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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. JOSE DEMETRIO MORENO, Defendant and Appellant.	B267884 (Los Angeles County Super. Ct. No. KA109044)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Affirmed.

Carlos Ramirez, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Jose Demetrio Moreno appeals from a judgment and sentence, following his conviction for second-degree robbery. He contends that the trial court abused its discretion in excluding hearsay statements made by his girlfriend about the robbery incident, that the prosecutor committed misconduct during closing argument, and that the evidence was insufficient to show he used force to commit the robbery. Finding no error, we affirm.

STATEMENT OF THE CASE

After a jury convicted appellant of second degree robbery (Pen. Code, § 211),[1] he admitted having suffered three "strikes" under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and six prior serious convictions for which he served prison terms. The trial court granted appellant's motion to strike two "strikes" pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and sentenced him to a total of 21 years in jail

Appellant filed a timely notice of appeal.

STATEMENT OF THE FACTS

Roxana Arriola testified that on January 29, 2015, at around 4:00 p.m., she was at a shopping center in Baldwin Park. She was going into a restaurant when Tina Ramirez,

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

who appeared to be homeless, approached her and said she had not eaten that day. Arriola bought Ramirez some takeout food. The two women walked toward a nearby park, talking and eating. Ramirez told Arriola that "she was hanging out around there with a boyfriend." There were other people eating at the park, and they began insulting Arriola, so she left and headed toward the shopping center. Ramirez followed. The women entered a clothing store, and Arriola purchased some clothing for herself and a dress for Ramirez. While inside the store, Ramirez told Arriola that her boyfriend was passing by and pointed out appellant, who was riding his bicycle outside.

When Arriola and Ramirez exited the store, appellant started arguing with Ramirez. Arriola decided to leave and walked away. Ramirez followed Arriola and started talking with her. Arriola heard a bicycle approach from behind. Appellant forcibly pulled Arriola's shopping bag from her hand, stretching her arm and causing her to stumble. Arriola testified that it was a "strong pull" and her arm was hurt from the force used. Her purchases and wallet were in the bag. Arriola asked Ramirez, "Why are you doing this to me?" Ramirez replied, "I don't know," and ran away, following appellant.

On February 17, at around 10:00 a.m., Arriola and her boyfriend were driving by the same location when she saw appellant and Ramirez outside a Church's Chicken restaurant. As her boyfriend took photographs, Arriola approached appellant and Ramirez and asked them to

return her wallet. Appellant and Ramirez said they did not know Arriola, grabbed their backpacks and fled in different directions. Arriola called 911.

Baldwin Park Police Officer Donald Newton testified he responded to Arriola's 911 call. Arriola told him she had located the suspects who had robbed her and showed him photographs of appellant and Ramirez. About two hours later, Officer Newton responded to a call for assistance from another officer at the shopping center. The officer had detained four men who were drinking. When Officer Newton arrived, he immediately recognized appellant. Officer Newton asked the other officer to contact Arriola to arrange for a field identification.

While Officer Newton was waiting for the other officer to return with Arriola, appellant asked why he was being detained. Officer Newton responded that he was investigating a crime. Appellant said, "It's about that bitch at Church's, isn't it?" Appellant asked if he could call his girlfriend to pick up his belongings, and Officer Newton agreed to let appellant make a phone call.

Several minutes later, Ramirez arrived. Officer Newton recognized her from the photograph Arriola had shown him. He asked Ramirez her name and told her to have a seat. Ramirez looked confused, and appellant said, "It's about that bitch at Church's."

Arriola arrived and identified appellant and Ramirez as the people who had robbed her. Because appellant's clothing was different from what he was wearing in Arriola's

photograph, Officer Newton asked appellant why he had changed his clothes. Appellant replied that he had changed clothes "because she was saying I robbed her, and I didn't want to be recognized." Appellant also told Officer Newton that Ramirez had nothing to do with the crime. He stated, "I'm the one who took the purse and threw it in the dumpster at Taco Nazo. Go look for it. It should be there." Officer Newton did not find a purse in the dumpster.

Appellant did not testify or present an affirmative defense.

DISCUSSION

A. *The Trial Court did not Abuse its Discretion in Excluding Statements Ramirez Made to a Defense Investigator.*

During appellant's trial, Ramirez was called as a witness, but she refused to testify and invoked her right against self-incrimination under the Fifth Amendment. Appellant then sought to call a defense investigator, George Moreno, to testify about statements Ramirez had made to him about the robbery. At the Evidence Code section 402 hearing, Moreno testified that Ramirez had related a version of the incident substantially similar to Arriola's testimony. According to Ramirez, Arriola approached her and offered to buy food and rent a room for her. Ramirez agreed, and after buying food, the women went to a nearby park where Ramirez ate. Appellant then approached and shortly after, left with Arriola. Ramirez finished eating and headed

toward the shopping center where she encountered Arriola and appellant. Arriola wanted to buy a dress for Ramirez, so all three went to a clothing store. After purchasing the dress, Arriola and Ramirez talked about going dancing. Appellant did not agree with the women's plans to go dancing and began arguing with Arriola. He struck the bags that Arriola was carrying, causing them to fall to the ground. He then stated, "I'm out of here" and rode away on his bicycle, leaving the bags on the ground.

Defense counsel argued that Ramirez's statements to Moreno fell with the statement against penal interest exception to the hearsay rule in Evidence Code section 1230. Counsel argued the statements showed Ramirez was present at the scene and "involved" in the robbery. The prosecutor argued that the statements were exculpatory. The trial court ruled that the statements were inadmissible hearsay. "This is an exculpatory statement for both her and the defendant. . . . -- other than placing herself at the scene, there is nothing there that is against her penal interest."

On appeal, appellant contends that Ramirez's statements were inculpatory, as they corroborated Arriola's version of events. We disagree. In Ramirez's version of events, no robbery occurred because appellant never gained possession of Arriola's personal property; appellant knocked Arriola's bag to the ground but left without taking it. Because the statements are exculpatory, they do not fall under the exception to the hearsay rule for statements

against penal interest. In short, the trial court properly excluded Ramirez's statements to the investigator.[2]

B. *The Prosecutor did not Commit Misconduct During Closing Argument, and Appellant's Counsel did not Render Ineffective Assistance.*

Appellant contends the prosecutor engaged in misconduct by misstating the law of robbery during closing argument. He further contends his trial counsel was ineffective for failing to object to the prosecutor's comments.

1. *Relevant Factual Background*

In closing argument, defense counsel urged the jury to find that appellant's crime was theft, not robbery. He stated, "Where is the evidence when you're analyzing the level of force that was used here that [appellant] even touched [Arriola]? He grabbed the bag. There is no evidence here that he even touched her at all. Where is the evidence that there was any type of struggle? See, that's when you look at robbery and the force that is required for robbery.

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[2] In the caption heading of appellant's brief, he asserts the trial court's exclusion of the statements violated his rights under *Chambers v. Mississippi* (1973) 410 U.S. 284. However, in the main text of the brief, appellant provides no argument in support of that contention. Accordingly, it is forfeited. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [any issue not adequately raised or supported deemed forfeited]; accord, *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 608.)

There's got to be an effort by the person, the owner of the property, to retain the property."

The prosecutor objected, and after an unreported sidebar, defense counsel continued his argument on this issue. He stated: "So in evaluating the level of force, you can look to see whether or not there is some evidence in there that [appellant] used force beyond that required to take the property because that's what is required. So you look to see whether or not there was a struggle, whether or not there was an effort by the person to retain the property. All we have here is that force, when he went by and grabbed it, to dislodge the bags that she was holding in her right hand with a light grip. How much force is required when you have a light grip and somebody pulled the bag?"

In rebuttal, the prosecutor stated: "This issue of whether or not there is force and how much of this touching or not touching has been argued many times. Robberies have happened many times before, and they're going to continue to happen. And the courts of our state have already addressed this issue. As a matter of fact, in 1992 the Court of Appeals--" Defense counsel objected, and following a sidebar, the court overruled the objection. The prosecutor continued: "In 1992, the Court of Appeal already decided this issue, and they said that the degree of force is immaterial. All you have to decide is whether force was used or not. And the tools that you can use, the evidence that has been presented that you can use are the victim's testimony, the circumstantial evidence that shows and tends to prove

that there was force in this case, the fact that she got pulled, the fact that her arm was fully extended, the fact that she was left with pain. These are all pieces of circumstantial evidence that shows and supports and tends to prove that force was used."

2. *Analysis*

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct . . . .'" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) "When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]" (*Ibid.*)

Section 211 provides that 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." Although no case has precisely defined the amount of force required for robbery as opposed to theft, "it is [well] established that something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property." (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.) In *People v. Jones* (1992) 2 Cal.App.4th 867 (*Jones*), the appellate court held that the degree of force used to commit robbery is "immaterial." (*Id.* at p. 871.) There, the evidence showed the defendant had grabbed the victim's purse, and that "[t]he purse was grabbed with such force that it injured

the victim. Her finger was cut ('a little blood') and her shoulder was injured ('a little bit')." The appellate court concluded that "[t]his ma[de] the taking a robbery," not theft. (*Id.* at p. 870.)

Here, the prosecutor's statements did not misstate the law of robbery. The prosecutor was responding directly to defense counsel's argument that the offense could not be robbery, because "there was [no] type of a struggle." The prosecutor was justified in arguing that Arriola's testimony -- that appellant pulled on the shopping bag with such force that it stretched Arriola's arm, caused her to stumble and inflicted pain -- provided ample evidence from which the jury could conclude that appellant used more force than the minimum necessary to take the bag. That argument properly identified the evidence a jury could use to convict appellant of robbery. In short, there was no misconduct, and trial counsel was not ineffective for failing to object to the prosecutor's statements.[3]

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[3] Appellant's reliance on *People v. Jasso* (2012) 211 Cal.App.4th 1354 is misplaced. There, the prosecutor repeatedly stated that "the California Supreme Court and the California Court of Appeal had upheld guilty verdicts on facts similar to those before the jury." (*Id.* at p. 1362.) In contrast, here, the prosecutor did not assert that a higher court had upheld robbery verdicts based on similar facts, but rather, emphasized established law that so long as force is used to commit a robbery, the "degree of force is immaterial." (*Jones*, *supra*, 2 Cal.App.4th at p. 871.) Whether such force was used here was expressly left for the jury to determine.

C. *The Evidence was Sufficient to Support Appellant's Robbery Conviction.*

Finally, appellant contends there was insufficient evidence to support his conviction for robbery, arguing that the prosecution failed to prove that he took Arriola's bag by means of force. "In determining whether the evidence is sufficient to support a conviction . . . , 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] . . . [T]he reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224, italics omitted.)

Here, Arriola testified that appellant seized the bag by pulling on it so hard that it caused her to lose her balance and caused pain to her arm. Based on her testimony, the force was more than that necessary to take the bag. (See *Jones*, *supra*, 2 Cal.App.4th at p. 871 [affirming robbery conviction where "victim's uncontradicted testimony showed her finger was bloodied and her shoulder injured by the force exerted by appellant in taking her purse"]; cf. *People v. Roberts* (1976) 57 Cal.App.3d 782, overruled on another ground in *People v. Rollo* (1977) 20 Cal.3d 109, 120, fn. 4

[evidence that purse's handle broke as a result of purse snatch supported jury's finding that defendant used force sufficient to commit robbery].) On this record, the evidence was sufficient to support the jury's finding that appellant committed robbery.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.