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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCUS ANTHONY MESSER, Defendant and Appellant.	B234119 (Los Angeles County Super. Ct. No. NA085910)

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

Melissa A. Fair, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Marcus Anthony Messer appeals from the judgment entered following a jury trial which resulted in his conviction of second degree robbery (Pen. Code, § 211). The trial court sentenced Messer to two years in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

At approximately 9:00 p.m. on June 3, 2010, Terry Ann Griffin was at Eddie's Liquor Store at 200 West Pacific Coast Highway in Long Beach. As was her habit, Griffin had stopped at the store to purchase something.

That night, as she was standing in line, Griffin overheard "a conversation between the store clerk and [Messer]. They were arguing." Griffin could not remember exactly what had been said, but she believed Messer had bought some cigarettes and that he and the clerk were arguing about the amount of change the clerk owed him. Messer then "grabbed a piece of candy and proceeded to walk out [of] the store." As Messer left the store, Griffin heard the store clerk say, " 'Come back here. You need to pay for that, what you have in your hands.' " Messer stopped, looked back at the clerk, said " 'I'm not paying for anything[,]' " then walked out of the store. The clerk came out from behind the counter, and followed Messer out of the store.

Krachang Bhaoprasirt had worked as a stock clerk and cashier at Eddie's Liquor Store for approximately five years. On the night of June 3, 2010, he and a coworker were working as "stocker[s]" and "cashier[s]." Bhaoprasirt, who is 5 feet 6 inches tall, was working at the register when Messer, who is approximately 5 feet 10 inches tall and weighs195 pounds, entered the store. Messer came up to the cash register, which is behind a Plexiglas window, and asked Bhaoprasirt for three cigarettes. It was the first time Bhaoprasirt had ever seen Messer.

Messer wished to buy individual cigarettes and he bought three for $1. He then walked away, grabbing a candy bar from out of a jar as he went. The jar had been marked "ten cent[s]" with a black marker. As Messer walked out of the store, Bhaoprasirt asked him, " 'Why don't you pay for the candy?' " When Messer did not answer, Bhaoprasirt again asked him why he had not paid for the candy. Messer

was almost out the front door when he turned around and answered Bhaoprasirt by indicating that "he [would] go back to pay [for] it at the counter." Messer at first walked back toward the register, then turned and walked quickly out of the store.

Bhaoprasirt followed Messer. When he caught up with him outside the store, Bhaoprasirt asked Messer, " 'Why you told me that you are going to pay for it, and you did not?' " Bhaoprasirt then reached toward Messer's left shoulder and tried to stop Messer from leaving. He wanted Messer to "take responsibility [for] what he [had done]." He held Messer's shoulder and asked him, " 'Why you don't pay me?' " Messer turned and attempted to hit Bhaoprasirt with his fist, but missed. Bhaoprasirt attempted to hit Messer, but also missed. Instead Bhaoprasirt kicked Messer "on his knee." Messer then retaliated by hitting Bhaoprasirt on the left side of his face, damaging the area around his eye and nose.

The two men stopped hitting each other when a marked police car pulled up. Bhaoprasirt was bleeding heavily and he spoke to the officer "about what had just occurred."[1] An ambulance arrived and transported Bhaoprasirt to a hospital where he was treated for his injuries. His eye, in particular, was swollen as he had suffered a fracture in the bone in the socket which surrounds it.

With regard to his nose, Bhaoprasirt was given pain medication and referred to a plastic surgeon. When he went to see the surgeon, the doctor told Bhaoprasirt that he needed surgery, but that he had to wait three months for the swelling to go down.

Phong Truong owns Eddie's Liquor Store. Although he was not present at the store on the evening of June 3, 2010, his brother downloaded the surveillance video and made copies for him and the police.

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[1] A video tape of the incident was then played for the jury. In addition, a three-page document containing photographs was marked People's exhibit number four and was received into evidence. Several of the photographs showed Bhaoprasirt bleeding. One photograph showed "what happened to [his] eye after the defendant socked him."

Truong indicated he did not have the complete video of the event because it was "recorded to a computer and ha[d] since been recorded over." Although Truong had surveillance video cameras both inside and outside the store, some of the tape, for example 20:00:30 to 20:00:40, or 59 seconds, had been deleted. In addition, there was no audio portion to these videos. The prosecutor then asked Truong "if [he] played this tape . . . on a better system and there's audio on that, would [Truong] know that [it was] from the store itself?" Or would he "not know?" Truong indicated he "might know."

Long Beach Police Department Officer Jason Kennedy was on patrol on June 3, 2010. On that evening, Kennedy responded to a call directing him to Eddie's Liquor Store on Pacific Coast Highway. It was 9:17 p.m. and Kennedy was informed that there had been an incident at the store. As a result of his response to the call, Kennedy took Messer into custody.

When he was taken into custody, Messer did not complain of any pain to his shin or face. The prosecutor had a photograph of Messer and Officer Kennedy which represented how Messer looked that night. He had no cuts, injuries or swelling on his face.

During the booking process, officers discovered that Messer had $31.33 in cash on his person. Messer then made a spontaneous statement to the officers. Kennedy and his partner had just arrived when Messer, who was standing outside, said, " 'He was hitting me, and so I ran out of the store.' " Later, Messer asked why he was being taken into custody. An officer indicated that he was being booked for robbery. In response, Messer said, " 'Robbery, for a piece of candy? . . . That guy kicked me in the chest, so I socked [him] . . . in the face. What was I supposed to do?' "

Messer called emergency medical physician, Ryan O'Connor, to testify in his defense. O'Connor had reviewed Bhaoprasirt's medical records, including photographs taken at approximately 10:00 p.m. on June 3, 2010. The records were from St. Mary's Medical Center emergency room, from which Bhaoprasirt had been discharged at approximately 11:20 p.m.

From reviewing the records, O'Connor concluded that Bhaoprasirt has suffered a broken nose and "what's known as [an] orbital floor fracture." The orbital floor surrounds the eyeball, separating the sinus, with a very thin, very fragile bone. Bhaoprasirt had indicated that his injury had caused him severe pain. However, by the time he left the hospital, "he appeared to be in mild distress." O'Connor suggested that Bhaoprasirt "follow-up with a plastic surgeon." The doctor indicated that, "[t]ypically when there's a fracture of the nose, nothing can be done immediately because there tends to be a lot of swelling associated with this injury . . . ."

2. *Procedural history.*

On September 8, 2010, Messer was charged by information with one count of second degree robbery in violation of Penal Code section 211, a felony. It was further alleged that, during the commission of the robbery, Messer personally inflicted great bodily injury upon Bhaoprasirt within the meaning of Penal Code section 12022.7, subdivision (a).

On February 22, 2011, a first amended information was filed. It alleged as count 1 that Messer had committed second degree robbery in violation of Penal Code section 211, with the special allegation that, during the offense, he had inflicted great bodily injury in violation of Penal Code section 12022.7, subdivision (a). As count 2, the amended information alleged that Messer had committed assault by means likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(l) and that he had personally inflicted great bodily injury upon Bhaoprasirt. As a lesser included offense of count 2, the information alleged that Messer committed the offense of simple assault in violation of Penal Code section 240.

On February 23, 2011, after all of the evidence had been presented and counsel had argued, the trial court instructed the jury. In particular, the court instructed on the elements of second degree robbery, assault with force likely to produce great bodily injury and the lesser included offense of simple assault in violation of Penal Code section 240.

At some point after the jury had begun to deliberate, it submitted the following request to the court: " 'We the jury in this case submit the following request or question to the court: We would like to see the testimony given by Ms. Griffin.' " After preparing the testimony, the court reporter took the witness stand and reread Griffin's entire testimony to the jury. After hearing the testimony, the jury resumed its deliberations.

Approximately one and one-half hours after Ms. Griffin's testimony had been reread to them, the jury buzzed the court three times, indicating that it had reached a verdict. The foreperson, Juror No. 6, handed the verdict forms to the bailiff, who handed them to the court. The court, in turn, handed them to the clerk. The court clerk read the verdict as follows: " 'Title of court and cause: We the jury in the above-entitled action find the defendant, Marcus Anthony Messer, guilty of the crime of . . . violation of Penal Code section 211, a felony, as charged in count one of the first amended information. We further find the allegation that in the commission of the above offense said defendant, Marcus Anthony Messer, personally inflicted great bodily injury upon Krachang Bhaoprasirt within the meaning of Penal Code section 12022.7[,] [subdivision] (a) to be not true.' "

After the jury was polled, the People dismissed the remaining counts and the matter was set for sentencing.

At proceedings held on March 3, 2011, counsel for Messer indicated that, although they were ready for sentencing, counsel wished to "put sentencing over and ask for a diagnostic study prior to actually giving the final sentence and judgment on behalf of Mr. Messer." As the prosecutor had no objection, the trial court "put [the matter] over for 90 days" and asked the Department of Corrections to prepare "a [Penal Code section] 1203 report" due back in the court at 8:30 a.m. on June 2.

The matter was called for sentencing on June 2, 2011. The trial court commented that this was a somewhat unusual case in that, after a jury trial and full probation report, the court had referred it for a Penal Code section 1203 evaluation. The court continued, "But in any event, we have both a probation report and a 1203 report in this matter."

Messer then addressed the court and asked that it consider a grant of probation. He indicated that his mother is ill and without him to care for her "things will go wrong." In addition, his daughter is a "special needs daughter." Most importantly, it had been Messer's understanding that, if he had no "write-ups" and did not get into any trouble while he was incarcerated, he would be granted probation. The following then occurred: "The Court: Well, that's the wrong impression. Anything else? [¶] Defendant Messer: I'm just sorry to waste the court's time. [¶] The Court: It's a waste of time. I agree. A ten cent piece of candy. [¶] Defendant Messer: I didn't steal the candy, Sir. [¶] The Court: No, no. We've already had the trial. We're not going to do the trial again. Twelve individuals heard the case. They made the decision." Messer went on to explain that he was sorry because he had put his "hands on the gentleman" and that had been a mistake. He should have "thought a little bit more before [he] reacted" and he was "sorry for what [he had] done to [Bhaoprasirt.]" He stated that it would never happen again.

The prosecutor indicated he was concerned with statements he had seen in the section 1203 report indicating that Messer was "excusing his conduct[.]" The prosecutor believed that Messer's conduct was "extreme." "It's a ten cent piece of candy. Drop it on the floor, walk away." If Messer had "just shrugged him off and walked away, even with the ten cent piece of candy and the police [officers] . . . there," the prosecutor "doubt[ed] this case would have even been filed as a possible . . . robbery . . . ."

Messer's counsel noted that, although Messer had broken Bhaoprasirt's nose "for such a trivial thing," Messer had at least acknowledged that he hadn't wanted to hurt the man and counsel did think that when he, Messer, looked at the case as a whole, he would know he could have avoided the entire confrontation.

The prosecutor indicated that he thought the trial court "should send a strong message to Mr. Messer that . . . the time ha[d] come for him to accept responsibility for what ha[d] happened [and] to learn from it and to, . . . spend the rest of his life making the correct decisions."

When the trial court then asked Messer whether the videotape of the incident had been altered, Messer answered, "Yes." Upon hearing Messer's response, the court addressed him and stated: "Mr. Messer, you're not getting it. . . . You're not getting it. No one altered that tape. You get that?" "Over a ten cent piece of candy you're saying that they're going to alter a tape? This was all staged just to get you?" The court continued, "Do you know, Sir, that the most important witness against you was . . . the person in line that was with you?" "She was critical, and she supported the store. She said basically to the jury that you were a bully, that your attitude was, hey, you guys owe me something. Come get me for this ten cent piece of candy. . . . That's what she said, and that's what she told the jury, and that's why the jury did what they did. It had nothing to do with the altered tape. It had nothing to do with the store. This was a third party that was in line with you. And that was her perception of the case."

After telling Messer that he had a "temper problem" and that the court hoped he would "be able to control it in the future," the trial court indicated that the simple assault in violation of Penal Code section 240 "merged" with the robbery pursuant to Penal Code section 654. Accordingly, the six months imposed for that offense would run concurrent to and "merge" with the sentence imposed for the robbery. The court then sentenced Messer to the low term of two years in state prison for the robbery. He was given presentence custody credit for 114 days actually served plus 16 days of good time/work time, for a total of 130 days. He was ordered to pay a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a stayed $200 parole revocation restitution fine (Pen. Code, § 1202.45), a $40 citation processing fee (Pen. Code, § 1463.07) and a $40 security assessment (Pen. Code, § 1465.08, subd. (a)).

Messer filed a timely notice of appeal on June 29, 2011.[2]

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[2] It should be noted that, at trial, the jury found the allegation Messer personally inflicted great bodily injury upon Krachang Bhaoprasirt within the meaning of Penal Code section 12022.7, subdivision (a) to be "not true." In addition, count 2, which alleged that Messer committed assault by means likely to produce great bodily injury in

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed February 7, 2012, the clerk of this court advised Messer to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. After receiving several extensions of time within which to submit it, on May 21, 2012, Messer filed a supplemental brief in which he asserted that he could not have been guilty of robbery since the store's video surveillance tape showed "no theft or robbery." However, apart from whether it is shown on the tape, several witnesses testified that Messer took the candy as he left the store. The jury found the witnesses credible and there is substantial evidence to support that finding.

Messer also contended that his crime, if it occurred, could not have amounted to a robbery since he was accused of taking a piece of candy worth only ten cents. If found guilty of anything at all, the jury should have found him guilty of petty theft. Messer's contention is without merit. Robbery, no matter what the worth of the item taken, "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." (Pen. Code, § 211.) Here, although Messer took only a ten-cent candy bar, he took it

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violation of Penal Code section 245, subdivision (a)(1), was dismissed on the People's motion made pursuant to Penal Code section 1385. Finally, the special allegation that Messer inflicted great bodily injury pursuant to Penal Code section 12022.7, subdivision (a) was dismissed by the prosecutor. On January 17, 2012, Messer filed a motion in the trial court to have the June 2, 2011 minute order and the June 8, 2011 abstract of judgment corrected to reflect these findings and rulings.

In addition, on January 17, 2012, Messer's counsel filed an ex parte motion to correct presentence custody credits. Counsel claimed the "defendant [was] entitled to 5 days more credit for presentence custody than awarded in the judgment and that the erroneous credit calculation represent[ed] an unauthorized sentence which [could] and should be corrected by[the trial] court." (*People v. Fares* (1993) 16 Cal.App.4th 954, 958.)

from Bhaoprasirt's immediate presence, against Bhaoprasirt's will, by means of force and fear. Although the jury found that Messer did not inflict great bodily injury, the evidence nevertheless established that Messer used fear and force. After taking the candy bar from its container, Messer taunted Bhaoprasirt, then hit him, breaking his nose and injuring the bone around his eye. This evidence more than substantially supports the jury's finding Messer committed robbery.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith* v. *Robbins* (2000) 528 U.S. 259; *People* v. *Wende* (1979) 25Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.