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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GEORGE ALBERT MONTANO, Defendant and Appellant.	B280351 (Los Angeles County Super. Ct. No. GA099814)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed.

Richard B. Lennon and Suzan E. Hier, 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, Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant George Albert Montano was convicted of one count of second degree robbery in connection with his theft of items from a Burlington Coat Factory. He contends on appeal that the trial court should have instructed the jury sua sponte on the lesser included offense of petty theft, because a reasonable jury could have found he committed petty theft but not robbery. We disagree and affirm.

PROCEDURAL HISTORY

Appellant was charged by information with one count of second degree robbery (Pen. Code, § 212.5, subd. (c)).[1] A jury found him guilty as charged. The trial court sentenced appellant to the midterm of three years in state prison and awarded him 125 days of custody credit. Appellant timely appealed.

FACTUAL BACKGROUND

Tino A.[2] testified that he worked as a loss prevention officer at the Burlington Coat Factory store in Alhambra. On October 8, 2016,[3] he was stationed by the front doors of the store, near a mobile cart that enabled him to monitor the store's 32-camera video surveillance system. The front doors were on the ground floor of the two-story store.

Around 1:30 p.m., Tino saw appellant enter the store carrying "a Halloween trick-or-treat bag that just was basically almost empty" by one strap; "[t]here was no weight" in the bag,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Pursuant to California Rules of Court, rule 8.90(b)(4), we refer to victim Tino A. by his first name. No disrespect is intended.

[3] The prosecutor asked Tino whether he was working on "August 8th, 2016," but the rest of the record indicates that the incident occurred on October 8, 2016.

which was moving in the wind as appellant walked. Tino had been trained that a person entering the store with an empty bag could use it to conceal merchandise. He thus decided to watch appellant using the surveillance system. Clips of the surveillance videos were played for the jury.

Using the video monitors on his mobile cart, Tino saw appellant take the escalator to the second floor. In the "men's furnishings" department, appellant picked up a hat, snapped off one of the two price tags, tucked the other price tag inside the hat, and put the hat on his head. Still wearing the hat, appellant then walked to the young men's clothing department. This raised an additional "red flag" for Tino, who explained that "[n]ormal customers" do not walk around the store when trying on a hat.

In the young men's clothing department, appellant picked up an aqua-colored Hurley brand shirt. He removed the shirt from its hanger and hung it over his arm. Carrying the shirt and wearing the hat, appellant proceeded to the men's shoe department. Tino lost sight of him there due to an obstructed camera view.

Tino regained sight of appellant as he "emerged from behind the racks" of the shoe department carrying a "full and heavy" trick-or-treat bag with "a bulk at the bottom" that no longer moved as he walked. Appellant walked past a bay of eight cashier lanes on the second floor and descended the escalator to the first floor. Appellant walked past the two cashier lanes on the first floor and headed to the front door. He was still wearing the hat, and the shirt was draped over the opening of the trick-or-treat bag. Though the opening of the bag was obscured, Tino observed a "definite weight on that bag that wasn't there when he came in the store." Tino radioed the assistant store manager for

assistance.

Tino approached appellant inside the front doors, identified himself, and asked appellant for the merchandise. Appellant "denied having done anything and taken anything," and asserted, "This is mine. You don't sell New Balance shoes." Tino, who by this point had seen a pair of brand-new New Balance shoes in appellant's bag, reiterated his request that appellant return the merchandise. Appellant became "defiant[,] like how dare you, and denied it again." In response to Tino's third request for the merchandise, appellant "said, Fine, the hat's yours, and he threw the hat on the trash can" near the front doors.

Tino then "took hold of the bag" that remained in appellant's hand. Appellant responded by punching Tino twice in the left arm, hard enough "to make a cut"; Tino's arm remained red for a couple of days afterward. Tino maintained his grip on the bag. Appellant then said to Tino, "I'm going to stab you." He and Tino continued to tussle over the bag, which tore at the handles. Tino fell through the open front doors, clutching the bag. The assistant store manager, who was standing nearby, called 911.

Tino saw that he had recovered "all of our merchandise," including a pair of New Balance shoes "which the sensor had been cut off of," and an aqua-colored Hurley shirt with no tags. Tino explained that it was "shocking" to him that the sensor on the shoes had been removed, because "the only way to take a sensor off a shoe would be using a sensor remover or pair of scissors, wire cutters or a knife." Tino did not personally observe appellant remove the tags or the sensor.

Appellant remained inside the store, maintaining his innocence and threatening legal action against Tino. The police

arrived within minutes and arrested appellant. They recovered two knives from his person.

Oscar Ramirez testified that he was the assistant store manager at the Alhambra Burlington Coat Factory. On October 8, 2016, Ramirez went to the front doors of the store after receiving a call from Tino. He saw Tino approach appellant and observed a struggle ensue over a bag. During the struggle, Ramirez saw Tino take appellant's bag "and pull[ ] out the shoes and the merchandise from the bag." Ramirez heard appellant say that the merchandise was his, and threaten Tino by saying 'I'll stab you." Ramirez called the police at Tino's request.

When the struggle between Tino and appellant ended, Ramirez took possession of a shirt and pair of shoes. He observed that neither the shirt nor shoes had price tags on them, and that the sensors had been removed from the shoes.

After the police arrived, Ramirez went back into the store and retrieved similar items from the sales floor; they were not the same sizes but were otherwise identical to the items recovered from appellant. He scanned the tags on those items at the cash register to determine their value and to make a record. Loss prevention officers later returned the items to the store's sales floor.

Two officers from the Alhambra Police Department, Olivia Magana and Sally Dominguez, testified that they responded to the Burlington Coat Factory on October 8, 2016. Magana observed a knife near appellant's waist, sticking out "behind his belt on his pants." She retrieved the knife from appellant. Dominguez handcuffed appellant and asked him if he had any other sharp objects. He indicated that he had another pocket knife in the front pocket of his shorts. Dominguez retrieved the

second knife. Both knives were admitted into evidence over appellant's objection. A further search of appellant did not uncover any money, credit cards, or gift cards in his possession.

Dominguez testified that three items were recovered from appellant: a plaid hat, a turquoise Hurley shirt, and a pair of New Balance tennis shoes. The items did not have price tags or sensors on them. Dominguez asked Ramirez to go inside the store and find similar items so she could verify that the store carried the merchandise. Ramirez complied and retrieved identical items from inside the store; those items had tags and sensors.

Appellant rested without presenting any evidence.

DISCUSSION

Appellant's sole contention on appeal is that the court had an obligation to instruct the jury, sua sponte, on petty theft in addition to robbery.

Petty theft is a subset of theft, committed when someone takes personal property not exceeding $950 in value from another. (§§ 484, subd. (a), 486, 487, 488, 490.2, subd. (a).) Theft is a lesser included offense of robbery, which requires the additional element of a taking by force or fear. (*People v. Williams* (2013) 57 Cal.4th 776, 799; *People v. Davis* (2005) 36 Cal.4th 510, 562.)

"California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself,

thus encouraging the most accurate verdict permitted by the pleadings and the evidence." (*People v. Birks* (1998) 19 Cal.4th 108, 112.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).)

"'Substantial evidence' in this context [means] '"evidence from which a reasonable jury could conclude"' that the lesser offense, but not the greater, was committed." (*Breverman*, *supra*, 19 Cal.4th at p. 162.) The mere existence of "'*any* evidence, no matter how weak,' will not justify instructions on a lesser included offense." (*Ibid.*) Likewise, speculation is insufficient to merit an instruction on a lesser included offense. (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.) However, "[i]n deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*Breverman*, *supra*, 19 Cal.4th at p. 177; accord, *People v. Moye* (2009) 47 Cal.4th 537, 556.) We independently review a trial court's failure to instruct on a lesser included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 595.)

Appellant contends an instruction on petty theft was required here, because "a reasonable jury could have believed that, while appellant took the hat from the store, the shirt and the pair of shoes were his own." Although he acknowledges the evidence was sufficient to prove robbery, he argues it did not compel that conclusion: "If the jury believed that appellant owned the pair of shoes and the shirt, they could not have found appellant guilty of robbery. It was only after tossing the cap

away that appellant used force and fear to retain the remaining property by punching [Tino] and threatening to stab him. . . . If that property was appellant's, appellant was not using force or fear to retain property that was not his own, but was simply protecting his own belongings. In that case, the jury could have found appellant guilty of [petty] theft for the taking of the cap that appellant admitted was not his and discarded before punching [Tino], as the value of the cap was under $950." In support of this argument, appellant points to his claims of ownership during the incident, the absence of eyewitness testimony that he removed the tags and sensors from the items and put them in his bag, the absence of broken sensors recovered from the store, and testimony that the sensors were difficult to remove without a tool such as a knife or scissors. Appellant posits that the jury reasonably could have concluded from this that he brought the shirt and shoes into the store with him, in the trick-or-treat bag. We disagree.

The prosecution presented uncontroverted evidence that appellant entered the store with an empty trick-or-treat bag and attempted to leave it with one full of merchandise. Appellant essentially contends the trial court should have rejected this affirmative evidence and given a lesser included instruction based on the absence of direct evidence that he removed tags from store items and put them in his bag. But when "there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1063.) A claim that prosecution witnesses—and surveillance video—were not credible is not proof, but merely "'an unexplainable rejection of the prosecution's

evidence'. . . [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 514.)

The affirmative evidence to which appellant points is his hearsay statement that he owned the shirt and shoes, and Tino's testimony that the sensors were difficult to remove. Appellant argues that "[t]he testimony of one witness, including the defendant, can constitute substantial evidence and doubts as to the sufficiency of the evidence must be resolved in favor of the accused." While this is accurate as a general principle (Evid. Code, § 411; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052), appellant did not testify. His hearsay statements regarding his alleged ownership of the items did not justify an instruction. Tino's testimony regarding the sensors, even construed generously, neither sheds light on appellant's claims of ownership nor calls into question the veracity of his own testimony about appellant's bag and aberrant behavior. In short, this evidence simply is not sufficiently substantial to warrant a lesser included instruction.

Even if it were, any error in failing to instruct the jury on petty theft would be harmless. "The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, at pages 836-837. . . . Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of. [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868, fn. omitted.) "In determining whether a failure to instruct on a lesser included offense was prejudicial, an appellate court may consider 'whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so

comparatively weak, that there is no reasonable probability the error of which defendant complains affected the result.' [Citations.]" (*Id.* at p. 870.) Having undertaken this assessment, we do not believe it is reasonably probable that the absence of a petty theft instruction affected the outcome of the jury's deliberations. As we have discussed, the evidence in support of a petty theft verdict due to appellant's ownership of the shirt and shoes was not only weak, it was insubstantial. In contrast, the evidence suggesting he did not own the items—the empty bag that became full, the surveillance footage, the presence of identical items on the store's shelves—was overwhelming. There is no reasonable probability that appellant would have been convicted only of petty theft of the hat.

DISPOSITION

The judgment of the trial court is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.