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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIK LOUIS VIGOUROUX, Defendant and Appellant.	B227666 (Los Angeles County Super. Ct. No. LA061862)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph A. Brandolino, Judge. Affirmed.

Kavinoky Law Firm and Mark A. McBride for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Tannaz Kouhpainezhad, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Erik Louis Vigouroux appeals from the judgment entered following successive jury trials in which he was convicted of two counts of carjacking and one count of resisting an executive officer. Defendant contends the trial court erred by denying his motion for a judgment of acquittal of the carjacking charges and violated his confrontation rights by admitting particular evidence. We affirm.

BACKGROUND

The charges in this case stemmed from defendant's reaction to an attempt to repossess his tenant's car. In defendant's original trial, the jury convicted him of resisting an executive officer during fingerprinting, acquitted him of assault with a semiautomatic firearm, and could not reach a verdict on the remaining charges. The court declared a mistrial and defendant was retried for two counts each of carjacking and second degree robbery. Because the issues raised on appeal pertain only to defendant's retrial, we set forth a summary of the evidence at the retrial, but not the original trial.

About 3:00 a.m. on April 6, 2009, licensed car repossession agent Julio Garcia and his cousin Kevin Flores went to defendant's residence in Woodland Hills to attempt to repossess a car registered to Carol Liglet. Because of the position of the car on the lot, the presence of other vehicles nearby, the shape and width of the driveway, and insufficient maneuvering room, it took Garcia and Flores about 45 minutes to hook Liglet's car up to Garcia's tow truck. While Garcia worked, two women on the balcony of the house spoke to him. He told them he was a "California Recovery Agent" and was repossessing a car registered to Carol Liglet. The women denied knowing her.

To exit, Garcia had to back his tow truck down the steep, narrow, curved driveway with Liglet's car going down first. Near the driveway's junction with the street, he had to unhook Liglet's car and push it around a bend. Flores stayed with the unhooked car as Garcia returned to his tow truck. Garcia saw defendant standing in the driveway with one hand in his pocket and a set of keys in his other hand. Defendant walked past Garcia and the tow truck without saying anything. Garcia believed defendant was going to give Flores the keys to Liglet's car. As Garcia got into his tow truck, he heard a door close.

He looked at Liglet's car and saw Flores open its driver's side door. Defendant was seated in the driver's seat of Liglet's car. Flores said, "What are you doing man? This is a repossession. Please get out of the car." Flores and defendant struggled over the car door for about 90 seconds, with Flores pulling the door open and defendant pulling it closed. Then Flores stopped talking to defendant and backed away from Liglet's car, holding his hands in the air at shoulder height.

Garcia grabbed his mace and walked up to Liglet's car. He told defendant they were repossessing the car and asked what defendant was doing. Defendant had one hand in his pocket and one hand on the steering wheel. He said nothing about getting his property out of the car. He mumbled something, started the car, put it in reverse and started driving. Garcia feared that defendant was either going to run over him and Flores or drive off with the car, so he sprayed defendant in the face with mace. It seemingly had no effect on defendant, who continued driving Liglet's car in reverse and struck Garcia's tow truck. Defendant then drove forward and Garcia again sprayed defendant with mace. Garcia was frightened. Defendant drove away down the street in Liglet's car, which Garcia never recovered.

Flores looked scared. Garcia asked him what had happened. Flores told Garcia that he saw that defendant had a gun. Garcia phoned 911 and told the dispatcher that as he and his partner were repossessing a vehicle, a man "came out with a gun, threatened us with a gun." The recording of the 911 call was played at trial.

The police arrested defendant on April 20, 2009, and searched his house, where they seized two shotguns, a rifle, a 10-millimeter semiautomatic handgun and airsoft rifle, some toy guns, and a camera. The prosecution introduced a single photograph the police had found in the camera's memory and printed out. It depicted defendant with the 10-millimeter semiautomatic handgun police had seized, a revolver, and a black semiautomatic handgun. The police did not find the latter two guns. On cross-examination Detective David Lange testified that the camera's memory indicated the photograph was taken in May of 2007.

Defendant told Lange and another detective that after one of his housemates knocked on his door, he got up and saw two men repossessing Liglet's car. Defendant knew it was a repossession, but did not like "repo guys." He watched them for about 45 minutes as they moved the car down to the street. When they disconnected the car from the tow truck, defendant walked down to the street and got into it. As he tried to close the car door, one of the "repo guys" tried to stop him, and they struggled over the door. Defendant denied that he had a gun with him. Defendant started the car, one of the men warned him they were going to use pepper spray on him, and the man sprayed him. Defendant then drove off in the car. He said he was doing Liglet a favor. Defendant never said anything to the detectives about retrieving his property from Liglet's car.

Defendant testified that he was awakened by a housemate who told him there were people "out back" and suggested he see what was happening. Defendant looked out a window and saw a tow truck "stuck" in the driveway. The truck was attempting to move the car belonging to his tenant, Liglet. Defendant grabbed the keys to Liglet's car and went outside. Defendant denied knowing that the men with the tow truck were repossessing Liglet's car, but he knew "people don't usually steal vehicles out of backyards with tow trucks," so he "figured something was going on." Defendant did not really care about the car itself, but he had left his backpack and wallet in it and wanted to get them out before the men took the car away. The men unhooked the car and left it unattended 20 or 30 feet up the street. Defendant walked past the tow truck and men to the passenger side of Liglet's car. His saw his backpack sitting on the passenger seat. He walked around to the open driver's door, got in, and attempted to close the door. It was caught on an embankment and would not close. Defendant leaned over and grabbed his property. One of the men then yelled, "What are you doing?" Defendant turned to explain, and the man sprayed him in the face with pepper spray, which caused him tremendous pain. As he "balled up" over the steering wheel, he felt hands attempting to pull him out of the car. He considered his options, put the key in the ignition, and drove

away. He did not back up and hit the tow truck. There was no struggle over the door, and he did not have a gun on him. He parked the car 300 to 400 yards away from the house.

Defendant and his business partner testified that they ran an outdoor recreation business that taught people skills such as shooting. Defendant's business partner testified he had taken photographs of defendant at firing ranges holding guns owned by other people.

In defendant's second trial, the jury convicted him of two counts of carjacking and acquitted him of two counts of robbery and two counts of grand theft as a lesser included offense. With respect to each carjacking count, the jury found that an allegation that defendant personally used a firearm was not true. The trial court granted defendant probation.

DISCUSSION

1. Denial of Penal Code section 1118.1 motion

At the conclusion of the prosecution's case-in-chief, defendant moved for a judgment of acquittal of the robbery and carjacking counts pertaining to Flores on the ground that Flores did not testify. The court denied the motion. The next day, defendant renewed his motion and sought dismissal of the firearm enhancement allegations attached to all of the carjacking and robbery counts. The court denied the motion.

On appeal, defendant contends the trial court erred by denying his motion for acquittal, apparently with respect to the carjacking of both Flores and Garcia. He argues there was insufficient evidence of force or fear. The trial court could not possibly have made an erroneous ruling on a nonexistent motion for acquittal with respect to the carjacking of Garcia, and a court has no sua sponte duty to consider the sufficiency of the prosecution's evidence. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1469 (*Smith*).) Accordingly, we consider only the ruling on the motion with respect to Flores.

When reviewing a claim the trial court erred by denying a motion for acquittal under Penal Code section 1118.1, we apply the same standard as when evaluating the sufficiency of evidence to support a conviction, except that we consider only the evidence

in the record at the time the motion was made. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371; *Smith*, *supra*, 64 Cal.App.4th at p. 1464.) We review that evidence in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Carjacking is the felonious taking by means of force or fear of a motor vehicle in the possession of another, from either the possessor's or a passenger's person or immediate presence, against his or her will, with the intent to temporarily or permanently deprive the possessor of the vehicle. (Pen. Code, § 215, subd. (a).)

Fear, for purposes of robbery or carjacking, may be inferred from the surrounding circumstances. (*People v. Holt* (1997) 15 Cal.4th 619, 690.) It may be shown by evidence of conduct, words, or circumstances reasonably calculated to produce fear. (*People v. Brew* (1991) 2 Cal.App.4th 99, 104.) The defendant need not assault or verbally threaten the victim or use or display a weapon. (*Ibid.*) The element of force exists "where a person wrests away personal property from another person, who resists the effort to do so." (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1257.)

Garcia's testimony regarding his observations and Flores's statement provided substantial evidence that defendant took Liglet's car by means of force or fear. Garcia saw Flores struggling to prevent defendant from closing the car door, which demonstrated that Flores resisted defendant's taking of the car, and defendant employed force to overcome that resistance. In addition, Garcia's testimony that Flores suddenly stopped talking and began to back away from the car with his hands in the air supported a reasonable inference that defendant somehow instilled fear in Flores, perhaps by telling Flores he had a gun or pretending to have a gun by holding his hand in his pocket, as Garcia described. Garcia further testified that in the immediate wake of defendant's departure with the car, Flores said that defendant had a gun. Defendant attempts to exclude from consideration Garcia's testimony regarding this statement by Flores by arguing that it was inadmissible. He is wrong, as addressed in the next section.

Finally, defendant argues that the jury's not true finding on the firearm-use enhancement allegation undermines the sufficiency of the evidence to support the carjacking conviction. Of course, the jury had not made that finding at the time the court ruled on defendant's motion for acquittal. In addition, our consideration of the sufficiency of the evidence is not limited by an allegedly "inconsistent" verdict or finding. (*People v. Lopez* (1982) 131 Cal.App.3d 565, 571; *People v. Santamaria* (1994) 8 Cal.4th 903, 911; Pen. Code, § 954.) An "inconsistent" acquittal or finding is viewed as the product of compromise, mistake, or leniency, of which a defendant is not permitted to take further advantage. (*Santamaria*, at p. 911; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1657.) Here, the finding is not even inconsistent, as the jury could have concluded defendant did not actually have a gun, but either convinced Flores he did or used force to accomplish the carjacking.

For all of these reasons, defendant's contention fails.

2. Confrontation violations

Citing *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354], defendant contends that admission of the 911 recording, Garcia's testimony that Flores said defendant had a gun, Lange's testimony regarding the guns found at defendant's residence, and the photograph of defendant with guns violated his confrontation rights.

Crawford held that with respect to the admission of testimonial hearsay evidence, such as police interrogations or testimony from grand jury proceedings, a preliminary hearing, or a former trial, the confrontation clause demands both unavailability of the witness and a prior opportunity for cross-examination. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.) Otherwise, such testimonial hearsay is inadmissible.

The confrontation clause does not apply to non-hearsay evidence or to hearsay evidence that is not testimonial in nature. Testimonial hearsay evidence is that in which a declarant makes a """solemn declaration or affirmation . . . for the purpose of establishing or proving some fact."" (*Davis v. Washington* (2006) 547 U.S. 813, 824 [126 S. Ct. 2266] (*Davis*).) "'An accuser who makes a formal statement to government officers bears

testimony in a sense that a person who makes a casual remark to an acquaintance does not.'" (*Davis*, at p. 824.)

a. 911 recording

At the outset of the second trial, the prosecutor informed the court and defense counsel that he might introduce the recording of Garcia's 911 call. Defense counsel stated, "At this point, I have no objection to it." The next day, before the prosecutor called Garcia as a witness, he informed the court he would be playing the 911 recording. Defense counsel stated, "I have an objection to two things on the transcript, first being that he put his name on the top corner of the [transcript]." The court noted, "It's set up as a pleading." Defense counsel then objected to the following statement by Garcia to the dispatcher: "'Okay. I wanted to advise you the guy that's driving the vehicle is a methamphetamine drug addict.'" Defense counsel later withdrew his objection to this statement. Finally, defense counsel argued there was an error in the transcript, in that "'doing'" in the statement "'He knows the person who we're doing—repoing the vehicle from'" should have been "'stealing.'" Defense counsel did not object to the portion of the 911 recording in which Garcia told the dispatcher that defendant had a gun.

By failing to object at trial to the reference to use of a gun in the 911 recording, defendant forfeited all claims regarding the admission of this evidence, including his confrontation objection. (*People v. Williams* (2008) 43 Cal.4th 584, 626; *People v. Stevens* (2007) 41 Cal.4th 182, 198–199.)

Even if defendant had preserved his confrontation claim, we would find it to lack merit (*Davis*, *supra*, 547 U.S. at pp. 822, 827, 831 [statements made in 911 call not testimonial]) and, even if its admission were error, we would necessarily find it to have been harmless beyond a reasonable doubt, as demonstrated by the jury's not true finding on the firearm enhancement allegations (*People v. Geier* (2007) 41 Cal.4th 555, 608; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431]).

b. Garcia's testimony regarding Flores's statement

The prosecutor asked Garcia, "[W]hat did Kevin tell you?" Garcia replied, without objection, "He—Kevin told me that he had a gun and he saw the gun." The prosecutor clarified, "Kevin told you that the defendant had a gun?" Again without objection, Garcia testified, "Correct." Three questions later the prosecutor asked, "After Kevin told you that the defendant had a gun, what did you do?" Garcia replied, "After he said that, I said, 'Are you sure?' [¶] And he goes, 'Yes, I'm sure.'" Defendant then objected on the ground of hearsay. The court overruled the objection.

Defendant failed to object both times Garcia testified that Flores said he saw defendant with a gun. When defendant finally objected to Garcia's testimony to a different statement by Flores, defendant did not inform the trial court his objection was based on a purported violation of his confrontation rights. Defendant thus forfeited the claim he raises on appeal.

Even if defendant had preserved his confrontation claim, and even if we were to find Flores's statement to be testimonial in nature, we would necessarily find any error harmless beyond a reasonable doubt, given the jury's not true finding on the firearm enhancement allegations.

c. Lange's testimony regarding the seizure of defendant's guns

Lange's testimony regarding the guns seized from defendant's residence was, as far as the record reveals, based upon his own observations, not any statement by other officers. It does not fall within the scope of the confrontation clause. In addition, although defendant objected to the admission of Lange's testimony regarding the seizure of guns on the grounds it was irrelevant, was improper propensity evidence, and should be excluded under Evidence Code section 352, he again asserted no confrontation objection, and thus forfeited any appellate claim on that basis. Finally, the jury's not true finding on the firearm enhancement allegations reveals that Lange's testimony regarding the guns was harmless beyond a reasonable doubt.

d. Photograph of defendant with guns

Defendant apparently also contends that the admission of the photograph found on defendant's camera violated his confrontation rights. Defendant fails to explain how this photograph could possibly be deemed testimonial. It was taken almost two years before the commission of the charged offenses and could not possibly have been created for the purpose of establishing or proving anything in this case.

Even if defendant could somehow establish that the photograph fell within the scope of the confrontation clause, he forfeited his confrontation claim by failing to raise it in the trial court. He asserted only relevance and Evidence Code section 352 objections regarding the photograph. And even if defendant had preserved a meritorious confrontation clause objection, the jury's not true finding on the firearm enhancement allegations reveals that the admission of the photograph was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.