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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MAYRA R. CONTRERAS, Defendant and Appellant.	B278697 (Los Angeles County Super. Ct. No. BA444615)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Perry, Judge. Affirmed.

Jared G. Coleman, 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, Senior Assistant Attorney General, Kenneth C. Byrne and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Mayra R. Contreras (defendant) of robbery after she grabbed a parrot, tossed it in her car, and pulled a knife to keep the parrot's owner from approaching the car as she got into the driver's seat. On appeal, defendant argues that the trial court erred in not instructing, sua sponte, on the lesser included offense of grand theft. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *First Incident*

One afternoon in February 2016, defendant parked her car along the curb in front of the driveway of a lot on East 22nd Street in Los Angeles, California. The lot contained a two-story house and a backhouse. After defendant got out of the car and started walking up the driveway toward a swinging gate that blocked the driveway, Ana Conde (Conde) approached defendant and asked her what she wanted. Defendant told Conde that she lived in the backhouse and had forgotten her key; Conde, who had just moved in, opened the gate for defendant. At defendant's request, Conde left the gate open. Conde then went inside the two-story house.

Nestled against the backhouse was a large birdcage housing a $2,000 parrot and two cockatoos. Defendant wheeled the cage to the gate and, once there, reached inside and pulled out the parrot. Conde's mother heard the commotion; from a window on the second story of the front house, she saw what was happening and shouted to defendant, "Why are you taking my bird?"

Hearing her mother's question, Conde immediately ran back outside. Conde saw defendant walking toward the parked

car, and demanded, "Give [the parrot] back." Defendant ignored Conde and continued to walk to the car, tossed the parrot into the car through the open front passenger window, and walked around the front of the car toward the driver's side. After Conde had taken several steps toward the car, defendant pulled a "pocket knife" out of her right front pants pocket. Conde's mother also saw the knife, and shouted to Conde, "Just leave her—don't fight her back." Conde stopped in her tracks, and held back her three-year-old nephew, who had followed her outside; Conde explained that she let defendant go because she was "afraid for" herself and for her "baby nephew." Defendant got into her car and drove away.

B. *Second Incident*

Later on the day of the first incident, defendant grabbed a $1,500 Brazilian umbrella cockatoo from a swap meet vendor, got into a melee with the vendor as she tried to flee, and eventually let go of the bird and fled; during the ensuing confusion, defendant grabbed and ran off with a laptop computer.

C. *Third Incident*

Approximately three weeks later, defendant jumped into a van that was left running outside of a liquor store and drove away. Defendant thereafter realized that a four-year-old child was asleep in the van's backseat and aborted her effort to steal the van, parking the van at a weird angle and running off.

II. Procedural Background

The People filed charges against defendant for all three incidents. For the first, the People charged robbery (Pen. Code, § 211)[1] and alleged that defendant personally used a dangerous

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1 All further statutory references are to the Penal Code unless otherwise indicated.

or deadly weapon (§ 12022, subd. (b)(1)). For the second, the People charged (1) robbery (§ 211), and (2) petty theft (§ 484). For the third, the People charged (1) felony child abuse (§ 273a, subd. (a)), (2) grand theft of an automobile (§ 487, subd. (d)(1)), and (3) driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)).

For the first incident, the jury was instructed on the crime of robbery and not on any lesser included offenses.

A jury found defendant guilty of the robbery underlying the first incident, but found the allegation regarding the personal use of a dangerous or deadly weapon "not true." The jury acquitted defendant of felony child abuse, but convicted her of the remaining crimes underlying the second and third incidents.

Defendant moved for a new trial on the ground that the trial court erred in not instructing the jury on the crime of grand theft as a lesser included offense of the robbery underlying the first incident. The trial court denied the motion, reasoning that (1) "[t]here was no direct testimony that [defendant] did not have a knife, and certainly Miss Conde was very firm about that in her testimony," and (2) "when [Conde] thought [defendant] pulled a knife she stopped pursuing the recapture of the bird."

The trial court sentenced defendant to state prison for three years and eight months, to be followed by six months in county jail. The court imposed a two-year prison sentence for the robbery underlying the second incident, one year for the robbery underlying the first incident, and eight months for the grand theft; all were to run consecutively. The court then imposed six months of county jail time on the petty theft, to run consecutively to the prison sentences.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues that the trial court committed instructional error because it did not instruct the jury on grand theft as a lesser included offense to the robbery underlying the first incident. Because grand theft is a lesser included offense of robbery (*People v. Webster* (1991) 54 Cal.3d 411, 443), whether the trial court erred turns on whether "'there [was] "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense [of grand theft], and that [s]he is not guilty of the greater offense [of robbery].'" (*People v. Whalen* (2013) 56 Cal.4th 1, 68, quoting *People v. DePriest* (2007) 42 Cal.4th 1, 50.) "[T]he 'substantial' evidence required . . . is not merely '*any* evidence . . . no matter how weak,' [citation], but rather '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) We independently review the substantiality of the evidence for these purposes, and do so by viewing it in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137; *People v. Posey* (2004) 32 Cal.4th 193, 218.)

Because, as pertinent here, it is the defendant's use of force or fear that distinguishes grand theft from robbery (*People v. Gomez* (2008) 43 Cal.4th 249, 257 (*Gomez*); *People v. Anderson* (2011) 51 Cal.4th 989, 994 (*Anderson*)), the question before us is: Is there substantial evidence in the record that the defendant did not use force or fear during the first incident?

We conclude that the answer to this question is, "No." That is because no rational jury could conclude that defendant did not use fear. Fear means "'sufficient fear to cause the victim to

comply with the unlawful demand for [her] property.'" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775 (*Morehead*).) Such fear may be proven directly or "may be inferred from the circumstances in which the property is taken." (*Id.* at p. 775; *People v. Holt* (1997) 15 Cal.4th 619, 690.) And fear may be established even if the defendant did not *intend* "to cause the victim to feel fear." (*Anderson*, *supra*, 51 Cal.4th at pp. 991-992.) In this case, no rational jury could fail to conclude that Conde felt fear: She *testified* that she was afraid for herself and for her "baby nephew," and she backed away from defendant and let her get away with the $2,000 parrot. The use of fear during the asportation phase of a robbery—that is, while the defendant is getting away with the property after taking it—is sufficient. (*Gomez*, *supra*, 43 Cal.4th at pp. 256, 261.)

Defendant's chief contention is that a rational jury could question whether she ever possessed a knife because Conde admitted it all happened "so quick[ly]," Conde was unable to describe the length of the blade, and the jury ultimately found that defendant did not personally use a dangerous or deadly weapon. Thus, defendant reasons, the "shiny" object Conde saw could have been defendant's car keys. For support, defendant cites *People v. Morales* (1975) 49 Cal.App.3d 134, 140-141 (*Morales*), which held that a trial court erred in not instructing on grand theft as a lesser included offense to robbery because there were "reasons to question" the victim's uncontroverted testimony about the use of force.

We reject defendant's argument for two reasons.

First, defendant's assertion that she held anything other than a knife has no evidentiary basis because both Conde and Conde's mother—the only witnesses who testified about the

incident—unequivocally said defendant wielded a knife. Defendant's argument that she held car keys is purely speculative, and "'[s]peculation is not substantial evidence.'" (*People v. Wallace* (2017) 15 Cal.App.5th 82, 92.) *Morales* found "reasons to question" the victim's testimony about the defendant's use of force, but did so while applying the test for whether to instruct on lesser included offenses set forth in *People v. Carmen* (1951) 36 Cal.2d 768, 773, which provided that "'a defendant is entitled to instructions on his theory of the case as disclosed by the evidence, *no matter how weak*.'" (*Morales*, *supra*, 49 Cal.App.3d at pp. 140-141, italics added.) Our Supreme Court subsequently rejected *Carmen's* permissive standard in favor of the more demanding substantial evidence standard we must now apply. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12, superseded in part on other grounds by § 188.)

Second, the existence or nonexistence of a knife is irrelevant where, as here, the robbery is independently valid due to a defendant's use of fear. (*Morehead*, *supra*, 191 Cal.App.4th at p. 775 ["The requisite fear need not be the result of . . . the use of a weapon."]; cf. *People v. Brew* (1991) 2 Cal.App.4th 99, 103-105 [lesser included instruction required where "the evidence would support a finding that the offense was committed [without the use of fear]"].) This is why defendant's denial of using a weapon during her postarrest interview is of no moment because even if her denial creates a factual question regarding the use of force (which is still unclear given that she does not cite this evidence on appeal and that she admitted during the interview to a having a grudge against Conde and being ready to "whoop [her] ass"), the denial still does not create any question regarding the use of fear.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

I concur:

_____, Acting P. J.
ASHMANN-GERST

GOODMAN, J., DISSENTING:

Respectfully, I dissent.

In my view, the evidence supported giving an instruction on the lesser included offense of grand theft, and the jury should not have been denied the opportunity to convict defendant of that offense instead of robbery for the theft of the parrot.

Defendant does not dispute that she took the parrot and is guilty of a theft offense. The facts relevant to the taking of the parrot are the following.[1] The victim lived with her mother and others in a two story house; there was another residence to the rear of this main house on the same lot. A locking gate controlled access to both the driveway of the residences and entry to the residences. The mother of the victim owned three birds, a parrot (value $2,000) and two cockatoos, all of which had been gifts from her children and which she kept in a cage outside of, but near, the front door to her house. The cage had wheels.

On the day of the crime, the victim observed defendant approach the locked driveway gate. Defendant's car was parked

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[1] To the extent the facts of the second theft (of a second bird later the same day from another location), recounted in the majority opinion, of which defendant was convicted, may be considered to be relevant to the crime at issue on this appeal, they suggest that her plan to commit these thefts did not include use of a weapon. (Evid. Code, § 1101, subd. (b); see *People v. Ewoldt* (1994) 7 Cal.4th 380, 386-387).

at the curb in front of the residences. When the victim went to see what defendant wanted, defendant told her that she lived in the back house and had forgotten her keys. The victim, who had been away at school and did not know who lived in the back house, unlocked the gate, leaving it open as defendant requested, and went back inside the main house.

A short time later, the victim's mother heard noises and, through a window of her house, saw defendant attempting to take the birds by wheeling their cage toward the driveway gate. The victim then went outside and approached the cage, which by this time had been left open by defendant and was near the driveway gate. Defendant, with the parrot now under her arm, proceeded to her car parked outside the gate at the curb. Defendant then threw the parrot through the open front passenger door window into her vehicle.

On direct examination, the victim testified that she had "barely taken any steps" toward defendant to ask her to return the parrot when she saw that defendant "just popped out a shiny pocket knife from her right front pocket. . . ." The victim was unable to provide any further description of the knife, including any facts relating to its blade, because "it was so quick." The victim testified that, at this point, she was in fear for herself and for her nephew who was near her.

On cross examination, the victim testified that, once she had closed the driveway gate and was standing inside it, she shouted to defendant to give back the parrot. She did this after defendant had thrown the parrot into the car and was "running towards the driver's seat, running around the hood of the car." The victim also testified it was while defendant was running around the hood of the car that she first saw defendant take out

of her pocket what the victim had described as the "shiny pocket knife." The victim made this observation when she was standing approximately 20 feet up the driveway away from defendant and behind the locked gate. Defendant never approached the victim with the shiny object. There is also no evidence that defendant brandished the object in any direction or moved it in any way; the victim never saw the shiny object again.

There is no dispute on one point: the crime of grand theft is a lesser included offense to that of robbery. (Pen. Code, §§ 211, 487, subd. (a); *People v. Jones* (1992) 2 Cal.App.4th 867, 869.) It is also clear that a defendant in a criminal case is entitled to an instruction on a lesser included offense when "there is substantial evidence that only the lesser crime was committed." (*People v. Smith* (2013) 57 Cal.4th 232, 239 (*Smith*), quoting *People v. Birks* (1998) 19 Cal.4th 108, 112.) That the evidence must be "substantial" does not preclude it from being circumstantial. "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]"' that the lesser offense, but not the greater, was committed. ([*People v.*] *Flannel* [(1979) 25 Cal.3d 668,] 684, [disapproved on another ground in *People v. Elmore* (2014) 59 Cal.4th 121, 138,] quoting *People v. Carr* (1972) 8 Cal.3d 287, 294; accord, [*People v.*] *Barton* [(1995)] 12 Cal.4th 186, 201, fn. 8 [(*Barton*)] ['evidence that a reasonable jury could find persuasive'].)" (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of witnesses as that is a task for the jury. (*Id.* at p.162, citing *Flannel, supra,* at p. 684.)

Applying these principles, there was sufficient substantial circumstantial evidence that the jury should have been given the

opportunity to decide that the crime committed was grand theft rather than robbery.[2] When the victim testified that she felt fear (when defendant pulled from her pants pocket what the victim took to be a pocket knife),[3] the victim was behind a locked gate which had prevented defendant from earlier gaining access to the residences—and now would bar defendant access to the victim's location should defendant make any effort to move toward the victim from defendant's location near the driver's door of her car. Immediately following her taking the shiny object from her pocket, defendant got into her car and drove away. There was no evidence that defendant took any action to approach the victim with the object; nor was there any testimony regarding any motion by defendant of the object she held in her hand.

Given the immediate action of defendant to flee the scene in her vehicle following removal of the object from her pocket, the jury was entitled to determine that what the victim saw was not a knife, and that what she felt was not fear, but anxiety over the loss of the parrot which she and her siblings had given to their mother.

In addition, the jury could have concluded that at the point defendant took the object from her pocket, she had reached a

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[2] There is also no dispute that the value of the parrot made the crime grand theft. (Pen. Code, § 487, subd. (a).)

[3] The only evidence that the "knife" was "open" when defendant took it out of her pocket came in response to a question by the trial judge in which he so characterized it, apparently based on the victim's testimony that what she saw was shiny. Neither the victim nor her mother, who remained in the house during the incident, and thus was at a further and unknown distance from defendant, could further describe the object.

location of temporary safety and thus the theft crime was complete. (*People v. Carroll* (1970) 1 Cal.3d 581, 584.)

The theory underlying the requirement that the jury be instructed sua sponte on all material issues presented by the evidence is predicated upon the interests of justice, which "demands that when the evidence suggests the defendant may not be guilty of the charged offense, but only of some lesser included offense, the jury must be allowed to 'consider the *full range* of possible verdicts—not limited by the strategy, ignorance, or mistakes of the parties,' so as to '*ensure* that the verdict is no harsher or more lenient than the evidence merits.' ([*People v.*] *Wickersham* [(1982)], 32 Cal.3d 307, 324, [disapproved on another ground in *Barton, supra,* 12 Cal.4th at pp. 200-201,] italics added; see also *Barton, supra*, [at p.] 196.) The inference is inescapable that, regardless of the tactics or objections of the parties, or the *relative* strength of the evidence on alternate offenses or theories, the rule requires sua sponte instruction on *any and all* lesser included offenses, or theories thereof, which are *supported* by the evidence." (*Breverman, supra*, 19 Cal.4th at p. 160.) As our Supreme Court also observed in *Breverman*, "the rule protects both the defendant and the prosecution against a verdict contrary to the evidence, regardless of the parties' own perceptions of their strongest lines of attack or defense. The rule's purpose is not simply to guarantee *some* plausible third choice between conviction of the charged offense or acquittal, but to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence." (*Id.* at p. 161.)

The *Breverman* court engaged in an additional analytical step, concluding that while in that case there was substantial

evidence to require that the lesser instruction under discussion there be given, there must also be actual prejudice based on the entirety of the trial record determined under state laws principles. (*Breverman, supra,* 19 Cal.4th at pp. 164, 172.) Some more recent cases have not had the occasion to discuss this second inquiry. (*Smith*, *supra*, 57 Cal.4th at p. 245; *People v. Richards* (Dec. 15, 2017, B275518) 18 Cal.App.5th 549, ___.) Assuming the second step remains a required element of analysis, given the evidence in this case, and the reasonable inferences which the jury may deduce from it, I would allow the jury the opportunity to consider whether defendant was guilty of grand theft rather than robbery.

For these reasons, I would reverse the conviction on count 2 of the information and remand the case for further proceedings on that count.

GOODMAN, J.*

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.