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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS BASULTO,

Defendant and Appellant.

B231523

(Los Angeles County  
Super. Ct. No. PA065305)

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

Tanya Dellaca, 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, Lawrence M.  
Daniels and William H. Shin, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Jesus Basulto appeals the judgment entered following his conviction by jury of carjacking, robbery and evading a police officer with willful disregard for the safety of persons or property. (Pen. Code, §§ 215, 211; Veh. Code, § 2800.2, subd. (a).)

Basulto contends the conviction of robbery must be reversed because the trial court erroneously denied his request for an instruction on voluntary intoxication. We reject this contention and affirm the judgment.

### **FACTS AND PROCEDURAL BACKGROUND**

#### *1. The prosecution's evidence.*

On August 27, 2009, at approximately 9:00 p.m., Frank Park was seated in his parked Toyota Camry near the intersection of Roscoe Boulevard and Balboa Place in Los Angeles. Basulto opened the driver's door, said something in Spanish, reached behind his back as if he had a gun in his waistband and told Park to get out of the car. Basulto then reached into the Camry with his left arm and placed his hand on the key in the ignition. Basulto was "right in [Park's] face." When Park exited the Camry, Basulto entered the car and drove away.

Park testified Basulto "reeked of alcohol" and appeared to be "heavily intoxicated." When asked if Basulto slurred his words, Park indicated Basulto was "not sober." When asked what, other than the odor of alcohol, led Park to believe Basulto was not sober, Park replied, "the smell is enough." When a "person reeks of alcohol, they generally have been drinking."

At approximately 10:30 p.m., Los Angeles Police Officer Brian Harris noticed a Toyota Camry westbound on Sherman Way stopped at a green light. Harris followed the Camry down an alley at approximately 25 to 35 miles per hour past an oncoming truck and a pedestrian. Harris activated the lights and siren of his patrol vehicle as the Camry turned southbound onto Kelvin Avenue. The Camry passed a stop sign at Sherman Way without stopping, turned eastbound on Sherman Way and accelerated to approximately 65 miles per hour. The Camry made an illegal U turn over a raised center median, drove through a business parking lot and into an alley

behind the business. At the end of the alley, the Camry skidded into the curb of Oso Avenue. Basulto ran from the driver's side door of the Camry, but complied with Harris's commands to stop and get on the ground.

In a field show up at Oso Avenue and Sherman Way, Park immediately identified Basulto as the person who had stolen his car and stated, "I'm a hundred percent sure that's him." Park also identified Basulto at the preliminary hearing. At trial, Park testified he was "a hundred percent certain" Basulto was the person who stole his car.

After the field show up, Park was taken to his car. It had been driven onto the curb and one of the front wheels was almost off the axle. The interior of the car had been ransacked, and there were one or two empty beer bottles on the front floor panel.

*2. Defense.*

Basulto presented no affirmative defense.

*3. Jury instruction conference.*

Defense counsel suggested an "intoxication-type instruction may be necessary" based on Park's testimony the suspect "reeked of alcohol and was heavily intoxicated." The trial court noted Park also testified his conclusion that Basulto was intoxicated was based entirely "on the odor . . . ." "There [were] no other objective symptoms or signs" of intoxication and there was no foundation for Park to testify with respect to intoxication. The trial court concluded Basulto was not entitled to an instruction on voluntary intoxication.

## **DISCUSSION**

*1. Basulto's arguments.*

Basulto contends a defendant too intoxicated to form the intent to permanently deprive the owner of property cannot be convicted of robbery.<sup>1</sup> He claims the jury

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<sup>1</sup> Basulto notes robbery requires the intent to permanently deprive the victim of the property, whereas carjacking may be founded on either the intent to temporarily, or permanently, deprive the victim of a vehicle. (See *People v. Vargas* (2002))

should have been allowed to consider his intoxication when deciding whether he harbored the specific intent to deprive Park permanently of his vehicle. Basulto relies on Park's testimony that Basulto appeared to be "heavily" intoxicated, "reeked of alcohol" and was not sober, claiming a nonexpert witness may give an opinion as to alcohol intoxication. (See *People v. Williams* (1988) 44 Cal.3d 883, 914; *People v. Ruiz* (1968) 265 Cal.App.2d 766, 773.)

Additionally, Officer Harris testified Basulto drove erratically at high rates of speed without regard for the safety of others and eventually crashed into a curb. Empty beer bottles were found on the front floor of the Camry that had not been present when the car was taken. Basulto concludes this evidence was sufficient to support instruction on voluntary intoxication pursuant to CALCRIM 3426.<sup>2</sup>

## 2. General principles.

Upon request, a defendant is entitled to an instruction on the relationship between voluntary intoxication and the formation of specific intent if the instruction is supported by substantial evidence. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1120.) In this context, substantial evidence requires " 'evidence of the defendant's voluntary intoxication and [that] the intoxication affected the defendant's "actual

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96 Cal.App.4th 456, 462.) Basulto concedes voluntary intoxication would not have prevented formation of the intent to temporarily deprive Parks of his vehicle and thus he does not attack the conviction of carjacking.

<sup>2</sup> CALCRIM No. 3426 states, in relevant part: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted (1) with the specific intent to [*permanently deprive the owner of his property*] . . . . A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance, knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

In connection with the charge of [*second degree robbery*], the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to [*permanently deprive the owner of his property*]. If the People have not met this burden, you must find the defendant not guilty of [*second degree robbery*.]

You may not consider evidence of voluntary intoxication for any other purpose."

formation of specific intent.” ’ [Citations.]” (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.) “[M]erely showing that the defendant consumed some alcohol prior to commission of the crime without showing the effect of the alcohol on him is not sufficient to warrant an instruction on [voluntary intoxication]. [Citations.]” (*People v. Carr* (1972) 8 Cal.3d 287, 294.)

3. *The trial court properly denied Basulto’s request for an instruction on voluntary intoxication.*

In this case, while there was some evidence Basulto had been drinking and may have been intoxicated, there was no evidence that suggested Basulto was not capable of forming the intent to deprive Park permanently of his vehicle. (*People v. Williams* (1997) 16 Cal.4th 635, 677 [instruction properly refused where a witness testified the defendant was “ ‘probably spaced out’ ” on the morning of the killings and the defendant told the police “that around the time of the killings he was ‘doped up’ and ‘smokin’ pretty tough then.’ ”]; *People v. Marshall* (1996) 13 Cal.4th 799, 848 [instruction properly refused where the defendant had gone without sleep and consumed an unspecified number of alcoholic drinks prior to the offense where evidence of the effect of the alcohol on the defendant’s state of mind was lacking]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1179 [intoxication instruction not required where the defendant testified he drank approximately 10 beers on the night of the offense and he “was higher” on the night of the killing than he was when he was arrested a few days later with a 0.14 percent blood-alcohol level]; accord *People v. Bandhauer* (1967) 66 Cal.2d 524, 528.)

Because there was no substantial evidence that intoxication affected Basulto’s ability to form the specific intent required for robbery, the trial court properly refused to instruct the jury regarding voluntary intoxication.

**DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.