Filed 5/17/17 P. v. Volpe CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

COLIN TAYLOR VOLPE,

Defendant and Appellant.

2d Crim. No. B269787
(Super. Ct. No. 2014011387)
(Ventura County)

Colin Taylor Volpe appeals from the judgment entered after his conviction by a jury of second degree robbery. (Pen. Code, §§ 211, 212.5, subd. (c).) The trial court suspended the imposition of sentence and placed appellant on probation on condition that he serve 482 days in county jail. The court ordered that the jail term be deemed served.

Appellant contends that the trial court erroneously modified three standard jury instructions. He also contends that the court gave an erroneous advisement to the jury after it had announced that it was deadlocked. We affirm.

Facts

In April 2014 Hector Murillo was working as a teller at a bank. Appellant walked to Murillo's window and handed him a note that said: "'Hello. This is a bank robbery. I have a gun. Please put $10,000 in an envelope. I don't want to hurt you.'" Murillo did not see a gun, but he "felt really scared." He put $500 to $600 in an envelope and gave it to appellant, who walked out of the bank.

Appellant testified as follows: He "thought [he] had [a] camera implanted in [his] head." He also thought that he was "on like a reality show, a live action role-playing game," and that he was receiving messages from the producers of the show. Appellant "heard a couple messages about robbing a bank, everyone saying 87 banks had been robbed that day, . . . and [he] thought [he] had to rob a bank. . . . So [he] went and robbed a bank in Camarillo." He "felt absolutely compelled" to rob the bank "[b]ecause they kept sending [him] the messages." He "was trying to get arrested. [He] was trying to end the show like Seinfeld." Appellant did not intend to steal money from the bank. He "thought [that the money he received from the teller] was going to be repaid by the producers." He "didn't really think [he] was stealing. [He] thought [he] was just playing [his] part [in the show]."

Modification of Standard Jury Instructions

Appellant contends that the trial court erroneously modified three standard jury instructions: CALCRIM Nos. 225, 251, and 3428. The instructions refer to the "intent and/or mental state" required for the commission of the charged offense. The trial court deleted the reference to "mental state." The court explained that, to prove the crime of robbery, the People are not

required to prove a particular mental state in addition to the specific intent to permanently deprive the owner of the property. The court continued: "[I]f we were to include the term mental state for the crime of robbery, it would be an undefined term because it is nowhere defined in the instructions for that crime. [¶] Having looked at the instructions, the use notes, certain treatises and case law, the Court has come to the conclusion that mental state shouldn't be referenced here." Appellant objected to the deletion of "mental state" from the instructions.

Appellant argues: "The court's omission of mental state from the instructions was . . . the result of faulty reasoning. [¶] . . . [¶] The court erred by concluding that in the instant case, the reference to mental state in the jury instructions was something separate or distinct from the requisite specific intent in robbery. Contrary to the court's conclusion, for the crime of robbery, the mental state is the specific intent to deprive the owner of their property. . . . [¶] . . . [T]he mental state for robbery was the element of the specific intent to deprive the owner of his property."

Appellant's argument acknowledges that the mental state and specific intent for robbery are identical. The culpable mental state, or mens rea, is "'the intent to deprive another of the property permanently, [which] is satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment.' [Citations.]" (*People v. Aguilera* (2016) 244 Cal.App.4th 489, 500.) The trial court correctly instructed the jury that, to prove appellant guilty of robbery, "the People must prove that . . . "[w]hen [he] used force or fear to take the property, he intended to deprive the owner of it permanently or to remove it from the

owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property." Robbery requires no additional mental state. (See *People v. Anderson* (2011) 51 Cal.4th 989, 991 ["the intent element of robbery does not include an intent to apply force against the victim or to cause the victim to feel fear"].)

Because the mental state and specific intent required for robbery are identical, the trial court did not err in deleting "mental state" from the instructions' reference to "intent and/or mental state." The term "mental state" was redundant and could have confused the jury since, as the trial court noted, it is not defined in the instructions.

Advisement to Deadlocked Jury

After one full day of deliberations, the jury announced that it was deadlocked by a vote of 10 to 2. It did not tell the trial court whether the vote was 10 for guilty or 10 for not guilty. The trial court gave CALCRIM No. 3551 instructing the jury to continue its deliberations. Appellant concedes that this instruction was proper. But he claims that, after giving CALCRIM No. 3551, the court erroneously "ordered the jurors to stop deliberating among themselves and go off individually and contemplate . . . embracing the opposing view." Appellant asserts, "The court's off-the-cuff jury advisement was prejudicial and coerced the minority voters to change their position in order to reach a guilty verdict."

The court told the jurors: "Now, just a thought about an approach you might take. . . . [Y]ou're impartial judges here. You are not an advocate for either side, and you really need to, in as good faith as you can, entertain the possibility that the other perspective might be correct. . . . [¶] . . . [¶] [M]y suggestion to

you is this: That you take a break for about a half hour or so, wander around the grounds a little bit because you are not going to have any distractions, really. And you cannot talk about the case among yourselves in little groups; that is absolutely forbidden. It has to be when everybody is together in the jury room[.] *[S]o I'm going to ask you to be bored for about a half hour and internally contemplate what you have heard and whether there's room for you to embrace the opposing view*. And come back having gone through that exercise and discuss it one more time and just see. . . . [¶] . . . [I]t is my hope that perhaps that time may allow some reconsideration, some progress. [¶] . . . I'm not going to hold you hostage; you have worked very hard. We will listen to what you have to say when you come back." (Italics added.)

In response to the jury advisement, defense counsel stated: "[T]he only objection I have . . . is asking the jurors to go be by themselves, think about it and see if they can change their mind. . . . [T]hat concerned me because . . . what we are telling them is they have to collectively come to a determination."

Appellant argues that the jury advisement was erroneous "in two respects. First the court improperly ordered the jurors to deliberate alone. Although the court phrased it as 'contemplate' rather than 'deliberate,' it was clear that [the] court wanted the minority voters to deliberate internally and with the stated purpose of embracing the opposing view. . . . [¶] Second, . . . the trial court improperly instructed the minority jurors to reconsider their views in light of the majority views. . . . In effect, the instruction prejudicially coerced the minority jurors to reconsider and change their position to the majority."

The trial court did not "improperly order[] the jurors to deliberate alone." The court asked them "to be bored for about a half hour and internally contemplate what you have heard and whether there's room for you to embrace the opposing view." Appellant mistakenly "equates thinking about the case with jury deliberations. . . . Once the case has been submitted to the jurors for decision, they may not deliberate except when all are together. [Citation.] Although the deliberation process of course includes thinking, [appellant] has failed to cite any authority suggesting that jurors must be directed not to think about the case except during deliberations." (*People v. Ledesma* (2006) 39 Cal.4th 641, 729; see also *People v. Collins* (2010) 49 Cal.4th 175, 255 [during deliberations, "there was nothing improper in Juror G.B.'s contemplating the case while separated from the other jurors"].)

The trial court did not direct "the minority voters to deliberate internally . . . with the stated purpose of embracing the opposing view." Nor did it direct "the minority jurors to reconsider their views in light of the majority views." If it had so directed the jurors, it would have erred. (*People v. Gainer* (1977) 19 Cal.3d 835, 851, disapproved on another ground in *People v. Valdez* (2012) 55 Cal.4th 82, 163 (*Valdez*).) The trial court asked all of the jurors, whether in the majority or the minority, to "contemplate . . . whether there's room for you to embrace the opposing view." This request was not coercive. In *Valdez* our Supreme Court observed that "many state and federal courts have held that a balanced instruction asking both majority and dissenting jurors to reconsider their positions is not error. [Citations.]" (*Ibid.*) *Valdez* upheld an instruction that "encouraged members of *both* the majority and the minority . . .

to 'reweigh [their] positions' in light of the 'arguments' and to 'have an open mind . . . to reevaluating [their positions].'" (*Id.* at p. 162, fn. omitted.)

Furthermore, the jury advisement must be viewed together with CALCRIM No. 3551, which was given immediately before the advisement. CALCRIM No. 3551 made clear that the trial court did not intend to pressure the minority into embracing the views of the majority. As given, CALCRIM No. 3551 instructed the jurors: "Each of you must decide the case for yourselves and form your individual opinion . . . . It is your duty as jurors to deliberate with the goal of reaching a verdict, if you can do so, without surrendering your individual judgment. Do not change your position just because it differs from that of other jurors or just because you want . . . to reach a verdict. Both the People and the defendant are entitled to the individual judgment of each juror."

Accordingly, "[n]othing in the trial court's charge was designed to coerce the jury into returning a verdict. [Citation.] Instead, the charge simply reminded the jurors of their duty to attempt to reach an accommodation." (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1121.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David Worley and John H. Reid, Judges

Superior Court County of Ventura

Stephen P. Lipson, Public Defender, Michael C. McMahon, Chief Deputy, William M. Quest, Snr. Deputy Public Defender, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.