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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. FREDERICK OWENS, Defendant and Appellant.	B266349 (Los Angeles County Super. Ct. No. SA090148)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elden S. Fox, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Tannaz Kouhpainezhad and David Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Frederick Owens appeals from the judgment entered following a jury trial in which he was convicted of felony grand theft in violation of Penal Code[1] section 487, subdivision (a), a lesser included offense to robbery. Appellant contends the instructions on grand theft and aiding and abetting violated due process, and his conviction must be reversed because grand theft was neither a charged nor a necessarily included offense of the robbery with which appellant was charged. We disagree and affirm.

FACTUAL BACKGROUND

On April 7, 2015, appellant and a male companion[2] entered Naveed Farahirad's bicycle store in Santa Monica. Appellant's partner said to Farahirad, " 'Yo. Will you take care of us? Will you give us a deal?' " Farahirad responded that he would help the men and give them " 'out-the-door pricing.' " The men selected two identical bicycles priced at $550 each from a display near the front of the store. The men then ran out of the store without paying for the bikes.

Using the front tire to push the door open, appellant's associate turned left and made his escape with the bike, riding south on Seventh Street. Appellant followed his cohort out the door, but headed east on Wilshire Boulevard as he attempted to mount the bicycle. Farahirad chased the two men outside and grabbed appellant's backpack, pulling him to the ground. Appellant stood up, raised fists in a fighting gesture, and said,

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[1] Undesignated statutory references are to the Penal Code.

[2] No evidence pertaining to the second man's identity was presented at trial.

" 'Let's go.' " Appellant started swinging at Farahirad, who swung back.

Jocelyn Centeno, an employee at the bicycle shop, saw the two men take the bikes out of the store without paying and watched Farahirad go after them. As Centeno ran out to retrieve the bike appellant had dropped on the ground, appellant lunged at her with his fists raised. Centeno took the bike inside the store. As appellant and Farahirad continued to struggle, a Santa Monica police officer intervened and took control of the situation.

DISCUSSION

Appellant maintains that the only lesser included offense of which he could have been convicted was the petty theft of a single bicycle. This assertion flows from appellant's contention that the amended information in this case charged one count of robbery based solely on his own conduct in taking a single bicycle; the information was neither based on nor charged appellant with the theft of the second bicycle taken by his accomplice. According to appellant, by instructing on grand theft and aiding and abetting, the trial court improperly combined the theft included in the robbery with an uncharged theft committed by appellant's accomplice. Appellant thus maintains that the resulting conviction for grand theft was based on an uncharged offense and must be reversed.

Appellant's argument fails because it incorrectly assumes (1) the evidence at the preliminary hearing showed appellant responsible for the theft of only one bicycle; (2) the amended information charged robbery based solely on the theft of one bicycle; and (3) grand theft (necessarily based on the theft of two bicycles) was not a lesser included offense of robbery on the facts of this case. However, the robbery charge in the amended

information was based on evidence at the preliminary hearing which established the simultaneous theft of two bicycles by appellant and his accomplice. The evidence presented at trial also supported the prosecution's theory that appellant and his partner acted together in stealing two bikes, not one. Hence, the trial court properly instructed the jury on principles of aiding and abetting and grand theft. Further, because the offense is a necessarily included offense of robbery, there was no requirement that the People separately charge appellant with grand theft.

Our Supreme Court has explained: "A defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime. (§ 1159; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368–369.) The basis for this rule is settled. ' "This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' " ' " (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) An accusatory pleading provides notice to the defendant of any charged offense as well as "any lesser offense that is necessarily committed when the charged offense is committed." (*Ibid.*)

"[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*People v. Lopez* (1998) 19 Cal.4th 282, 288; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1434.) In an unbroken line of authority starting with *People v. Jones* (1878) 53 Cal. 58, 59, our Supreme Court has held that the crime of theft, whether grand or petty theft, is a necessarily included offense of robbery. (*People v. Ortega* (1998) 19 Cal.4th 686, 694, and cases cited therein, overruled on other grounds in *People v.*

Reed, *supra*, 38 Cal.4th 1228–1229; *People v. DePriest* (2007) 42 Cal.4th 1, 50.)

A trial court has a sua sponte duty to instruct on any lesser included offenses supported by the evidence " 'when the evidence raises a question as to whether all of the elements of the charged offense were present.' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Lopez*, *supra*, 19 Cal.4th at pp. 287–288.) The court's obligation to instruct on a lesser included offense arises even in the absence of a request or in the face of a defendant's express objection to the instruction, for " '[j]ust as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense.' " (*People v. Breverman*, *supra*, 19 Cal.4th at p. 155.) " 'Our courts are not gambling halls but forums for the discovery of truth,' " (*People v. Barton* (1995) 12 Cal.4th 186, 204), and "the rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the *full range of possible verdicts*' included in the charge, regardless of the parties' wishes or tactics. [Citation.] The inference is that *every* lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 155.)

Here, appellant requested that the court instruct on the lesser included offense of petty theft, but objected to any instruction on grand theft. The court declared theft—whether petty or grand—to be a necessarily included offense of robbery and agreed to instruct on petty theft as well as grand theft on an aiding and abetting theory. But appellant claims no evidence supported the prosecution's theory that he aided and abetted his accomplice in committing a robbery. He thus characterizes his

accomplice's theft of the bicycle as a completely separate criminal act distinct from his own bicycle theft, and contends he could not be held accountable for the grand theft of two bicycles as opposed to the petty theft of just one. In so arguing, appellant misapprehends the application of aiding and abetting principles to the crimes of robbery and theft by larceny, or grand theft.

Larceny is the taking of the property of another with the intent to steal and carry it away. (*People v. Gomez* (2008) 43 Cal.4th 249, 254–255 (*Gomez*).) " 'Taking' " includes two elements: gaining possession of the property, known as " 'caption,' " and carrying the property away, or " 'asportation.' " (*Id*. at p. 255; *People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) "[T]he theft continues until the perpetrator has reached a place of temporary safety with the property." (*Gomez*, at p. 255.)

Robbery 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." (§ 211.) Larceny becomes robbery when the taking is accomplished by force or fear and the property is taken from the victim or in his presence. (*Gomez*, *supra*, 43 Cal.4th at p. 254.) And like larceny, robbery is a continuing offense: The crime of robbery " 'begins from the time of the original taking until the robber reaches a place of relative safety.' (*People v. Estes* (1983) 147 Cal. App. 3d 23, 28.) It thus is robbery when the property was peacefully acquired, but force or fear was used to carry it away." (*People v. Anderson* (2011) 51 Cal.4th 989, 994; *Gomez*, *supra*, at pp. 255–256.)

Criminal liability on a theory of aiding and abetting requires that a person, " 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the

offense, (3) by act or advice aids, promotes, encourages, or instigates, the commission of the crime.' " (*People v. Johnson* (2016) 62 Cal.4th 600, 630, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560.) Because the commission of a robbery or theft by larceny continues until all acts constituting the crime have ceased, aider and abettor liability may attach during the time that the stolen property is being carried away to a place of temporary safety. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1161 ["Accordingly, in order to be held liable as an aider and abettor, the requisite intent to aid and abet must be formed *before or during such carrying away of the loot to a place of temporary safety*"]; *People v. Hinton* (2006) 37 Cal.4th 839, 885.)

From initiation through closing argument, the People prosecuted this case as a theft committed by two people acting in concert with a plan to steal two bicycles. The evidence at the preliminary hearing was the same as that presented at trial: Appellant and a companion walked into Farahirad's bicycle shop together. After appellant's associate asked Farahirad about pricing, appellant and his accomplice each grabbed a bicycle from the display and ran out of the store without paying. When appellant started swinging at Farahirad, the accomplice had begun his escape, but had not yet reached a place of safety. Thus, appellant's initiation of a fight—the force that supported the prosecution's robbery theory—could reasonably be inferred to have facilitated the accomplice's asportation of the bicycle. It is irrelevant to the question of whether appellant aided and abetted the theft of two bicycles that only appellant used force while his accomplice fled with some of the stolen property.

Appellant's argument that he was charged with "one count of robbery based on his own conduct in taking a single bicycle" is similarly without merit. Neither the information nor the

amended information identified the property taken in the robbery, much less specified that appellant was only charged with the robbery of one bicycle. Rather, by alleging that appellant "unlawfully, and by means of force and fear [took] personal property from the person, possession, and immediate presence of Naveed Farahirad," the charge encompassed both bicycles.

Appellant further contends that he was convicted pursuant to an improper amendment of the information. In so arguing, he relies on his assertions that the information did not charge grand theft, and grand theft was not a necessarily included offense of the robbery charged in this case. However, as set forth above, ample evidence that would support a conviction for grand theft as a lesser included offense of robbery was presented at the preliminary hearing. Accordingly, no amendment of the information was necessary to put appellant on notice that he could be found guilty of this necessarily included offense.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.