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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. VANESSA V. MORCILLO, Defendant and Appellant.	B234207 (Los Angeles County Super. Ct. No. KA092142)

APPEAL from the judgment of the Superior Court of Los Angeles County. Tia Fisher, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnson and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * *

Defendant and appellant Vanessa V. Morcillo was convicted by jury of one count of assault and one count of robbery. Defendant's sole contention on appeal is that the trial court committed prejudicial error in refusing to instruct the jury on the lesser included offense of theft as to the robbery count. We find no instructional error and affirm.

FACTS

Defendant Morcillo and codefendant Daniel Ibarra (who is not a party to this appeal) dated for a period of time and have three children together. In August 2010, they were no longer dating and Ibarra had recently ended a seven-month relationship with the victim, to whom we will refer as Jane Doe to protect her privacy. About a week before the charged incident, Jane Doe went with Ibarra's sister, Sandra, to Ibarra's brother's house to visit. Ibarra and defendant Morcillo were at the brother's house already. While Jane Doe and Sandra were still outside, defendant Morcillo began sending unpleasant texts to Jane Doe. At some point, defendant Morcillo and Ibarra came outside, and Ibarra told Jane Doe to leave. They argued for a bit, then Ibarra hit Jane Doe and threw her to the ground. Ibarra and defendant Morcillo left. The police were called, but Jane Doe declined to speak with the police, leaving Sandra to speak with them instead.

Jane Doe did not have any contact with Ibarra or defendant Morcillo for a week. On August 28, Jane Doe began to receive repeated phone calls and texts from Ibarra, most of which she ignored. However, she did respond to a few of his calls. Ibarra claimed he wanted to apologize for what happened and wanted Jane Doe to meet with him. Jane Doe refused. Later, when she went shopping, she saw Ibarra driving behind her. He pulled alongside of her car and yelled at her to pull over. She was scared of him because he had hit her before, and she pulled over to the side of the road out of fear.

They both got out of their cars and Ibarra coerced Jane Doe to go with him in his car. Ibarra told her, "Shorty, you know I'm always strapped." Jane Doe, whose nickname was "Shorty," understood that to mean he was carrying a gun and she knew he usually did have one, although she did not see one on him that day. Jane Doe took her

purse with her, which had a shoulder strap, containing her wallet, keys, camera and cell phone.

Ibarra and Jane Doe drove to a neighborhood park, where Ibarra pulled in and parked near some public restrooms. He got out of the car claiming he had to use the restroom. Before reaching the restroom door, Ibarra turned back and called to Jane Doe to come hold his cell phone and keys. As Jane Doe approached Ibarra near the entrance to the restroom, he made a gesture like he was going to hug her, but then he quickly shoved her into the men's restroom, simultaneously "yanking" her purse off of her shoulder.

Inside the restroom, defendant Morcillo and Ibarra's 14-year-old sister A.I. were waiting. Defendant Morcillo said, "What's up Shorty?" and then immediately grabbed Jane Doe's hair while A.I. started hitting and kicking her. Defendant Morcillo began to punch Jane Doe in the face with one hand while holding onto her hair with the other hand. Jane Doe heard Ibarra say "get her in the face." Jane Doe fell to the ground and tried to block her face from being kicked. She believed Ibarra kicked her at least once while defendant Morcillo and A.I. were attacking her. She heard Ibarra say, "I told you, bitch, I was no little bitch." Defendant Morcillo broke something that felt like glass over the back of Jane Doe's head. The attack lasted maybe "five minutes." Ibarra, A.I. and defendant Morcillo then left the restroom together with Jane Doe's purse. She heard them "burning tire" in the parking lot.

Jane Doe got up and found two individuals in the park who let her use their cell phone to call a friend for help. She had a bruised and swollen eye, and multiple cuts and bruises to her ear, elbow, ribs and legs. Jane Doe contacted the police when she got home, but did not seek medical treatment for her injuries.

Defendant Morcillo was charged by amended information with one count of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) and one count of robbery (§ 211). The two counts were jointly charged against codefendant Ibarra, who was also charged with kidnapping, corporal injury to a former cohabitant, and possession of a controlled substance. A.I. was separately prosecuted as a

juvenile. Neither Ibarra nor A.I. are parties to this appeal, and we will not discuss the prosecutions against them here. It was specially alleged that in the commission of the assault, defendant Morcillo used a deadly and dangerous weapon, a glass object (§ 12022, subd. (b)(1)). Defendant Morcillo pled not guilty to both charges.

During a discussion of jury instructions, counsel for defendant Morcillo requested a lesser included instruction on theft as to the robbery count on the grounds the evidence showed codefendant Ibarra took the purse from the victim, not defendant Morcillo. After entertaining argument, the court declined to give the instruction, explaining that "[if defendant Morcillo] aided and abetted the taking of the property, the taking was by force. . . . [T]here's no set of circumstances or scenario where that wasn't forcible."

The jury found defendant Morcillo guilty of assault and second degree robbery of Jane Doe. Before the case was submitted to the jury, the court granted the prosecution's motion to dismiss the personal use allegation. The court made a finding that, given the prior history of domestic violence between defendant Morcillo and codefendant Ibarra, the interests of justice warranted probation. Imposition of sentence was suspended, and defendant Morcillo was placed on three years formal probation and ordered to serve 110 days in county jail. Defendant was credited with 110 days of custody credits and ordered to pay various fines and restitution. This appeal followed.

DISCUSSION

Defendant Morcillo contends the court committed prejudicial error in refusing her request for a jury instruction on theft as a lesser included offense to robbery. We independently review whether the trial court erred in failing to instruct on a lesser included offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181.) We conclude the court did not err.

A trial court has a duty to instruct on lesser included offenses supported by substantial evidence in the record. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155, 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to

merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*Id.* at p. 162.)

Robbery is defined as "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." (Pen. Code, § 211.) Theft is a lesser included charge as it contains all of the elements of robbery except the element of force or fear. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1256 (*Burns*); accord, *People v. Jones* (1992) 2 Cal.App.4th 867, 869 (*Jones*).)

To rise to the level of robbery, force *or* fear must be shown. (*People v. Reade* (1961) 197 Cal.App.2d 509, 510 (*Reade*).) The force used need only be greater than the amount required to accomplish a mere seizure or to overcome the victim's resistance. (*Jones*, *supra*, 2 Cal.App.4th at p. 870; see also *Burns*, *supra*, 172 Cal.App.4th at p. 1259.) The testimony of Jane Doe, the victim, was unequivocal that force was used against her in the taking of her purse. She said it was "yanked" off her shoulder and that she was simultaneously shoved into the restroom. Immediately after being shoved, Jane Doe was assaulted by defendant Morcillo and A.I. who were waiting in the restroom.

Defendant argues Jane Doe's testimony contained inconsistencies about how the purse was taken from her (when and by whom), that the alleged force used was a mere "snatching" of a purse that could only amount to theft, and was so minimal that Jane Doe could not even accurately and consistently recount how the taking occurred. Defendant's arguments are without merit.

Jane Doe testified at trial that Ibarra shoved her into the restroom, simultaneously yanking her purse from her shoulder, that defendant Morcillo and A.I. immediately attacked her, that she was unable to defend herself or attempt to retrieve her purse as she fell to the ground and tried to block her face from the attack, that she was assaulted for approximately five minutes, and that all three defendants then fled together with her purse.

On cross-examination, Jane Doe admitted that she testified at the preliminary hearing that A.I. may have been the one to take her purse. The following colloquy from her prior testimony was read into the record:

> "Question: Earlier you said you thought it was A.I. who took your purse . . . . Why did you think that?
>
> "Answer: Because everything happened so fast. I didn't know.
>
> "Question: Did you have your purse when [A.I.] was attacking you?
>
> "Answer: No, he had yanked it from me.
>
> "Question: Why did you think A.I. had taken it? [¶] . . . [¶]
>
> "Answer: I don't know. But he had yanked it from me when he pushed me to the restroom."

When asked if she recalled telling a police officer that "they" yanked it away from her during the assault, Jane Doe said she did not recall saying that. On redirect, she reiterated that Ibarra yanked the purse from her. There were no material inconsistencies in Jane Doe's testimony regarding the physical assault, including that she was helpless on the ground, simply trying to block her face from being kicked. She admitted she did not see who actually carried the purse away when the three fled the scene, and that she did not recall seeing defendant Morcillo with it. When she got up to leave however, her purse was not on the floor of the restroom and she never recovered her purse or its contents.

The prosecutor argued that defendant Morcillo aided and abetted Ibarra in the robbery, and the jury was duly instructed on aiding and abetting liability, including with CALCRIM Nos. 400, 401 and 1603.

The yanking of the purse from Jane Doe, accompanied by the shove and the subsequent immediate assault is more than sufficient to support the jury's finding that defendant Morcillo was guilty of aiding and abetting the robbery of Jane Doe. (See *Burns, supra*, 172 Cal.App.4th at pp. 1257, 1259 [act of wresting purse away from victim while stepping on her foot as she attempted to hold on was sufficient force to support robbery and court did not err in refusing to instruct on theft]; *Jones, supra*, 2 Cal.App.4th

at p. 871 [proper to not instruct on theft where victim's uncontradicted testimony showed that grabbing of purse resulted in minor injury to her finger and shoulder]; see also *Reade*, *supra*, 197 Cal.App.2d at pp. 511-512 [pushing of victim after snatching envelope containing cash, causing victim to fall to floor sufficient to support robbery charge].)

Moreover, nothing in Jane Doe's testimony supports a version of the taking as a mere theft without force. If the jury believed the prosecution's evidence, the jury could only reasonably conclude that the taking of the purse was accomplished with force, and that additional force was used thereafter, primarily by defendant Morcillo, which prevented Jane Doe from fighting back and allowed Ibarra, defendant Morcillo and A.I. to flee the scene with the purse. Moreover, it is well-established that even where the evidence of the initial taking arguably could support a finding of theft, the use of force to retain the property or to effectuate an escape transforms a theft into robbery. "The act of 'taking' begins when the separation of the victim from his or her property occurs, and it continues through the forcible consummation." (*People v. Webster* (1991) 54 Cal.3d 411, 442; *People v. Winkler* (1986) 178 Cal.App.3d 750, 756.)

The record does not contain *any* evidence, let alone substantial evidence, that defendant Morcillo was guilty of theft but not of robbery. The trial court therefore correctly denied defendant's request for the lesser included instruction. (*People v. DePriest* (2007) 42 Cal.4th 1, 50-51 [no error in refusing lesser included theft instruction where evidence supported robbery and no substantial evidence supported theory that intent to steal victim's car was only formed after shooting of victim].)

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

We concur:

BIGELOW, P. J. RUBIN, J.