwards, and eventually, defendant turned around and returned to the apartment building. Salcido retrieved his phone from the ground and called 9-1-1.

Police arrived on the scene within 10 minutes. The men reported the encounter with defendant and directed police to defendant's apartment building. An altercation ensued. Defendant was so uncooperative and belligerent that the police obtained the assistance of the fire department to strap defendant to a spinal board to transport him to a hospital to be cleared for booking in county jail. Police searched defendant's person and the stairwell of the apartment building, but did not find the knife.

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[1] It is unclear what kind of knife defendant brandished because the victims described the knife differently and no weapon was found by the police. Salcido testified that he thought it was a knife and that it was reflective. Sanchez described it as a shiny metal object, about five to six inches in length. Carrillo described it as a butter knife, about 12 inches long.

2. Criminal Proceedings

In an information filed on April 29, 2016, the People charged defendant with multiple offenses. As to four of the counts it was alleged that defendant used a knife. Finally, the information alleged that defendant had a prior serious/violent felony. Eventually some of the charges were dismissed, and the case proceeded to trial on the following counts together with the enhancements and prior felony allegations:

Count 1: assault likely to cause great bodily injury;
Count 2: robbery
Count 4: making criminal threats (victim Salcido)
Count 8: making criminal threats (victim Sanchez)
Count 9: making criminal threats (victim Carrillo)
Count 10: resisting a peace officer (misdemeanor)

It was also alleged that defendant previously suffered a conviction for a serious or violent felony.[2]

Defendant's jury trial commenced June 24, 2016. The jury found defendant guilty of all six counts and found true the allegation that defendant used a knife in the commission of the second degree robbery and the three criminal threat counts. The trial court found true the allegations that defendant previously suffered a conviction for a serious or violent felony.

3. Sentencing

The trial court selected count 2 (the second degree robbery of Salcido) as the principal term and imposed a total of seven years imprisonment (six years for the second-degree robbery plus one for the weapon enhancement). For count 4, the court imposed five years (four years for the criminal threat to Salcido and one year for the weapon enhancement), and stayed the sentence pursuant to section 654. The court imposed a

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[2] All subsequent statutory references are to the Penal Code.

consecutive two-year, four-month term on count 8 for the criminal threat against Sanchez (with one year of that term attributable to the weapon enhancement). The court imposed the identical sentence for count 9—the criminal threat against Carrillo. The court imposed two years on count 1 for the assault on defendant's girlfriend. The court imposed 90 days on count 10 (resisting arrest) and awarded defendant credit for 90 days. Lastly, the court added 5 years to defendant's sentence pursuant to section 667, subdivision (a) for the prior serious felony conviction. In total, the court sentenced defendant to serve 18 years and 8 months.

DISCUSSION

Defendant contends that his robbery conviction was not supported by substantial evidence of asportation, that the court committed reversible error by not instructing on attempted criminal threats, and the court did not properly sentence him on the weapon enhancements for counts 8 and 9. We address each issue in turn.

1. Defendant's Second Degree Robbery Conviction was Supported by Substantial Evidence

Defendant argues that there is insufficient evidence to support his conviction for second-degree robbery. In reviewing claims of insufficient evidence, " ' "we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . [W]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence." ' " (*People v. Wilson* (2008) 44 Cal.4th 758, 806 (citations omitted).) Reversal is warranted only where it appears " 'that upon no hypothesis what[so]ever is there sufficient

substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"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." (§ 211.) The taking aspect of robbery has two parts: "gaining possession of the victim's property and asporting or carrying away the loot." (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 130.) Defendant specifically argues that there was insufficient evidence of asportation. The other elements of robbery are not at issue.

A defendant satisfies the asportation element when he exercises dominion and control over the victim's possessions. (*People v. Price* (1972) 25 Cal.App.3d 576, 578.) " 'Asportation . . . may be fulfilled by wrongfully . . . removing property from the . . . control of the owner, . . . even though the property may be retained by the thief but a moment.' " (*People v. Pruitt* (1969) 269 Cal.App.2d 501, 506.) Cases repeatedly emphasize that crime of robbery is completed upon any asportation, however slight or short. (*Ibid.*; *People v. Pham* (1993) 15 Cal.App.4th 61, 67; *People v. Cooper* (1991) 53 Cal.3d 1158, 1165; *People v. Martinez* (1969) 274 Cal.App.2d 170, 174 ["It is sufficient if he acquired dominion over it, through the distance of movement is very small and the property is moved by a person acting under the robber's control, including the victim."].)

Here, the robbery victim, Salcido, testified that defendant brandished a knife, threatened to cut him, and demanded that he empty his pockets. Salcido then complied and handed defendant his cell phone. Defendant took the phone in his hands, looked at it, said "I don't want your fucking phone," and tossed it over defendant's shoulder. In this, albeit brief, moment, defendant removed the phone from the victim's control and exercised

dominion over it. Even though defendant's exercise of control and dominion over the phone was short, it was clearly sufficient based on a series of appellate cases.

That defendant decided he did not want the property after taking it from the victim does not negate the asportation. (See *People v. Dukes* (1936) 16 Cal.App.2d 105, 108 [finding sufficient evidence of asportation where the defendant picked up and dropped object right before he was caught by a bystander].) In *People v. Hill* (1998) 17 Cal.4th 800, 851-852, the Supreme Court found substantial evidence of asportation where, the robber took the victim's purse from her possession, moved it a slight distance from inside the car to his possession, found nothing of value in it, and returned the purse to the victim. Likewise, in *People v. Pruitt, supra,* 269 Cal.App.2d at page 505, the Court of Appeal concluded that "the taking of the wallet from the person of [the victim], even though it was promptly handed back, constituted a robbery." In *People v. Quiel* (1945) 68 Cal.App.2d 674, 679, the Court of Appeal explained: "The fact that the thief is frustrated in his attempt to carry stolen property away, or that he may change his mind immediately after the theft, because he concludes that the property is of insufficient value to warrant him in retaining it, does not relieve him of the consequence of the theft."

Here, defendant's taking the phone into his possession satisfied the asportation element of robbery. The conviction was supported by substantial evidence.

2. The Court Did Not Have a Duty to Sua Sponte Instruct the Jury About Attempted Criminal Threat

Defendant contends his convictions for criminal threats in counts 4, 8 and 9 must be reversed because the trial court did not sua sponte instruct on the lesser included offense of attempted criminal threats. An attempt to commit a specific intent crime is

a lesser included offense of the completed crime. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 156.) "The trial court has a duty to instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser, uncharged offense, but not the greater." (*People v. Brothers* (2015) 236 Cal.App.4th 24, 29.) There is no such duty when there is no evidence that the offense was less than that charged. (*People v. Campbell* (2015) 233 Cal.App.4th 148, 162.) We review the trial court's failure to instruct on a lesser included offense de novo, viewing the evidence in the light most favorable to the defendant. (*Brothers,* at p. 30.)

At issue is whether there was substantial evidence from which a jury could have reasonably concluded defendant committed only attempted criminal threats, but not the completed crimes of criminal threats. The elements of a criminal threat are: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat . . .' (3) that the threat . . . [was] 'so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; § 422.)

Defendant asserts that his actions amounted only to attempted criminal threats because the evidence did not unequivocally show that the three men he threatened had

sustained fear for their safety. Sustained fear has an objective and subjective component: "A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.) "Sustained fear occurs over 'a period of time "that extends beyond what is momentary, fleeting, or transitory." ' " (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) "The victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Defendant admits that all three men testified they felt fear when defendant produced a knife and threatened to cut them. Defendant nonetheless asserts there was "no credible showing to suggest just how long each of their fear's [sic] lasted" and that their fear was fleeting and momentary. Defendant likens his case to *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 604, where the appellate court held that there was insufficient evidence of criminal threats and modified the conviction to attempted criminal threat. In that case, there was no testimony from the victim and a plain failure of proof as to whether the victim experienced any fear. (*Id.* at p. 607.)

In contrast, here, there was testimony from each of the victims indicating they had sustained fear and there was no evidence that their fear was fleeting and momentary. Defendant brandished a knife and threatened the three victims, saying "Do you want to get fucking cut today" and "Do you want to fucking die today." Defendant repeated his threat to cut the victims three or four times. Victim Salcido testified that he saw his life flash before his eyes, that he felt he was in danger, and that he believed defendant was capable of anything. Victim Sanchez likewise testified that he felt "very, very threatened" because his life was at stake when defendant brandished the weapon.

Sanchez testified he feared for himself and his two friends. Sanchez stated that he felt defendant would harm or kill them. Victim Carrillo also testified he was afraid he would be stabbed by defendant and that he felt nervous because he did not want to die.

Their testimony does not state exactly how long the encounter lasted. Even if this encounter lasted only a short time, it was long enough for defendant to have brandished a weapon, make the threats, demand Salcido's phone and money, take Salcido's phone, toss the phone away, and take advancing steps toward the three men. We have previously found that the length of an encounter like this one supports a showing of the victim's sustained fear. In *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349, we concluded that the victim had sustained fear for his and his son's life where the defendant told the victim, " 'I will kill you . . . right now,' " and brandished a weapon. We held that a minute of sustained fear under these circumstances was sufficient to satisfy the criminal threats statute, stating: "the minute during which [the victim] heard the threat and saw [the defendant]'s weapon qualifies as 'sustained' under the statute. When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory.' " (*Ibid*.)

The circumstances of this encounter negate the notion that the victims' fear was only transitory. The three victims' knowledge of defendant's prior attack on his girlfriend objectively supported the victims' feelings of sustained fear. Just moments before the encounter with defendant, the victims witnessed defendant brutally hitting, punching, kicking, and pushing his girlfriend. It was also apparent that defendant was intoxicated and not acting rationally. This evidence of the victims' knowledge of defendant's prior conduct negated that their fear was "momentary, fleeting, or transitory."

Here, the testimony from the three victims about their fear for their lives, when viewed from the specific context of defendant's erratic and aggressive behavior prior to his threats, only supports the conclusion that they each had a sustained fear. The evidence does not support a mere attempt.

The trial court had no sua sponte duty to instruct on attempted criminal threats because there was no substantial evidence from which a jury could have reasonably concluded defendant committed the lesser offense, but not the greater offense. (See *People v. Brothers, supra,* 236 Cal.App.4th at p. 29.)

3. The Court Erred in Imposing Full One-Year Sentences for the Weapon Enhancements

Defendant contends and the People agree the trial court erred by imposing a full one-year prison sentence for each of the weapon allegations found true in counts 8 and 9. Section 1170.1, subdivision (a) establishes the sentencing requirements for the court's imposition of consecutive terms, such as those imposed here. In pertinent part, the statute provides that where a defendant is convicted of two or more felonies: "The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and *shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses*." (Italics added.)

Here, the court consecutively sentenced defendant for multiple felonies and issued a full one year term for the weapon enhancements on counts 8 and 9., which were subordinate offenses. The sentences on these two weapon enhancements were

unauthorized by law. Pursuant to section 1170.1, subdivision (a), the trial court was required to impose a sentence of four months (one-third of the full term) for each section 12022, subdivision (b)(1) weapon enhancement. We modify the judgment and direct the clerk to correct the abstract of judgment so that the sentences for the weapon enhancements are four months on each of counts 8 and 9.

The People also point out that the abstract of judgment incorrectly reflects that no prison time was imposed on count 4 (criminal threat made to Salcido). The record shows that the trial court indeed issued a combined five-year sentence for count 4 and the weapon enhancement on count 4 and then stayed the sentence. Nonetheless, the abstract of judgment incorrectly states that defendant received a sentence of "0" years and months on that count.[3]

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) We therefore order the trial court to correct this clerical error on remand. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate courts may correct clerical errors at any time, and order correction of abstracts of judgment inconsistent with oral judgments of sentence].) The clerk is directed to correct this error in the abstract and forward the corrected abstract to the Department of Corrections.

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[3] "The one-third-the-midterm rule of section 1170.1, subdivision (a), only applies to a consecutive sentence, not a sentence stayed under section 654." (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164.)

DISPOSITION

The judgment is modified to reflect that (1) the sentence on each weapon enhancement on counts 8 and 9 is four months; and (2) the sentence on count 4 is four years plus one year for the weapon enhancement, and that the sentence is stayed. The clerk of the superior court is directed to correct the abstract of judgment to reflect this modification and forward the corrected abstract to the Department of Corrections. As modified, the judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J.

GRIMES, J.