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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS VILLEGAS, Defendant and Appellant.	B275547 (Los Angeles County Super. Ct. No. LA082718)

APPEAL from the judgment of the Superior Court of Los Angeles County. Richard Kirschner, Judge. Affirmed as modified.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Carlos Villegas appeals from his conviction on one count of second degree robbery, and one count of making criminal threats. His sole contention on appeal is that the trial court committed prejudicial error by refusing to instruct with the lesser included charge of grand theft as to the robbery count.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Around 7:00 p.m. on January 16, 2016, Jose De La Fuente was walking his dog in his neighborhood. He was holding his dog's leash in his left hand and his cell phone in his right. A man, later identified as defendant, approached him and asked to use his cell phone. Mr. De La Fuente said "I'm sorry, I cannot," and tried to walk away. Defendant called him a "mother f----r" and approached Mr. De La Fuente in "an aggressive manner," with his hands raised. Defendant's conduct scared Mr. De La Fuente and he stepped back, and also pulled his dog back as he was concerned defendant could hurt his small dog. As he did so, defendant grabbed Mr. De La Fuente's phone from his hand, it dropped to the ground, and defendant snatched it and ran away.

Mr. De La Fuente picked up his dog and started to run after defendant. He saw defendant run in through the back entrance of a laundromat, so he followed him inside. Defendant ran out the front, crossed the street and Mr. De La Fuente lost sight of him. Mr. De La Fuente crossed the street toward several more businesses and came upon another laundromat. He asked the customers inside if they had seen anyone, explaining he had just been robbed of his phone. Most everyone was quiet, but one man motioned with his eyes to the back of the store.

Mr. De La Fuente walked towards the back and found defendant crouching between some of the washing machines. He told defendant he did not want any trouble and could he "please" have his phone back. Defendant responded by punching Mr. De La Fuente twice in the face, resulting in a cut above his left eye and swelling around his mouth. Mr. De La Fuente pulled a nearby laundry cart in front of him to protect himself from defendant, and asked again for his phone. Defendant started to walk away and told Mr. De La Fuente that if he followed him he was "going to die" and "I know where you live." Defendant kept reaching behind his back in a way that made Mr. De La Fuente worry he may have some sort of weapon, so he let defendant leave. However, he once again pleaded for his phone and defendant said, as he continued to walk out, "your f---ing phone is in the laundromat."

While Mr. De La Fuente tried to locate his phone, another patron in the laundromat called 911. Mr. De La Fuente was never able to find his phone. He gave a statement to police officers and identified defendant in a six-pack photographic array.

Defendant was charged by information with one count of second degree robbery, and one count of making criminal threats. (Pen. Code, § 211, § 422, subd. (a).) It was further alleged defendant had suffered four prior convictions within the meaning of section 667.5, subdivision (b).

The case proceeded to a jury trial in May 2016. Mr. De La Fuente attested to the above facts. When asked by the prosecutor why he chased after defendant, Mr. De La Fuente said he was scared but he felt it was just instinct to go after him. He also

said defendant's conduct and threats made him frightened for both himself and his family.

On cross-examination, Mr. De La Fuente denied having taken any drugs or consumed any alcohol on the evening of January 16. He said he only smokes cigarettes. He denied knowing defendant or ever having seen him before that night.

Defendant testified in his own defense. He said he knows Mr. De La Fuente from the neighborhood as "Antonio." Defendant said he is often in jail, but when he is not, he runs into Mr. De La Fuente and they get high together, mostly in an alley near a neighborhood car wash. On the evening of January 16, he and Mr. De La Fuente were hanging out and smoked "two bowls." He told Mr. De La Fuente that a girl was going to pick him up. Mr. De La Fuente started "tripping" and hitting him in the back, so defendant turned around and "laid his ass out." Mr. De La Fuente got up, pulled out a knife and started chasing defendant. They ran through several businesses and ended up at a laundromat. Mr. De La Fuente was still holding the knife, so defendant punched him in the face and then fled. Defendant denied making any threats to Mr. De La Fuente and denied he ever took or tried to take his cell phone. He said he knows a lot of people in the neighborhood, so if he needed to use a phone, he had plenty of people he could turn to for a phone.

During discussion of the jury instructions with counsel, the court denied the request for a grand theft instruction. Both defendant and the prosecutor requested the lesser included instruction. In denying the request, the court explained there was evidence of the use of force or fear at the initial encounter, and also that defendant had testified the robbery never happened at all.

The jury found defendant guilty on both counts. Defendant admitted three prior convictions. At the sentencing hearing, the court struck, pursuant to Penal Code section 1385, all but one of defendant's prior convictions. The court sentenced defendant to a state prison term of four years eight months. The court also imposed $500 in restitution for the victim, and imposed various fines, including, as relevant here, a court operation assessment of $40 and a criminal conviction assessment of $30, "times two, one for each count."

This appeal followed.

DISCUSSION

Defendant contends his robbery conviction must be reversed and a new trial granted because of instructional error. He argues the court erred in refusing to give a lesser included instruction on grand theft as to count 1 (robbery). We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) We find no such error.

The court's obligation to instruct on all principles of law relevant to the issues raised by the evidence at trial includes the obligation to instruct " 'on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed.' [Citation.]" (*People v. Smith* (2013) 57 Cal.4th 232, 239; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1344-1345.) "An instruction on a lesser included offense *must be given only when the evidence warrants such an instruction*. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require

the giving of an instruction on a lesser included offense." (*People v. Mendoza* (2000) 24 Cal.4th 130, 174, italics added.)

Defendant's primary argument is that there was no evidence the taking of the cell phone was accomplished by means of force or fear, and the testimony about the encounter reasonably supported a finding that at most, there had been a theft. Further, because Mr. De La Fuente ran after and pursued defendant, defendant contends that contradicts any claim that he was afraid or felt threatened by defendant.

It is well established that, to prove robbery, the law does not require "direct proof of fear; fear may be inferred from the circumstances in which the property is taken. [Citation.] [¶] If there is evidence from which fear may be inferred, the victim need not explicitly testify that he or she was afraid. [Citations.] Moreover, the jury may infer fear ' "from the circumstances despite even superficially contrary testimony of the victim." ' [Citations.] [¶] The requisite fear need not be the result of an express threat or the use of a weapon. [Citations.] Resistance by the victim is not a required element of robbery [citation], and the victim's fear need not be extreme to constitute robbery [citation]. All that is necessary is that the record show ' " 'conduct, words, or circumstances reasonably calculated to produce fear . . . .' " ' [Citation.]" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775.)

Here, Mr. De La Fuente testified he was fearful when defendant aggressively approached him with his hands raised and cursed at him for declining to allow him to "use" his cell phone. Mr. De La Fuente said he pulled his dog away from defendant because he even feared defendant might try to hurt his dog. At that point, defendant attempted to snatch the phone

from Mr. De La Fuente's hand. When the phone dropped to the ground, defendant picked it up and ran off. This constitutes substantial evidence of the force or fear element of robbery. The fact Mr. De La Fuente thereafter ran after defendant in an attempt to reclaim his phone, on "instinct" as he testified, does not detract from the evidence supporting robbery.

More importantly, defendant, without equivocation, denied he made any attempt to take Mr. De La Fuente's phone. He described an entirely different, and largely fantastical, scenario of his interaction with Mr. De La Fuente, with Mr. De La Fuente as a person who just started "tripping" and then pulled a knife on defendant. Defendant testified he made no attempt whatsoever to rob Mr. De La Fuente, and underscored that testimony by saying he had lots of friends and family in the neighborhood whose phones he could use. Defendant said he had no reason to attempt to take Mr. De La Fuente's phone. "Generally, when a defendant completely denies complicity in the charged crime, there is no error in failing to instruct on a lesser included offense." (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709.) We find no such error given the testimony summarized above.

Respondent requests we order correction of the abstract of judgment to correctly reflect the fines imposed by the court at the sentencing hearing. Defendant did not file a reply or otherwise oppose respondent's request. The trial court is required to impose a court operations assessment of $40 (Pen. Code, § 1465.8), and a criminal conviction assessment of $30 (Gov. Code, § 70373) as to each count on which the defendant is convicted. (See, e.g., *People v. Sencion* (2012) 211 Cal.App.4th 480, 484-485; *People v. Calles* (2012) 209 Cal.App.4th 1200, 1226.) The court did so here, explicitly saying "times two, one for

each count" after imposing each statutory assessment. However, the abstract of judgment erroneously provides for only one fee of $40 and one fee of $30. The abstract of judgment must be corrected accordingly.

DISPOSITION

The judgment of conviction shall be modified to reflect the trial court's oral pronouncement of sentence as follows: delete the $40 court operations assessment and replace with an $80 assessment; delete the $30 criminal conviction assessment and replace with a $60 assessment. The judgment is affirmed in all other respects. The superior court is directed to prepare and transmit a modified abstract of judgment in accordance with this opinion to the Department of Corrections and Rehabilitation.

GRIMES, J.

WE CONCUR:

FLIER, Acting P. J.

SORTINO, 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.