Filed 6/13/16 P. v. Arciniega CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ARCINIEGA, Defendant and Appellant.	B263746 (Los Angeles County Super. Ct. No. GA093291)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Cathryn Brougham, Judge. Affirmed.

Melissa J. Kim, 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, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant Daniel Arciniega was convicted of second degree robbery (Pen. Code, § 211, subd. (a))[1] and resisting arrest (§ 148, subd. (a)(1)). He was granted probation on both offenses.

Defendant contends: the conviction for robbery was not supported by sufficient evidence the property was taken by force; the trial court erred by failing to instruct the jury that it must unanimously agree on the act that constituted the force necessary for robbery; and, pursuant to section 654, the trial court should have imposed and stayed the sentence for resisting arrest. Defendant also requests we independently examine the record of the in camera hearing conducted by the trial court pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) to determine whether the trial court abused its discretion in finding there was no discoverable misconduct related to one of the arresting police officers—Corporal William Early.

The judgment is affirmed because defendant's claims of error lack merit and we have ensured the trial court did not abuse its discretion when conducting the in camera hearing.

FACTS

Prosecution Case

On May 14, 2014, Abel Ibarra, a loss prevention officer at Pavilions grocery store, observed defendant place beer in his backpack and leave the store without paying for it. Ibarra, and his partner Elizabeth Ayala, approached defendant about 10 feet outside of the entrance and said they needed to speak with him about items in his backpack. Defendant continued walking.

Ibarra positioned himself in front of defendant so as to block defendant's path. Ibarra was five feet, eight inches tall; defendant stood six feet tall. Defendant grabbed Ibarra's forearms and tried to push him out of the way. Ibarra and Ayala attempted to clutch defendant's arm and hold onto him. Defendant reacted by using additional force

---

[1] All further statutory references are to the Penal Code.

in an effort to flee. A struggle ensued and eventually Ibarra and defendant fell to the ground.

Ibarra explained, while on the ground, "[defendant] was still struggling to try to get away." The loss prevention officers focused their efforts on simply holding defendant down as Ibarra knew the police had been called. But, defendant never stopped "thrashing" or attempting to escape.

Corporal William Early, a South Pasadena police officer, arrived and observed the loss prevention officers struggling with defendant as defendant was "flailing very violently" on the ground. Early took over the detention and ordered defendant to stop fighting. But, defendant continued to resist so violently that Early was not able to subdue him. A police sergeant ultimately responded to the scene and assisted Early with handcuffing defendant. Defendant was arrested and the beer was recovered from his backpack.

Wesley Coop was eating his lunch in his car in the parking lot when he saw the commotion. He watched as defendant argued with a male and a female. Coop heard something along the lines of "please come back in the store" or "please wait here." The two individuals tried to block defendant's path and at one point had his hands against a wall. Defendant was attempting to "break his way through them." Coop explained, "the main aggressor was [defendant]. [T]he other two individuals were just trying to hold him there, trying to just keep him from leaving, from fleeing or whatever else he wanted to do."[2]

Defense Case

Defendant testified on his own behalf. He admitted he took beer from the grocery store without paying for it. When he reached approximately 10 feet outside the store, Ibarra violently grabbed him from behind without saying anything. Ibarra pushed

---

[2] Similarly, the store manager observed a loss prevention agent attempting to stop defendant, or someone matching defendant's description, from fleeing the scene.

defendant toward the store, telling him to return the beer. Ayala arrived and identified herself as a loss prevention officer before a handcuff was secured to defendant's left arm.

Ibarra placed defendant in a chokehold and told defendant he was "gonna put [him] to sleep." The group fell to the ground with defendant between Ibarra and Ayala. Ibarra released the chokehold when Early arrived.

Defendant believed Early used unnecessary force in arresting him. Defendant never put his hands on either Ibarra or Ayala.

DISCUSSION

Sufficiency of Force for Robbery

"'"'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

Robbery is defined as "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.) "A robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property" (*People v. Estes* (1983) 147 Cal.App.3d 23, 27.) In this regard, "'robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety. [Citation.]'" (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) Thus, a person may be convicted of robbery of a security guard if the person, as he or she is leaving the scene, uses force or fear to resist the guard's attempt to regain the property. (*People v. Estes*, *supra*, 147 Cal.App.3d at p. 27; see also *Miller v. Superior Court* (2004) 115 Cal.App.4th

216, 222 [it is robbery "where the perpetrator peacefully acquires the victim's property, but then uses force to retain or escape with it"].)

"'The terms "force" and "fear" as used in the definition of the crime of robbery have no technical meaning peculiar to the law and must be presumed to be within the understanding of jurors.' [Citation.]" (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.)[3] "'Force' is a relative concept." (*Id.* at p. 1709.) "[T]he degree of force utilized is immaterial. [Citations.]" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1025.) Rather, in order to qualify for a robbery the force must simply be more than that which is '"necessary to accomplish the mere seizing of the property.' [Citations.]" (*People v. Anderson, supra*, 51 Cal.4th at p. 995.)

Under this rubric, "[a] shove by a defendant who is larger or stronger than his victim may lead a jury to find that the shove amounted to the necessary 'force.'" (*People v. Mungia, supra*, 234 Cal.App.3d at p. 1709.) Similarly, a "rather polite" tap or "slight push" on the shoulder of a cashier in order to get the cashier to move away from an open register of money was "more than incidental and was not merely the force necessary to seize the money." (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved on another point in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 2,) On the other hand, the type of force that may be insufficient to support a robbery conviction includes the force applied to the victim's body as a result of a pickpocket (*People v. Garcia, supra*, 45 Cal.App.4th at p. 1246) or the force caused by someone who snatches the purse of an unresisting victim (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1258-1259).

Defendant did not merely brush against Ibarra as he fled the scene. He initiated contact with Ibarra, i.e., a man four inches shorter than him, by grabbing Ibarra's arms and attempting to push him out of the way. Defendant then opted to continue the struggle until he was handcuffed by two police officers. When defendant grabbed Ibarra's arms,

---

3 Because the prosecutor did not proceed on the theory that the robbery was accomplished by the use of fear, and indeed there is no evidence the loss prevention officers were fearful, we focus on whether there was sufficient evidence the robbery was committed with the use of force.

the stolen property had already been secured and his attention was directed toward using force to retain it and facilitate an escape. A rational trier of fact could have found defendant's use of force was sufficient to establish a robbery.

Unanimity

Defendant notes the prosecutor relied on two separate acts of force to support the robbery offense—the grab of Ibarra's arm and concurrent push, and the struggle with Ibarra and Ayala. He maintains the trial court had a sua sponte duty to instruct the jury that it must unanimously agree on the act of force supporting the robbery.

It is a rudimentary principle of California law that a defendant is "entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count." (*People v. Jones* (1990) 51 Cal.3d 294, 305.) However, the trial court is not required to instruct the jury that it must agree on the theory of how an offense was committed (*People v. Russo* (2001) 25 Cal.4th 1124, 1132) nor is it required to give a unanimity instruction where the offense constitutes a continuous course of conduct (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299).

Both exceptions apply here. First, the evidence showed only one discrete crime of robbery; the different possibilities of force amounted to different theories for a single robbery. In addition, the potentially different applications of force were so closely connected that they fell within the continuous course of conduct exception. No unanimity instruction was required.

Section 654

With respect to both offenses, sentence was not imposed, and defendant was granted probation. It is true that section 654 prohibits multiple punishment for a single physical act that violates different provisions of law. However, because probation does not constitute "punishment," section 654 is not applicable to defendant's case. (See *People v. Wittig* (1984) 158 Cal.App.3d 124, 137; *People v. Stender* (1975) 47

Cal.App.3d 413, 425, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 240.) We therefore reject defendant's claim that the trial court was required to stay the sentence for resisting arrest.

The Pitchess Hearing

At the request of defendant, we have conducted an independent review of the record including the reporter's transcript of the in camera hearing corresponding to defendant's motion filed pursuant to *Pitchess*. We hold the trial court trial court did not abuse its discretion in ruling that there was no discoverable information relating to Corporal William Early.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

---

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