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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY ISIDRO ROJAS, Defendant and Appellant.	B285388 (Los Angeles County Super. Ct. No. NA106518)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Randall Conner, 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, Supervising Deputy Attorney General, Paul S. Thies, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Johnny Isidro Rojas (defendant) of second degree vehicle burglary and receiving stolen property. Defendant testified at trial and claimed the burgled car's window was open and he never entered the vehicle. The car's owner testified the windows were rolled up and the doors locked, the owner's son (an eyewitness) testified he saw defendant's head and shoulders inside the car, and a subsequent inspection of the car revealed items in the glove compartment and center console had been rifled through. We consider whether reversal is warranted because the trial court should have instructed on vehicle tampering as a lesser included offense of vehicle burglary.

I. BACKGROUND

A. The Charges

An information filed by the Los Angeles County District Attorney's Office charged defendant in count 1 with second degree vehicle burglary (Pen. Code, § 459).[1] In count 2, defendant was charged with receiving stolen property not exceeding $950 in value, a misdemeanor (§ 496, subd. (a)). As to count 1, the district attorney further alleged defendant had three prior "strike" convictions within the meaning of sections 667, subdivisions (b)-(j) and 1170.12, as well as four prior prison terms within the meaning of section 667.5, subdivision (b).

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

B. Trial

1. The prosecution's evidence

In May 2017, Edecilia Martinez Rodriguez (Martinez) parked her car across the street from her Long Beach apartment at about 10:00 p.m. According to Martinez, she made sure to lock the doors and roll all the windows up because her car had been burglarized in the past. When she exited the vehicle, the center console and glove box were closed.

Martinez walked up the street, where her boyfriend and her son, Luis Alonso (Alonso), were outside fixing a car. According to Alonso, Martinez's car was visible from where they were working and he did not recall seeing people walking around the area when they were outside that evening.

Alonso returned to Martinez's apartment around 11:00 p.m. Fifteen minutes later, Martinez was walking back to the apartment, on the opposite side of the street from where her car was parked, when she noticed defendant "bending over" the front passenger side of her car. Defendant "squatted down" when he saw Martinez but then stood up and began walking towards her when he realized she had seen him. Defendant told Martinez, "the car was open." Martinez responded, "'No. The car is locked, closed and locked.'"

Martinez went into her apartment and called her son, telling him there was someone standing by her car and "she heard something." Alonso went outside and saw defendant while looking through the driver's side window of Martinez's car. Alonso could not see defendant's arms or hands, but he saw defendant's shoulders and head leaning inside Martinez's car. According to Alonso, defendant "looked like [he was] looking around, . . . so [Alonso] flashed [his cell phone] light" and

defendant then "looked up." Defendant "tried to hide" by ducking down towards the rear passenger side of Martinez's vehicle, but when Alonso did not leave, defendant stood up, walked towards him, and said "someone broke in the car and that it was broken . . . ." Defendant left, and Alonso and Martinez called 911. Martinez never saw defendant "go inside" her car and Alonso neither saw defendant's hands inside Martinez's car nor saw defendant take anything out of the car.

Long Beach Police Officer Benjamin Hearst arrived at Martinez's apartment approximately 10 minutes later. He found the front passenger window of Martinez's vehicle all the way down, the center console opened, and "items and papers scattered all over the passenger seat." The open window, which was electronically operated, was not broken. Martinez told Officer Hearst she was certain she had locked her car doors and rolled up the windows.

At around the same time, a different responding Long Beach police officer detained defendant not far from Martinez's apartment. Officers brought Alonso to defendant's location, and Alonso identified defendant as the person he had seen near Martinez's car.

Officers recovered a black duffel bag defendant was carrying and found a $200 check from Western Union made out to a Lucia San Juan Cortez (Cortez) inside of it. Cortez lived less than a mile away from Martinez. Officers went to Cortez's residence and confirmed the check belonged to her. Cortez had been expecting a check from Western Union, but it had never arrived.

2. Defendant's testimony

Defendant represented himself at trial and testified in his own defense. He claimed he never entered Martinez's car (even part way), never "put [his] hands inside the vehicle," and never "push[ed] the [passenger side] window down." According to defendant, he was simply walking down the street when he noticed Alonso "look[ing] kind of suspicious" because he "kept looking around" as though he were "waiting for somebody . . . to walk by, or he was looking out, like a look-out type of thing." Defendant noticed Martinez's car at that point and saw "it d[id]n't have a window." Thinking "maybe there was somebody inside the car waiting for [him] to pass by" in order to rob him, defendant "kind of stopped a little bit before the car" and "kind of turned [his] body and . . . bended down a little bit to try to see towards the back window that there was nobody hiding in the back seat or in the car . . . ." Defendant testified he then walked over to Alonso, asked him if Martinez's car was his, and when Alonso said yes, told him he "'might want to go look at it because [it was] missing a window.'"

With respect to Cortez's check, defendant claimed he found the check on the ground, did not see anybody in the vicinity who might have dropped it, and placed it in his bag with the intention of dropping it in a post office box. During cross-examination, defendant admitted he had been convicted of first degree robbery in 2012 and petty theft, twice, in 2016.

C. Jury Instructions

After the presentation of evidence, the prosecution and defendant met with the trial court to discuss jury instructions; the force element included as part of the CALCRIM No. 1700

vehicle burglary instruction was the main topic of consideration. The trial court discussed the language involving force with the prosecutor, and defendant ultimately agreed with the result:

"[Trial Court]: [I]f the doors are all locked but the person has the window down, for whatever reason, then it's not auto burglary because there is no reasonable expectation that you secured the vehicle. So I just need to have language so that he can argue to the jury that defense. . . . [¶] . . . [¶]

"[Prosecutor]: There must be evidence of forced entry to constitute vehicular burglary. [¶] . . . [¶] The reason why an unrolled window does not constitute burglary is because there would be no force necessary to enter.

"[Trial Court]: I understand. So I am just talking about the language. Give me the exact language that you think should be added.

"[Prosecutor]: There must be evidence of forced entry to constitute vehicular burglary or burglary of a vehicle.

"[Trial Court]: There must be evidence—it would not be evidence. 'There must be forced entry of a vehicle to constitute burglary of a vehicle.' How about that?

"[Prosecutor]: If I may have a moment?

"[Trial Court]: I can't just say evidence. There has to be more than evidence.

"[Prosecutor]: I understand. [¶] I submit, your honor. Thank you.

"[Trial Court]: Mr. Rojas, what I would be doing is adding that language that the jury would have to find that you used force—you used force to gain entry into the vehicle. So if the window was open and you didn't force it down, then it's not burglary. If the window was cracked a little bit and you forced it

down, then it was burglary. So you can argue that to the jury. You can argue the window was down.

"[Defendant]: That's a go."

The trial court instructed the jury as to count 1, the vehicle burglary charge, that they must find defendant "entered a locked vehicle" with the intent "to commit theft." The trial court then gave the following additional instructions: "Under the law of burglary, a person enters a vehicle if some part of his body penetrates the area inside the vehicle's outer boundary. [¶] There must be forced entry of a vehicle to constitute burglary of a vehicle." The court also instructed the jury on the elements of theft.

D. Verdict and Sentence

The jury convicted defendant on both charged offenses, vehicle burglary and a misdemeanor violation of receiving stolen property. At a bifurcated bench trial on defendant's priors, the prosecution sought to prove only one prior strike conviction and two prior prison terms. The court found the prior strike and prison term allegations proven.

The court sentenced defendant to six years in state prison on the vehicle burglary charge—the high term of three years, doubled on account of defendant's prior strike. The court imposed a concurrent, time-served sentence for the receiving stolen property conviction. The court dismissed defendant's prior prison terms in the interest of justice.

II. DISCUSSION

Defendant contends he is entitled to reversal of his conviction for vehicular burglary because the trial court did not

sua sponte instruct on the lesser included offense of vehicle tampering, premised on the theory that he entered Martinez's car through an already open window. On the evidence at trial, we doubt a reasonable jury could have found defendant tampered with Martinez's vehicle but did not burglarize it, but more to the point, we are convinced there is no reasonable probability the jury would have returned a more favorable verdict if instructed on vehicle tampering—particularly given defendant's unequivocal testimony he never entered Martinez's car at all. Reversal is therefore unwarranted.

A. Governing Law and the Standard of Review

Trial courts have a "'sua sponte duty to "instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." [Citation.] Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, *but not the greater*, offense.'" (*People v. Landry* (2016) 2 Cal.5th 52, 96; see also *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*) [trial court must provide "'instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged'"].) This is the governing rule because "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.' [Citations.]" (*Breverman*, *supra*, at p. 160.)

"[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)]." (*Breverman*, *supra*, 19 Cal.4th at p. 178.) A conviction may be reversed only if, "'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (*Watson*, *supra*, [at p.] 836)." (*Breverman*, *supra*, at p. 178.) The requisite prejudice inquiry here thus moves beyond considering what a jury *could* find (the standard for whether a vehicle tampering instruction was needed) and instead analyzes what a jury *is reasonably likely* to have found had the instruction been given (which would warrant reversal only if the result would be more favorable to defendant). (*Id.* at p. 177; see also *People v. Banks* (2014) 59 Cal.4th 1113, 1161, disapproved on another point in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

We review de novo a claim the trial court erred by failing to instruct on a lesser offense, construing the evidence in the light most favorable to the defendant. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

B. Defendant Was Not Prejudiced by the Absence of a Vehicle Tampering Instruction

Vehicle tampering, which is proscribed by Vehicle Code section 10852,[2] is a lesser included offense of vehicle burglary. (*People v. Mooney* (1983) 145 Cal.App.3d 502, 505 ["one cannot burgle a vehicle without tampering with it"] (*Mooney*).) But a defendant on trial for vehicle burglary is entitled to a vehicle tampering instruction only if there is substantial evidence a reasonable jury could find the defendant guilty of tampering, but not burglary. Here, that would mean evidence that Martinez's car window was already down when defendant came across it such that defendant could enter the vehicle without applying force.

We are skeptical there was substantial evidence a jury could find defendant committed only the lesser included offense, but that is admittedly a close call given the defendant-favorable standard by which we assess whether lesser included instructions are necessary. (See, e.g., *People v. Chestra* (2017) 9 Cal.App.5th 1116, 1121 ["trial court must instruct on a lesser included offense supported by the evidence even when it is inconsistent with the defendant's chosen defense"]; *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1018-1021 [discussing application of lesser included instruction requirement in cases where defendant testifies he or she committed no crime at all].) The question of prejudice from an assumed error in not instructing on vehicle

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[2] "No person shall either individually or in association with one or more other persons, willfully injure or tamper with any vehicle or the contents thereof or break or remove any part of a vehicle without the consent of the owner." (Veh. Code, § 10852.)

tampering is straightforward, however, and that is the basis on which we resolve defendant's appeal.

Defendant's trial testimony was unequivocal on at least two points: (1) he did not go inside the vehicle, and (2) the window was all the way down when he approached the car. To find defendant guilty of the lesser but not the greater offense (vehicle tampering, not burglary), jurors would have had to reject the first of these two positions and yet accept the second. That is possible in theory, but it is highly unlikely the jury would have been so discriminating—selectively believing and disbelieving two critical elements of defendant's testimony. (See *People v. Delgado* (2013) 56 Cal.4th 480, 491 [possible the jury believed the defendant's testimony but not reasonably likely in light of all the evidence]; *People v. Medina* (1978) 78 Cal.App.3d 1000, 1005-1006 [accepting the rule that a jury can accept only part of a witness's testimony but reasoning there was no reason to conclude a jury that rejected the thrust of the defense testimony would have selectively relied on an incidental aspect of that testimony]; compare, e.g., *People v. Tufunga* (1999) 21 Cal.4th 935, 957 [refusal to instruct on a defense was not harmless, even though the defendant's testimony differed markedly from other evidence, where the jury's verdict indicated it most likely credited at least part of the defendant's testimony].) Rather, the far more likely scenario is that the jury disbelieved defendant's account in its entirety because it was contradicted or undermined by other evidence (the testimony of Martinez and Alonso, plus the recovery of the Cortez check) and because the jury knew defendant had sustained three prior felony convictions, one for robbery and two for petty theft.

Thus, under these circumstances, we reject defendant's contention that *Mooney*, *supra*, 145 Cal.App.3d 502 supports reversal. In *Mooney*, the Court of Appeal concluded the trial court should have instructed the jury on the lesser included offense of vehicle tampering, but key to the court's holding was the defendant's testimony that he *did* enter the vehicle in question. (*Id.* at pp. 503-504, 506 [the defendant admitted he entered the van and the only dispute at trial was whether the van's doors were locked or unlocked].)

Mooney was decided fifteen years before our Supreme Court's decision in *Breverman*, and thus the Court of Appeal in *Mooney* did not conduct a prejudice analysis of the type we conduct here and find dispositive. Unlike the defendant in *Mooney*, defendant here never testified to entering the vehicle. Rather, he testified directly to the contrary and so argued his case to the jury. As we have said, in light of defendant's unequivocal testimony, his prior convictions, and the other evidence at trial, we are confident the jury rejected his testimony outright and would not have selectively believed only part of his testimony had a vehicle tampering instruction been given.

DISPOSITION

The judgment is affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

JASKOL, J.*

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