Filed 9/12/19 P. v. Moore CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JASCHA MOORE, Defendant and Appellant.	B288197 (Los Angeles County Super. Ct. No. BA451229)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry A. Bork, Judge. Affirmed.

Peter J. Boldin, 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, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jascha Moore of a single count of robbery. On appeal, Moore contends his trial counsel was ineffective in failing to request a jury instruction describing the degree of force necessary for a robbery. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the evidence in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

The afternoon of October 21, 2016, Moore entered a 7-Eleven convenience store and took cigars and two cans of beer without paying for them. At the time, a stay-away order was in effect requiring Moore remain 100 yards from the store. The manager of the store, D.D., called the police and reported the theft. The police located Moore in a nearby park and arrested him. Moore was subsequently charged with one count of second degree robbery (Pen. Code, § 211).[1]

At trial, the prosecutor played for the jury a surveillance video of the incident. In addition, D.D. testified that when he tried to prevent Moore from opening the beer cooler, Moore pushed him, causing him to fall against the cooler door. Moore then took two cans of beer from the cooler, grabbed a pack of cigars off the counter, and moved toward the exit. D.D. told Moore he had to pay for the items, and he blocked the exit with his body to prevent Moore from leaving. Moore pushed D.D. to the ground and left the store with the beer and cigars.

During her closing argument, defense counsel stressed that D.D. was an unreliable witness and the surveillance video did not demonstrate precisely what transpired in the store. Counsel characterized the events captured on the video as follows:

---

[1] All future undesignated statutory references are to the Penal Code.

"[Moore] opens that [cooler] door and that door obscures everything that happens next. And in that moment, that millisecond of a moment [D.D.] inserted himself into that cooler. And at the rate that people are moving Mr. Moore is reaching for a beer and [D.D.] is trying to block him. It's more than reasonable . . . [t]hat any touching that occurred [was] accidental and non intentional and that there was no force used to deprive [D.D.] of the beer." Counsel later reiterated that "what happened at that cooler was in fact an accident[al] touching, if any touching at all."

The jury found Moore guilty as charged. The court sentenced him to the midterm of three years, and ordered execution of the sentence suspended. Moore was placed on probation and ordered to serve 548 days in county jail. The court awarded him 548 days of custody credit, and imposed various fines and fees.

Moore timely appealed.

DISCUSSION

Moore's sole contention on appeal is that his trial counsel was ineffective for failing to request a pinpoint jury instruction related to the degree of force required for robbery. We disagree.

To prevail on a claim of ineffective assistance of counsel a defendant must establish two elements: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors or omissions, a determination more favorable to the defendant would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 690, 694; see *People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*).) We presume counsel rendered adequate assistance and exercised reasonable professional judgment in making trial

decisions. (*Holt, supra,* 15 Cal.4th at p. 703.) The record must demonstrate the lack of a rational tactical purpose for a challenged act or omission. (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

Robbery is "the felonious taking of personal property in the possession of another . . . and against [the person's] will, accomplished by means of force or fear." (§ 211.) The distinguishing factor that turns a larceny into a robbery is the application of force or fear to the victim to permanently deprive him of his property. (*People v. Gomez* (2008) 43 Cal.4th 249, 265; *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1308.) The term "force" does not have a technical meaning and is presumed to be within the jurors' understanding. (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708; *People v. Griffin* (2004) 33 Cal.4th 1015, 1025–1026.)

Courts often remark that the degree of force used for a robbery is immaterial. (See, e.g., *People v. Griffin, supra,* 33 Cal.4th at p. 1025; *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved of on other grounds by *People v. Mosby* (2004) 33 Cal.4th 353; *People v. Jones* (1992) 2 Cal.App.4th 867, 871.) However, "at the very least it must be a quantum more than that which is needed merely to take the property from the person of the victim . . . ." (*People v. Wright* (1996) 52 Cal.App.4th 203, 210; see *People v. Morales* (1975) 49 Cal.App.3d 134, 139 [for robbery, "something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property"]). For example, a pickpocket who incidentally touches the victim while extracting a wallet from his pocket does not commit a robbery. (See *People v. Garcia, supra*, 45 Cal.App.4th at p. 1246.) Where the victim resists, however, " ' "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.]" (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1259.)

Here, the trial court instructed the jury with CALCRIM No. 1600, which informed the jurors that, to convict Moore of robbery, they must find he "used force or fear to take the property or to prevent the person from resisting." This instruction provided a correct recitation of the law, and the trial court did not have a sua sponte duty to give an additional instruction defining the term "force." (See *People v. Anderson* (1966) 64 Cal.2d 633, 639.) Nonetheless, Moore argues his counsel should have requested an additional pinpoint instruction informing the jury that the force used must be a quantum more than that which is needed merely to take the property from the person of the victim. He asserts the instruction was necessary to effectively argue the defense theory of the case, and there was no tactical reason for his counsel not to request it.

A trial court must generally give requested instructions that pinpoint the theory of defense. (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Contrary to Moore's assertions, however, his theory of defense was not that he used no more force than was necessary to accomplish the taking. Rather, as is evident from trial counsel's closing argument, his theory was that he applied no force to D.D., but, if he did, the force was accidental and unconnected to the taking.[2] Defense counsel never argued,

---

[2] The California Supreme Court has held that accident, in the sense that it represents the absence of an intent to cause the victim to experience force or fear, is not a defense to robbery. (*People v. Anderson* (2011) 51 Cal.4th 989, 999.)

or even suggested, that Moore used only the amount of force necessary to take the beer and cigars. Thus, there was no reason for counsel to request a pinpoint instruction related to the degree of force necessary for a robbery.

Even if we accepted Moore's premise that the instruction would have been relevant to his theory of defense, his counsel was not ineffective for failing to request it. The trial court is required to give a requested instruction relevant to a theory of defense only if it is supported by substantial evidence. (*People v. Sisuphan* (2010) 181 Cal.App.4th 800, 806.) In this case, a theory of defense premised on the degree of force used was not supported by substantial evidence.

As we explained in *People v. Lopez* (2017) 8 Cal.App.5th 1230, "[f]or thefts of most personal property, there is an appreciable distinction between the quantum of force necessary to seize the property from an unresisting victim, and the additional force needed to seize the property if the victim fights back. . . . [I]f the thief is applying no more force than necessary to lift the property and carry it off, there is no robbery; if the victim resists, more force is needed and the theft becomes a robbery." (*Id.* at p. 1236.) In other words, "physical resistance will convert a theft into a robbery, regardless of the amount of force involved." (*Id.* at pp. 1236–1237; see *People v. Hudson* (2017) 11 Cal.App.5th 831, 839 ["if a victim resists during the initial seizure, the force applied is necessarily more than required to seize the property absent resistance; and, if a victim does not resist at the time of seizure, force applied to overcome subsequent resistance is force in excess of that required to effect the initial seizure"].)

Here, Moore did not need to apply any force to D.D. in order to take the beer or cigars; they were, after all, sitting in a cooler and on the counter. It was only when D.D. attempted to block Moore from taking the property—i.e., resisting—that the use of force became necessary. Under these circumstances, there was no way for the jury to conclude Moore used force without also finding he used more force than was necessary to accomplish the mere seizing of the property. (See *People v. Lopez, supra*, 8 Cal.App.5th at pp. 1236–1237; *People v. Hudson, supra*, 11 Cal.App.5th at p. 839.) A request for a pinpoint instruction on the degree of force required for a robbery, therefore, would have been futile, and counsel was not ineffective for failing to make such a request.[3] (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 280–281 ["there could be no deficiency in failing to request an unnecessary instruction"]; *People v. Weaver* (2001) 26 Cal.4th 876, 931 ["Counsel is not ineffective for failing to make a frivolous motion."].)

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J. STRATTON, J.

---

[3] For this same reason, defense counsel's failure to request the instruction caused no prejudice. In finding Moore guilty of robbery, the jury necessarily determined he used more force than required to seize the property.