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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.

JAMES METOYER,

Defendant and Appellant.

B233582

(Los Angeles County
Super. Ct. No. PA068401)

APPEAL from a judgment of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed.

Kevin Michele Finkelstein, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

James Metoyer appeals from the judgment entered following a jury trial which resulted in his conviction of second degree robbery (Pen. Code, § 211)¹ and simple battery (§§ 242/243). The trial court sentenced Metoyer to three years in prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

a. The prosecution's case.

At approximately 6:30 p.m. on August 7, 2010, Josh Pineda and his friend, James Dalton, rode their bicycles to Petit Park in Granada Hills. Pineda, who was riding a new “Mongoose” bicycle which he had just purchased, had brought his dog with him and the two young men intended to just “hang out” for awhile. Pineda left his bicycle on a concrete walkway “on its kick stand” while he and Dalton sat at a nearby picnic table.

After Pineda and Dalton had been sitting for a few moments, Pineda got up and left to help a group of people take down a “bouncer” that children had been jumping in. As Pineda was returning from assisting with the “bouncer,” Metoyer approached him and made a comment about his shirt. The shirt, which had on it “some profane language” and the “middle finger,” was known as a “Metal Militia” shirt. After Pineda and Metoyer discussed the shirt for several minutes, Metoyer let Pineda know that he was “pretty offended” by it.

Pineda walked back to the picnic table and sat down next to Dalton. A group of people was sitting at another table approximately 10 feet away. In that group, there were approximately “three [African-Americans] and . . . an equal number of Latino[s].” Dalton was “not sure of the [ethnicity of the] other [individuals].”

Approximately 20 minutes after Pineda had returned to the picnic table, Metoyer walked over to Pineda’s bicycle and “grabbed” it. Pineda went to his bike and “grabbed . . . the handle bars” in an effort to keep Metoyer from taking it. As the two men struggled over the bicycle, words were exchanged. Metoyer told Pineda that “this

¹ All further statutory references are to the Penal Code unless otherwise indicated.

[was his] bike now” and that he was taking it for his daughter. Pineda sarcastically told Metoyer that this was “not an honorable way to get a bike.”

The members of the group which had gathered at the table next to the one at which Pineda and Dalton had been sitting saw the encounter between the two men, but no one became involved. They just stood in a semi-circle around the pair and watched.

While Pineda was struggling with Metoyer, he tossed his cell phone to Dalton. Although Dalton “really didn’t know what to do with [Pineda’s phone,]” one of the individuals in the group watching Metoyer and Pineda told Dalton that he had “better not call the cops.” Such comments made Dalton feel intimidated and reluctant to get involved.

After Pineda and Metoyer “struggle[d]” over the bicycle for several minutes, Metoyer “threw a punch” and hit Pineda in the face. Metoyer continued to hit Pineda in the face and did so “[a]t least four times.” At this point, Dalton stood up and said, “What is this shit?” Metoyer stopped hitting Pineda for a moment, walked over to Dalton and hit him on the chin. The punch “grazed down [from his chin] on to [Dalton’s] chest.” Metoyer “stared [into Dalton’s] eyes,” then returned to where Pineda was standing with his bicycle. Dalton did not hit Metoyer back. Although he stood up, he “didn’t actually approach either [Metoyer or Pineda].”

By this time, Metoyer had grabbed Pineda’s bike and hit Pineda several times in the face, “around the upper chest” and in the “belly.” At some point during the altercation, Dalton heard Metoyer refer to Pineda as a “White boy.” Pineda simply continued to hold onto the bike while Metoyer “started pulling on it again.” There was “some struggle back and forth,” but Pineda eventually got “tired of getting punched and . . . gave up.” He let go of the bicycle and Metoyer got on it, rode it around and taunted Pineda by saying, “[T]his is my bike now[.]” Metoyer even rode the bicycle past Dalton, shook Dalton’s hand, then rode off. A short time later, Dalton saw “some kid,” who was not Metoyer, “riding [Pineda’s] bike.”

At about the same time that Metoyer was riding away on Pineda's bicycle, Pineda's girlfriend, Jessica Clark, arrived at the park. She, along with Pineda, Dalton and a young man named Ramon, went to a nearby Carl's Jr. restaurant. There, Clark called the police. The group, including Pineda, met with police officers in the parking lot at the park.

Clark testified that, on August 7, 2010, she was Pineda's girlfriend.² The two had planned to meet at the park at approximately 7:00 p.m. that evening to go bicycle riding and Pineda's friend, Dalton, was supposed to join them. However, Clark's bicycle was not working so, sometime before 7:00 o'clock in the evening, she attempted to call Pineda to let him know. Although she tried to call Pineda more than 20 times, he did not answer his phone. Clark decided that "something wasn't right" and she got into her car and drove to the park. When she saw Pineda, Clark walked "directly towards him." As she approached Pineda, Clark saw Dalton standing nearby with his bike and "four or five people behind him." Clark, however, did not see Pineda's bicycle anywhere and she asked him "what was going on."

As she walked toward Pineda, Clark thought he looked "shaken up, like he was just scared[.]" When Pineda looked up at Clark, she realized that his lip was bleeding. When she again asked him what was going on, Pineda, after a few moments and still looking visibly shaken, told Clark that "his bike [had been] stolen and he [had been] punched." Clark asked Pineda "who did it." At first, Pineda did not want to answer. However, when Clark asked him a second time, Pineda pointed out Metoyer. At that moment, Metoyer, whom Clark had never seen before, was "walking toward the bike[,] taunting [Pineda] with his gestures." Metoyer "had his arm up [and was] laughing [as though] he was provoking [Pineda] to try to challenge him." Pineda's bike was leaning against the entrance to the park pool, approximately five feet from where Metoyer was standing. There were three people with Metoyer, all of whom were African-American.

² Although she was no longer dating him, at the time of trial, Clark was pregnant with Pineda's child.

Clark noted that the several people standing around Pineda were “mixed White, Mexican, [and African-American].”

Metoyer got on the bicycle and “rode up with it.” Clark was “cussing.” She was angry at Metoyer for having taken the bike and she was “mad at [Pineda] for not reacting or doing anything about it.” After he rode the bicycle around the park for approximately 10 minutes, Metoyer left. A little girl was riding a bicycle behind him.

When she saw Metoyer and the little girl leave the park, Clark had Pineda and Dalton get into her car. She drove them to a Carl’s Jr. restaurant a short distance away and, from there, telephoned the police.

Seventeen-year-old Ramon Lara had been a good friend of Pineda’s. In August 2010, Lara was allowed to “hang out” with Pineda. However, as of a couple of months before trial, Lara had been forbidden to associate with Pineda.

On August 7, 2010, Lara had gone to the skate shop on Balboa and Chatsworth to purchase some wax. On his way home, he had to pass by Petit Park. Although he had intended to go straight home, when he passed by the park he saw Pineda’s dog and he decided to ride his bicycle down into the park to look for Pineda. When Lara saw Pineda, he was standing by the bike racks with Dalton and a number of other individuals. Lara approached Pineda “[t]o say hi.” After greeting Pineda, Lara backed up and began petting Pineda’s dog.

Lara stated that Pineda had been holding his bicycle when Metoyer, who was “[h]anging out with a group of people” at a nearby picnic table, approached Pineda. Metoyer, who was holding a beer can in his hand, began to argue with Pineda. Lara heard Metoyer tell Pineda that “he was taking [Pineda’s] bike for his daughter” but that he would give Pineda “his bike back if he [fought] back, if he [stood] up.” Metoyer then “grab[bed] the wheel of [Pineda’s] bike” and the two men struggled for it. As Pineda and Metoyer fought over the bicycle, Lara heard Pineda say, “[I]t’s a great honor[.] [T]his is how you get your . . . daughter a bike, by stealing it? . . . [T]hat is why nobody likes your kind.”

After several minutes of struggling, Metoyer let go of the bicycle for a moment and hit Pineda in the jaw and on the lip, causing Pineda to fall backward into some bushes. Dalton, who had been sitting nearby, stood up and said, “What’s going on here?” Metoyer then walked over to Dalton and hit him in the cheek. When Metoyer then returned to where Pineda was standing, holding his bike, the struggle continued. Although Metoyer kept hitting Pineda in the face, Lara never saw Pineda hit Metoyer back. He simply hung onto his bicycle until, after a time, he just let go.

Shortly after Metoyer took Pineda’s bicycle, Pineda’s girlfriend arrived at the park. She drove Pineda and Dalton to a nearby Carl’s Jr. Lara rode to the restaurant on his bicycle.

Several months later, in December 2010, Lara spoke about the incident to a detective named Santiago. Lara had told the detective that shortly after Metoyer took the bike from Pineda, he leaned it against a nearby table. As Metoyer then sat with a group of people, Pineda, Dalton, Clark and Lara went to the parking lot to speak “with the police.”

Pineda testified at trial. He stated that, although a few days before trial he had been arrested and taken into custody, he had been released and no charges had been filed against him. Pineda however admitted that in 2006, when he was 14 years old, he had committed “a burglary, a shoplift at a retail store,” and that in 2005 he had committed an attempted burglary at a school.

Pineda stated that he went to Petit Park almost every day “just to get out of [his] house.” He usually took his dog, a German Shepherd, and would either relax at a table or play ball with the dog. He would throw a ball and the dog would retrieve it. Pineda rarely met friends at the park, but “people would come up to [him] and just say hi.” One of the individuals Pineda recognized from the park was Metoyer. However, Pineda did not know Metoyer well enough to talk with him or “[a]pproach him in any way.” Although he had seen Metoyer a number of times, Pineda had never acknowledged him.

At times Pineda would ride his bicycle to the park. He owned a “Mongoose Rebel,” which is a “BMX” type of bike. On the evening of August 7, 2010, Pineda, accompanied by his dog and his friend, James Dalton, rode his bicycle to Petit Park. At that time, Dalton was 17 years old and Pineda was 18. When they arrived at the park, the two young men immediately sat down on a bench. Pineda was throwing a ball to his dog when he was approached by a woman who asked him if he could help move a “party bouncer.” Pineda decided to help her out and he, along with a few other young men, moved the bouncer.

As he was returning to the table where Dalton was sitting, Pineda was approached by Metoyer, who commented on Pineda’s shirt. The shirt was “a black Metal Militia T-shirt and it [had] a skull on it, and the skull had a finger flipping off.” Pineda explained that “Metal Militia is a dirt biking company brand” which has a “dirt biking team.” According to Pineda, although there is “nothing racial about it,” Metal Militia is often associated with “White people.”³ After looking at Pineda’s shirt, Metoyer stated that he was looking for “some racist White boy.” Although Metoyer then just walked away, his comment left Pineda feeling anxious. Pineda was afraid that Metoyer was assuming that he, Pineda, was the “White boy” he was looking for. Pineda suspected this because, in addition to the shirt, he had other body adornments, such as tattoos and piercings, which could be construed as indicating that he was a racist.

Although Metoyer did not mention them, Pineda has a tattoo of a Confederate flag on one of his arms and tattoos of skulls, both “Metal Militia” skulls and “regular skulls.” Pineda indicated that although he no longer intended his tattoos to reflect it, when he had acquired them at the age of 16 he was going through a “White pride phase.” The “phase” lasted for about a year. However, in August 2010, Pineda was no longer in that “phase” and he had several African-American as well as Hispanic and Asian friends.

³ Pineda indicated that his mother is German and Irish and his father is Spanish. He stated that he also had “Mexican in [his] family.”

After his encounter with Metoyer, Pineda decided to go home and change his shirt. He took off the “Metal Militia” T-shirt and put on a tank top. Dalton had accompanied Pineda and, after Pineda changed, the two young men returned to the park and sat down at the same table and bench that they had been sitting at earlier.

According to Pineda, “Things were going okay for about 10 minutes or so. . . . [He] had [his] bike just leaning over at the side about five feet away from [him], and that’s when [Metoyer] approached [him,]” said “[t]his is my bike now[,]” and “just grabbed [it].” Pineda got up and put both hands on the bike in an attempt to keep Metoyer from taking it. The two men engaged in a “tug of war” over the bicycle, during which Metoyer continued to say, “ ‘This is my bike, and you ain’t so tough now, White boy.’ ” When Pineda asked Metoyer why he wanted the bike, Metoyer replied in an angry, aggressive tone, “ ‘This is for my daughter. She needs a bike.’ ”

As the “tug of war” over the bicycle continued, Pineda and Metoyer moved from the area next to the picnic table to an area with bushes behind the park pool. There, Metoyer began to punch Pineda “in the face over and over again.” Metoyer punched Pineda in the head, on the lip, on the right side of his face and in the nose. While continuing to hold onto his bike, Pineda responded to Metoyer’s actions by stating, “ ‘This is not an honorable way to get a bike for your daughter.’ ” Metoyer then, while holding onto the bike with one hand and punching Pineda with the other, began beating Pineda on his body as well as his face. At that point, Dalton stepped up and asked Metoyer, “ ‘Why the hell are you doing that to him? He didn’t do nothing.’ ” Metoyer immediately let go of the bicycle and directed his attention toward Dalton, punching Dalton in the face. Although, while Metoyer was busy with Dalton, Pineda could have taken his bicycle and left, he did not do so. He simply stood there “dazed” and “in shock.”

After hitting Dalton, Metoyer returned to Pineda, grabbed onto the bicycle with one hand and again “punched” Pineda in the face with his other hand. Pineda, while still holding onto the bicycle with his left hand, used his right hand to take his cell phone from his pocket and throw it to Dalton. Although Pineda told Dalton to “ ‘call the cops[,]’ ”

Dalton did not do so. Pineda finally just let go of his bike. He decided that it “[was]n’t worth it.” It was “[j]ust a bike.” He believed that if Metoyer or one of Metoyer’s friends had a weapon, he or she might use it against Pineda. Pineda also thought that, if he chose to attempt to fight back, the group of Metoyer’s friends which had gathered around them might “jump in” and “start beating on [him].”

After he had taken the bicycle, Metoyer looked at Pineda and said, “ ‘This is my park, White boy. If I see your ass around here again, I’ll kill you.’ ” After he threatened to hurt Pineda’s dog, Metoyer rode Pineda’s bicycle around the park for a time, then left. Pineda, accompanied by his girlfriend, who had arrived just after Metoyer took the bike, Dalton and a young man named Ramon, also left the park. As they were walking toward the exit, Pineda called 911. He arranged to meet the police at a nearby Carl’s Jr. restaurant.

Approximately 10 days later, Pineda was contacted by a detective from the police department. Accompanied by two detectives, Pineda rode in an undercover police car by the park and into the neighborhood next to the park. As they drove slowly past one of the walkways, Pineda spotted Metoyer. After Pineda identified Metoyer, the detectives got out of the car and took Metoyer into custody.

Los Angeles Police Department Detective Luis Santiago was the investigating officer on Metoyer’s case. When the detective interviewed Pineda regarding the incident, Pineda told the detective that when he first rode through the park, he passed Metoyer, who was with several male African-Americans. As Pineda passed by, Metoyer had yelled out, “ ‘Fucking White people.’ ” Pineda also indicated that, at some later point, Metoyer had approached him and told him that he was “ ‘looking for a fucking White boy.’ ” or a “ ‘fucking Nazi.’ ” Finally, according to Santiago’s report, Pineda told him that Metoyer had stated he “hated White people.”

b. *Defense evidence.*

Casey Montgomery is one of Metoyer’s friends and they see each other often. Montgomery, along with two more friends, Ryan, who is Mexican, and Christopher, who

is Caucasian, had been with Metoyer at Petit Park during the early evening hours of August 7, 2010. Montgomery was riding his bicycle and the others were walking.

At the park, Montgomery saw Pineda and Dalton. At that time, Montgomery and Pineda were friends.⁴ However, when Montgomery and Metoyer “met up with” Pineda at the park, Pineda, who appeared to be under the influence of alcohol and drugs, began to call Metoyer insulting “names.” Montgomery believed that Pineda was “pretty hyped up from the alcohol” and drugs and just “wanted to fight somebody.” In addition, Montgomery believed that Pineda “didn’t like [Metoyer].” After insulting him, Pineda hit Metoyer in the head and chest. In response, Metoyer hit Pineda once or twice on his right cheek and in the back of the head. There were people around when Metoyer and Pineda were fighting, but Montgomery did not know them. Most of them appeared to be homeless.

After Metoyer hit Pineda, Dalton walked around behind Metoyer. It appeared as though Dalton intended to hit Metoyer, however before he could do so, Metoyer turned and punched Dalton in the chest. When Montgomery told Metoyer to stop hitting Dalton, Metoyer listened, stopped punching Dalton and walked away from Pineda and Dalton and toward the basketball court where his daughter was playing. A short time later, Montgomery and Metoyer saw Dalton with a bicycle. There was only one bike.

Later that night, Pineda, Pineda’s girlfriend, “some other guy” and a number of police officers came to Montgomery’s home. Ramon Lara was not with them and had not been at the park. After Montgomery spoke with the police officers, “[t]hey brought [him] out of the house in handcuffs.”

⁴ After the August 7, 2010 incident at the park, Pineda “threatened [Montgomery]” and his family” because he believed that Montgomery had been “on [Metoyer’s] side” during the altercation. In addition, Montgomery stated that Pineda had told him that he, Pineda, did not want Montgomery “hanging out” with Metoyer because Metoyer is African-American.

Since the August 7, 2010 incident at the park, Montgomery had seen Pineda twice. Both times Pineda was at a Taco Bell restaurant and had with him a gray and red bicycle.

c. Rebuttal.

Los Angeles Police Detective Luis Santiago testified that it is the responsibility of the officer investigating an incident to determine what happened and who, if anyone, was at fault. In making such a determination, the officer is not to take sides and is to “interview all parties and all people that are potential witnesses or . . . have [pertinent] information.” Based on the investigative report, Ramon Lara was at the site of the altercation which occurred at Petit Park on the evening of August 7, 2010.

In Santiago’s report regarding the August 7 incident at Petit Park, there is no mention of Casey Montgomery. There are, however, statements made by Pineda and Dalton. According to Santiago, neither young man appeared to be under the influence of alcohol or drugs when he was interviewed. In addition, after reviewing a recording of the “9-1-1 ta[p]e” of Pineda’s call, Santiago indicated that Pineda had neither slurred his speech nor sounded impaired.

Pineda testified that he never called Metoyer “the ‘N’ word” and never threatened to shoot him. He had not been drinking on the evening of August 7th and the photographs of the injuries he received that night accurately portrayed them. Pineda explained that he has “panic disorder,” “anxiety disorder” and “agoraphobia.” For these illnesses, he takes an antidepressant called Zoloft and two anti-anxiety medications, Klonopin and Ativan. He takes no illegal drugs or medications.

Just a few minutes before being called to testify, Pineda was approached by Montgomery in the courthouse hallway. Montgomery said to Pineda, “ ‘What the fuck, Josh. I thought you were gonna drop this.’ ” In response, Pineda told Montgomery that he had “ ‘nothing to say to [him,]’ ” then walked away.

2. Procedural history.

Following a preliminary hearing, on September 10, 2010 an information was filed charging Metoyer with one count of second degree robbery (§ 211) and one count of criminal threats (§ 422). It was further alleged that Metoyer previously had suffered a

conviction for possession of cocaine base for sale (Health & Saf. Code, § 11351.5) for which he served a prison term (§ 667.5, subd. (b)). On February 16, 2011, the information was amended to add as count 3 a violation of sections 242 and 243, subdivision (a), misdemeanor battery. Metoyer pled not guilty to all counts and denied the special allegations.

Trial was by jury. After the prosecution presented its case, the trial court granted Metoyer's section 1118.1 motion to enter a judgment of acquittal as to count 2, the allegation that Metoyer made criminal threats in violation of section 422. In granting the motion, the trial court indicated that the prosecution had failed to establish the element of "sustained fear."

After the jury began deliberating, Metoyer indicated that he was willing to waive a jury trial as to the prior conviction. He agreed that, should the jury find him guilty of robbery as alleged in count 1, he would admit having been convicted of possession of cocaine base for sale and serving a prison term for the offense.

During deliberations, the jury sent a note to the trial court stating the following: "Can we please view Ramon's testimony?" The trial court indicated that the jury was referring to Ramon Lara, then asked counsel if they believed that the jury was "just asking for the readback of Ramon's testimony[.]" Both counsel agreed that the jury wished to hear Ramon's testimony read back. When asked if he wished to waive his appearance or be present for the readback, Metoyer indicated that he wished to be present. Accordingly, the jury was brought back into the courtroom and, in the presence of Metoyer and both counsel, the court reporter read to the jury the testimony of Ramon Lara. The jury then resumed its deliberations.

Later that day, the jury indicated that it had reached verdicts. It found Metoyer "guilty of the crime of second degree robbery upon Joshua Pineda, in violation of Penal Code section 211, a felony as charged in count one of the Amended Information." In addition, the jury found Metoyer "guilty of the crime of battery upon James Dalton, in violation of Penal Code section[s] 242[-]243 subdivision (a), a misdemeanor as charged in count three of the Amended Information."

After Metoyer waived his right to have the trial on his prior conviction and sentence imposed that day, disposition of the prior and sentencing were scheduled for two weeks later, on April 13, 2011.

At proceedings held on April 28, 2011, the prosecutor indicated that the People had decided not to proceed on the one-year prior conviction. Accordingly, the trial court indicated that Metoyer would be sentenced. After the trial court indicated that it had read and considered the probation report, it heard argument by the prosecutor and defense counsel. The court then sentenced Metoyer to the mid-term of three years in prison for his conviction of robbery. The court based its sentencing choice on “the fact [that] defendant’s prior convictions are numerous, of increasing seriousness, and [that it believed the] crime involved a threat of great violence.” With regard to count 3, the misdemeanor battery, the trial court sentenced Metoyer to “180 days, [the term to] run concurrent[ly] to the principal term.”

The trial court granted Metoyer presentence custody credit for 116 days actually served and 15 percent, or 16 days of good time/work time, for a total of 132 days. Metoyer was then directed to pay a \$200 restitution fine (§ 1202.4, subd. (b)), a stayed \$200 parole revocation restitution fine (§ 1202.45), a \$40 court security fee (§ 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373) and to make restitution to the victim in the amount of \$120 (§ 1202.4, subd. (f)).

Metoyer filed a timely notice of appeal on May 26, 2011.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed November 30, 2011, the clerk of this court advised Metoyer to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.