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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE BENITEZ,

Defendant and Appellant.

B275470

(Los Angeles County
Super. Ct. No. LA082565)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Eric P. Harmon, Judge. Affirmed.

Renee Rich, 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, Assistant
Attorney General, Steven D. Matthews and Analee J. Brodie,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Jose Benitez guilty of second degree robbery. He contends the trial court erred by failing to sua sponte instruct the jury on attempted robbery, and therefore his conviction must be reversed or reduced to attempted robbery. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

On January 9, 2016, Bernardo Ignacio rode his bicycle to his job at a Panorama City supermarket. He locked his bicycle with a metal “U” lock and went inside to work. Later that morning Ignacio was informed that someone was stealing his bicycle. Ignacio exited the market and found Benitez using bolt cutters to remove a nut from the bike’s wheel. Ignacio told Benitez, in Tagalog, “ ‘This bike is mine. Why are you getting it?’ ” Ignacio used his cellular telephone to photograph Benitez and used his key to unlock the bicycle, intending to move it away from Benitez.

As Ignacio began to move the bicycle, Benitez grabbed it and the men briefly struggled. Ignacio held onto the front grip and seat, and Benitez held the other side of the front grip, with the bolt cutters still in his hand. Benitez raised the bolt cutters in the air and lunged as if to hit Ignacio with them. Frightened, Ignacio “let go of the grip of the bike” and “r[a]n back.” Benitez placed the bicycle on top of a shopping cart and pushed it away from the supermarket, still holding the bolt cutters. According to Ignacio, he followed Benitez for approximately three minutes, at a distance of approximately 15 to 20 meters. Meanwhile, bystanders were watching the incident. One, Michael Fontillas, called 911.

When Ignacio had a chance, he grabbed the bolt cutters and handed them to Fontillas. Benitez became “so mad,” raised his fists in the air in a fighting stance, and cursed at Ignacio. Benitez said to Ignacio, “ ‘What the fuck are you going to do?’ ” Fontillas pulled Benitez away from Ignacio, causing both Fontillas and Benitez to fall to the ground. Ignacio and some bystanders restrained Benitez until police arrived.

Fontillas’s account of the incident was largely consistent with Ignacio’s. He testified that when Benitez first raised the bolt cutters, Ignacio “just backed off, let go of the handle [of the bicycle] and just backed up.” Fontillas, who was calling 911, turned and moved a few steps away to get a better cell phone connection; when he turned back, the bicycle was loaded on a shopping cart. As Benitez rolled the shopping cart away, Ignacio stayed with the cart, holding on to the bicycle. Benitez became angry and raised the bolt cutters a second time when Ignacio tried to remove the bicycle from the shopping cart. Ignacio grabbed the bolt cutters, and Benitez came at him with a closed fist. Ignacio backed off “all the way to” a store window, looking “scared and helpless.”

Los Angeles Police Department Officer Sarah Slavid spoke with Ignacio at the scene shortly after the incident, in English. Ignacio spoke some English and seemed to understand some of what Slavid said. Fontillas and other bystanders assisted with translation during portions of the interview. Ignacio retrieved the bolt cutters and gave them to Slavid. Ignacio told Slavid that Benitez had held on to the bicycle with one hand and held the bolt cutters in his other hand, by his side. Ignacio then backed away from the bicycle and Benitez took it, placed it in the shopping cart, and walked away with it. Neither Ignacio nor

Fontillas stated that the men had struggled over the bicycle, or that Benitez raised the bolt cutters or assumed a fighting stance. However, based on Ignacio's statements, Slavid understood that Benitez had held the bolt cutters in a threatening manner. Ignacio told her he was afraid Benitez was going to hit him with them.

Benitez presented no evidence.

2. *Procedure*

A jury convicted Benitez of the second degree robbery of Ignacio (Pen. Code, § 211, 212.5, subd. (c)).¹ In a bifurcated proceeding, the trial court found Benitez had served one prior prison term within the meaning of section 667.5, subdivision (b). It sentenced Benitez to the low term of two years, plus one year for the section 667.5 prior prison term enhancement, for a total of three years. It imposed a restitution fine, a suspended parole revocation restitution fine, a criminal conviction assessment, and a court operations assessment. Benitez appeals.

DISCUSSION

The trial court did not commit instructional error

The trial court instructed the jury on robbery and the lesser included offense of theft. When discussing the instructions, the court stated: "I've examined the state of the evidence with regard to any other lessers. After having heard the arguments, I don't believe there is substantial evidence to give any other lessers included than attempted robbery. I don't think that would be appropriate, given the state of the evidence." Notwithstanding these comments, the defense did not request, and the trial court did not give, an instruction on attempted robbery.

¹ All further undesignated statutory references are to the Penal Code.

Benitez argues the trial court should have sua sponte instructed on attempted robbery because there was substantial evidence he never gained dominion and control of the bicycle. He avers that the trial court's comment indicates it believed the evidence supported such an instruction, but the court erroneously failed to give it because the defense did not request it. The court's error, he insists, violated his rights to due process and a fair trial, requiring reversal of his conviction or its reduction to attempted robbery.

1. *Applicable legal principles*

In a criminal case, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence, including lesser included offenses, whether or not the defendant makes a formal request. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Instruction on a lesser included offense is required when there is evidence that indicates the defendant is guilty of the lesser offense but not of the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68–69; *People v. Thomas* (2012) 53 Cal.4th 771, 813.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) The existence of *any* evidence, no matter how weak, will not justify instructions on a lesser included offense. (*Whalen*, at p. 68; *People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In deciding whether there is substantial evidence, we do not evaluate the credibility of the witnesses, a task for the jury. (*Wyatt*, at p. 698; *People v. Manriquez* (2005) 37 Cal.4th 547, 585.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

“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,” with the intent to permanently deprive the victim of the property. (§ 211; *People v. Anderson* (2011) 51 Cal.4th 989, 994; *People v. Gomez* (2008) 43 Cal.4th 249, 254 (*Gomez*); *People v. Lopez* (2003) 31 Cal.4th 1051, 1058 (*Lopez*).) Taking has two aspects: achieving possession of the property, known as “caption,” and carrying the property away, known as “asportation.” (*Gomez*, at p. 255; *Lopez*, at p. 1056.) “[T]he theft continues until the perpetrator has reached a place of temporary safety with the property.” (*Gomez*, at p. 255.) “To satisfy the asportation requirement for robbery, “no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim.” [Citation.] “[S]light movement” is enough to satisfy the asportation requirement. [Citations.]” (*Lopez*, at p. 1060; *People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [“Robbery does not necessarily entail the robber’s manual possession of the loot. It is sufficient if he acquired dominion over it, though the distance of movement is very small and the property is moved by a person acting under the robber’s control, including the victim”].) The asportation element is not satisfied unless “ ‘the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment.’ ”” (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654.) The force or fear may occur at any point while the property is being carried to a place of temporary safety. (*Gomez*, at p. 257.) Attempted robbery is a lesser included offense of robbery. (*People v. Crary* (1968) 265 Cal.App.2d 534, 540; see *People v. Pham* (1993) 15 Cal.App.4th 61, 67.)

In support of his contention that the jury could have found he never acquired dominion of the bicycle, Benitez points to the following. Fontillas testified that Ignacio kept his hand on the bicycle as Benitez walked away with it in the shopping cart. Officer Slavid testified that Ignacio initially told her Benitez attempted to steal the tire; “he did not say appellant took the bicycle from him and carried it away.” And, Benitez’s “attempt to steal and gain control of the bicycle or its front tire was interrupted by Ignacio and Fontillas.” Benitez urges that the foregoing evidence shows the property was never severed from Ignacio’s possession, and was therefore sufficient to allow the jury to find he committed only attempted robbery.

We disagree. The evidence did not support an attempted robbery instruction. There was undisputed evidence Benitez picked up the bicycle and placed it in the shopping cart, after frightening Ignacio off by means of his menacing demeanor and display of the bolt cutters. It was also undisputed Benitez pushed the shopping cart, containing the bicycle, down the street. This constituted more than the “slight movement” required to establish asportation. It was also undisputed that the bicycle was severed from Ignacio’s possession, at least for a moment. Although Ignacio’s and Fontillas’s accounts of the crime differed in some respects, both testified that Ignacio released the bicycle when Benitez threatened him. Ignacio testified that when Benitez raised the bolt cutters in the air, Ignacio let go of the bike and ran back. He then followed Benitez at a distance for several minutes. Fontillas testified that “Ignacio just backed off [and] let go of the handle” when Benitez first threatened Ignacio with the bolt cutters. Officer Slavid testified that Ignacio told her he backed away from the bicycle and Benitez placed it in the

shopping cart. None of the witnesses, or any other evidence, suggested that Benitez held on and refused to relinquish the bicycle during the entire encounter. That Fontillas's and Ignacio's testimony differed regarding whether Ignacio kept his hand on the bicycle as he followed Benitez down the street is immaterial in light of the undisputed evidence Ignacio moved away from the bike initially.

Ignacio's statement to Officer Slavid that he thought Benitez was attempting to steal the tire is irrelevant to the claimed instructional error. For one thing, it matters not whether the bicycle or the tire was the initial target of the robbery; for another, the most reasonable inference from the evidence is that Benitez was attempting to remove the tire in order to steal the bike. And, the fact that Ignacio and Fontillas "interrupted" Benitez and prevented him from successfully making off with the loot does not mean the crime was only an attempted robbery. It is settled that "[t]he *commission* of a robbery does not require the robber to escape with the loot to a place of temporary safety." (*People v. Pham, supra*, 15 Cal.App.4th at p. 68.) In sum, there was no substantial evidence Benitez committed only an attempted robbery, and therefore no instructional error occurred.

In light of our conclusion, we do not address the parties' arguments regarding prejudice.

DISPOSITION

The judgment is affirmed.

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EDMON, P. J.

We concur:

EGERTON, J.

CURREY, J.*

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