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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. BRYAN LEMONT HOWARD, Defendant and Appellant.	B290047 (Los Angeles County Super. Ct. No. MA072124)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen I. Goorvitch, Judge. Affirmed as modified.

Law Office of Christine M. Aros and Christine M. Aros, 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, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Bryan Lemont Howard was convicted by jury of first degree burglary (Pen. Code, § 459),[1] first degree residential robbery (§ 211), and attempted grand theft of an automobile (§§ 664/487, subd. (d)(1).)[2] Howard pled no contest to one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)) and unlawful possession of ammunition (§ 30305, subd. (a)(1)). Howard challenges the sufficiency of the evidence to sustain his robbery conviction. He also challenges his sentence. We find the evidence sufficient to sustain the robbery conviction. However, we agree that his sentence needs to be modified. We therefore order the trial court to modify the judgment to vacate the six-year sentence on count 3, attempted grand theft of an automobile, and instead impose a three-year sentence to reflect Howard's conviction of an attempt. (See § 664.) We further order the judgment modified to strike the imposition of the three one-year section 667.5, subdivision (b) enhancements. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

In January 2017, Mayra Hernandez and her boyfriend, Aaron Valencia, were living in Lancaster with their six children. They lived in a two-story home, with the bedrooms on the second floor.

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[1] Unspecified statutory references will be to the Penal Code.

[2] The appeal of Howard's codefendant, Susana Rico-Canchola, was dismissed per her request.

On January 12 around 9:30 p.m., they checked that the front door, the back sliding door, and the garage side door leading into the house were all locked and went upstairs to bed. Around 2:00 a.m., Hernandez was awakened by the sound of a male voice that she did not recognize. She woke Valencia up and told him someone was in the house.

Valencia heard someone running down the stairs. As Valencia ran downstairs, he saw a female in a dark hoodie trying to unlock and open the front door. When he got downstairs, she was already outside. Valencia chased the woman outside until she stopped in front of the house next to the garage door and "froze." He grabbed the back of her jacket and asked what she was doing in his home, but she did not reply. Valencia identified the woman as Susana Rico-Canchola at trial.

Valencia noticed that his garage door was open and the lights were on. He pulled Rico-Canchola into the garage, and she struggled to get away.

Valencia saw someone running up his driveway from about 15 feet away. An African American man, later identified by Valencia as Howard, approached him and stated, "you hit my girl." Valencia was afraid because he did not know if Howard had a weapon, so he grabbed Howard and let go of Rico-Canchola. Howard attempted to remove his jacket in order to escape. As Howard struggled to get away, Rico-Canchola paced the driveway and told Howard she wanted to leave.

Hernandez came outside and stood behind Valencia. Rico-Canchola walked toward Valencia's toolbox in the garage, which made

Valencia worried. Hernandez handed Valencia a hammer. Valencia told Hernandez to call the police.

Howard repeatedly asked Valencia not to hit him and not to kill him. Valencia asked Howard why he had broken into the house, but Howard said only that he thought Valencia had hit Rico-Canchola.

Valencia saw his children come outside. He was worried because Rico-Canchola was "loose," so he let go of Howard. Howard and Rico-Canchola ran away.

Los Angeles County Sheriff's Deputy Kyle Deluca and his partner responded to the call. Deluca's partner sent out a radio broadcast with a description of the suspects, and Deluca walked through the house with the victims.

Several screens had been removed from windows in the back yard. Valencia's wallet and car keys, which had been on the kitchen table, were missing. Valencia never found his keys or wallet. An entertainment center upstairs was ransacked, and electronic devices were missing from the family room. A backpack found in the garage contained items taken from the home. There was a cell phone near the front door that Valencia had seen Rico-Canchola drop as she ran out the door. Inside the garage, the passenger door to Valencia's Honda Accord was slightly ajar, and a jack was in the back seat.

Hernandez printed out flyers and distributed them in her neighborhood. Several days after the incident, an officer came to fingerprint the car. Hernandez found their leaf blower and a laptop

computer in the trunk, and she later discovered a cell phone in the trunk that did not belong to them.

Hernandez found a picture of Rico-Canchola and her name and email address on the phone. Howard was in the picture with Rico-Canchola, but Hernandez was uncertain if he was the man involved in the incident. Hernandez found Rico-Canchola's Facebook page and saw a picture of a man she recognized as someone to whom she had given a flyer.

On January 25, 2017, Hernandez emailed a picture of the cell phone and a picture of Howard and Rico-Canchola from the phone to Sergeant Chris Bergo. That evening, Bergo showed Hernandez and Valencia six-pack photographic lineups. Hernandez and Valencia circled photos of Howard and Rico-Canchola.

On February 8, 2017, law enforcement searched Howard's and Rico-Canchola's residences but found no items belonging to Hernandez and Valencia. There were no matches from the fingerprints taken from the scene, and no DNA testing was done. Bergo examined a surveillance video from a residence across the street, but it was not possible to identify faces or physical descriptions because of the poor quality of the video.

Valencia told Deluca that the male suspect was between 5'8" and six feet tall. He testified that the man had short hair and no glasses. Hernandez also testified that the man was not wearing glasses.

Detective Kenneth Fitch extracted data from the two cell phones recovered in the case. The phone found in the trunk of the car showed

an incoming call from a contact named "Mr. Profit." The phone found by the front door had a person in the contact list named "Miss Profit," and the phone's website history showed an Outlook mailbox belonging to "Chase Profit."

II. *Defense Evidence*

Dr. Mitchell Eisen, a psychologist, testified as an expert witness about eyewitness memory and suggestibility. One of the topics Eisen discussed was the carryover effect, which posits that a witness cannot be shown a person's picture more than once because after the initial view, the person's face is familiar to the witness. Thus, when the witness is shown a six-pack, the picture previously viewed is familiar.

Eisen also testified that sometimes witnesses conduct their own investigation, find a picture of a person they believe to be the culprit, and give the information to law enforcement, who include the picture in the lineup. Then, the witness merely repeats the earlier identification.

Howard's brother, Thomas Jones, testified that Howard wears glasses and that the person in the surveillance video did not walk like Howard because Howard does not walk with a limp.

Howard's stepfather, Donald Jones Beckett, testified that Howard wears glasses and that neither person in the video walked like Howard. Beckett testified that on January 12, 2017, he left home around 11:30 p.m. to get some marijuana, which he used to treat pain from a neck injury. Howard was home the entire time and did not leave the house.

When Beckett returned around 1:00 a.m., he sat with Howard, talking and smoking.

Howard testified on his own behalf. He stated that he is 5'7" tall and wears glasses most of the time.

Howard denied that he was involved in the burglary, stating that he was at home from 1:00 a.m. to 4:00 a.m. on the day of the burglary. On January 12, 2017, Howard saw his friend, Sequoia, and brought her to his house. They talked in his room, and Sequoia fell asleep in his bed while he slept in a chair. Beckett woke Howard up to ask if he wanted to go with Beckett to get marijuana, but Howard said he was too tired.

At some point later that night, Howard's girlfriend, Rico-Canchola, came over and saw Sequoia. She became upset and told Howard to get Sequoia out of there. Howard and his mom drove Sequoia to McDonald's around midnight. Rico-Canchola stayed at Howard's house.

When Howard returned, he and Rico-Canchola argued, and Rico-Canchola left his house, taking his cell phone with her. After Rico-Canchola left, Beckett came home, and Howard smoked with his father and his brother. Howard stayed home the rest of the night.

The next morning, January 13, Howard realized his phone was missing, so he went and got a new phone, using the name Chase Profit, a name he sometimes used. Howard later learned that Rico-Canchola had taken his phone.

On February 8, 2017, when Bergo told Howard he was a suspect in a burglary, Howard was "relieved," because he knew he had not

committed a burglary. He stated that on the day of the burglary, he was at home from 1:00 a.m. to 4:00 a.m.

III. *Rebuttal Evidence*

Bergo arrested Howard on February 8, 2017, and interviewed him at the jail. Bergo showed Howard the cell phone recovered in the case, and Howard identified it as his. Howard did not explain how he lost his phone or tell Bergo about his argument with Rico-Canchola.

IV. *Procedural Background*

Howard was charged by information with count 1, first degree burglary (§ 459); count 2, first degree residential robbery (§ 211); count 3, attempted grand theft of an automobile (§§ 664/487, subd. (d)(1)); count 4, possession of a firearm by a felon (§ 29800, subd. (a)(1)); and count 5, unlawful possession of ammunition (§ 30305, subd. (a)(1)). The information further alleged that Howard had suffered two prior strikes, two prior serious felonies, and served one prior prison term, based on a 2007 conviction.

Howard pled no contest to counts 4 and 5, the firearm and ammunition counts. A jury found him guilty of counts 1, 2, and 3. Howard admitted the prior strikes, prior serious felonies, and prior prison term. The court sentenced him to a total of 25 years to life, plus five years, calculated as follows: counts 1 and 2, concurrent terms of 25 years to life, plus five years for the prior serious felony; counts 3, 4, and

5, the high term of three years, doubled to six years, plus one year for the prior prison term, to run concurrently with all other terms.

DISCUSSION

I. *Sufficiency of the Evidence to Support Robbery Conviction*

Howard contends the evidence is insufficient to support the robbery conviction because there is no evidence that he used force or fear with the intent to retain the victims' property. We conclude that a reasonable jury could have found that he used force or fear to accomplish the offense.

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains 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. [Citation.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

"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 element of the taking of another's property to constitute theft "has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.' [Citations.] Although the slightest movement may constitute asportation [citation], the theft continues until the perpetrator has reached a place of temporary safety with the property [citation]." (*People v. Gomez* (2008) 43 Cal.4th 249, 255.) "'A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim's presence. [Citations.]' [Citation.] . . . '[A] robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property.' [Citation.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 686-687.)

"The fear mentioned in Section 211 may be either: [¶] 1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or, [¶] 2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (§ 212.)

"'To establish a robbery was committed by means of fear, the prosecution "must present evidence 'that the victim was *in fact afraid*, and that such fear allowed the crime to be accomplished.'"' [Citation.] Thus, the fear element is subjective in nature. [Citation.] However, the

victim need not explicitly testify that he or she was afraid of injury where there is evidence from which it can be inferred that the victim was in fact afraid of injury. [Citation.] 'The fear is sufficient if it facilitated the defendant's taking of the property. Thus, any intimidation, even without threats, may be sufficient.' [Citation.]" (*People v. Montalvo* (2019) 36 Cal.App.5th 597, 612 (*Montalvo*).)

"[T]he force necessary to elevate a theft to a robbery must be something more than that required to seize the property. [Citations.]" (*People v. Anderson* (2007) 152 Cal.App.4th 919, 946.) "'[T]he force need not be great . . . .' [Citation.] 'An accepted articulation of the rule is that "'[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance . . . .'" [Citations.]" (*Montalvo*, *supra*, 36 Cal.App.5th at p. 618.)

The theory of the prosecution was that, although Howard did not achieve the possession of Valencia's property through force or fear, he used force or fear in the garage when he wrestled to escape from Valencia with Valencia's wallet and the keys to his car, in which he and Rico-Canchola had placed Valencia's property. In closing argument, the prosecutor asserted that Valencia's wallet and keys "were never found later," Howard and Rico-Canchola placed the stolen items in the car, one of them had the car key, and they used force or fear to escape with the key.

The evidence showed that Valencia's car keys and wallet were missing from the table where he had placed them and that Valencia never recovered them. Moreover, Hernandez discovered that some of

their tools and their laptop computer had been placed inside the car. It is reasonable to infer that either Howard or Rico-Canchola had the wallet and car key in their possession when they were confronted by Valencia in the garage and that their plan was to take the car with the objects they had placed inside it.

"The use of force or fear to escape or otherwise retain even temporary possession of the property constitutes robbery. [Citations.]" (*People v. Flynn* (2000) 77 Cal.App.4th 766, 772 (*Flynn*).) Here, Howard applied force by wrestling to get away from Valencia when Valencia grabbed him by the jacket. In addition, Valencia testified that he was afraid when he saw Howard because he did not know if Howard had a weapon. He also testified that he let go of Howard, allowing Howard and Rico-Canchola to run away, because he was worried about his children, who had come outside. Thus, Howard's escape to a place of safety was accomplished by force or fear. (See *People v. Mullins* (2018) 19 Cal.App.5th 594, 604 [affirming robbery conviction where the defendants robbed an ATM customer by shoving him aside before he completed his transaction and then withdrawing money from the account, reasoning that "[t]his force was sufficient to overcome [the victim's] resistance"]; *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 220 [defendant used force to retain property sufficient to support robbery charge, even though the defendant returned the wallet, when he tried "to push and shove his way" past the victim]; *People v. Cuevas* (2001) 89 Cal.App.4th 689, 699 (*Cuevas*) ["the relevant inquiry for the jury was the fear actually experienced by the victim, causing [him] to

"'suspend the free exercise of will'"']; *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1244-1246, disapproved in part on other grounds by *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2 & 3 [force sufficient for robbery conviction where the defendant approached a cashier in a market, "lightly pushed" his shoulder against the cashier's shoulder, and took money from the register after the cashier moved away].)

Valencia allowed Howard and Rico-Canchola to run away with his car keys and wallet because he feared for his children. Thus, as in *Cuevas*, Valencia's fear caused him "to "'suspend the free exercise of will,'"" allowing Howard to escape. (*Cuevas*, *supra*, 89 Cal.App.4th at p. 699.) The evidence thus is sufficient to support the robbery conviction. (See *Flynn*, *supra*, 77 Cal.App.4th at p. 772 ["So long as the perpetrator uses the victim's fear to accomplish the retention of the property, it makes no difference whether the fear is generated by the perpetrator's specific words or actions designed to frighten, or by the circumstances surrounding the taking itself"]; *People v. Estes* (1983) 147 Cal.App.3d 23, 28 ["It is sufficient to support the conviction that appellant used force to prevent the guard from retaking the property and to facilitate his escape"].)

II. *Sentencing*

Howard raises two challenges to his sentence. First, he contends that his sentence on count 3 must be reduced to three years. Second, he argues, and respondent concedes, that the trial court erroneously imposed three one-year prior prison term enhancements on counts 3, 4,

and 5. Respondent does not address Howard's first contention, but we conclude that Howard is correct regarding both claims.

"A sentence is said to be unauthorized if it cannot 'lawfully be imposed under any circumstance in the particular case' [citation], and therefore is reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.) "An unauthorized sentence is "'subject to judicial correction when it ultimately [comes] to the attention of the trial court or [reviewing] court" [citation].' [Citation.]" (*People v. Cates* (2009) 170 Cal.App.4th 545, 552.)

A. *Count 3*

Howard was convicted in count 3 of attempted grand theft of an automobile, in violation of section 664/487. The court sentenced him to the high term of three years, doubled to six for the prior strikes, plus one year for the prior prison term, to run concurrently with the 30-year term imposed on count 1. However, section 664 provides that the punishment for an attempt is "one-half the term of imprisonment prescribed upon a conviction of the offense attempted." (§ 664, subd. (a).) Howard accordingly should have been sentenced to one-half of three years, or 18 months, doubled to three years. We therefore will vacate the unauthorized six-year sentence on count 3 and correct it to reflect the imposition of a three-year term, to run concurrently with the 30-year term imposed on count 1. (See *People v. Abdullah* (2019) 38 Cal.App.5th 218, 226 [because sentencing errors "pertained only to the

length of concurrent terms, the correction of the errors did not affect the other components of [the] sentence," and "due process does not require the court to hold a resentencing hearing to correct them"]; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473 [exercising authority under section 1260 to modify the judgment by correcting an unauthorized sentence]; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3 [vacating unauthorized sentence and correcting it rather than remanding because the record showed the trial court's intention to run the sentences concurrently].)

B. *Prior Prison Term Enhancements*

The information alleged that Howard suffered two prior serious felony convictions (§ 667, subd. (a)(1)) and served a prior prison term (§ 667.5, subd. (b)), based on his conviction in case No. MA038476. Howard admitted the allegations. The trial court imposed a five-year enhancement on the sentences in counts 1 and 2 for the prior serious felony conviction and also imposed three one-year enhancements for the prior prison term. This was error. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1150 (*Jones*) ["[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply"].) We therefore will order the one-year enhancements stricken from Howard's sentence. (*Id.* at p. 1153; see *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021, 1025 [relying on *Jones* to strike the section 667.5, subdivision (b) enhancement].)

In *Jones*, *supra*, 5 Cal.4th 1142, our Supreme Court "held that in enacting what is now subdivision (a) of section 667, the voters did not intend that a defendant's sentence would be enhanced for both a prior conviction (under the new statute) *and* the resulting prison term (under § 667.5)." (*People v. Murphy* (2001) 25 Cal.4th 136, 156.) The imposition of the section 667.5, subdivision (b) enhancements on counts 3, 4, and 5 was contrary to *Jones* and therefore must be stricken.

DISPOSITION

The judgment is modified as follows: (1) the six-year sentence imposed on count 3, attempted grand theft of an automobile, is vacated and a sentence of one-half the high term of three years, doubled to three years, is imposed to run concurrently with count 1, first degree burglary; (2) the three one-year enhancements imposed on counts 3, 4, and 5 pursuant to section 667.5, subdivision (b) are stricken. The clerk of the superior court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.