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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.

THOMAS M. ROJAS,

Defendant and Appellant.

B275884

(Los Angeles County
Super. Ct. No. LA082329)

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

Caneel C. Fraser, under appointment by the Court of
Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted defendant and appellant Thomas M. Rojas of second degree robbery (Pen. Code, § 211),¹ and the trial court sentenced him to three years in prison. He appeals. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

Gurdial Singh worked as a cashier at a North Hollywood 7-Eleven store. On December 1, 2015, at approximately 10:40 p.m., Rojas entered the store. According to Singh, Rojas selected some caps and food items, concealed them in his clothing, and attempted to leave without paying. Singh followed Rojas out of the store, told Rojas to stop, demanded payment for items he believed Rojas had taken from the store, and grabbed Rojas's shoulder when Rojas ignored him. Rojas responded by punching Singh repeatedly in the face and chest. Singh attempted to avoid Rojas's punches but eventually punched back. Singh retreated to the store and Rojas followed. Singh picked up a "wet floor" sign and attempted to use it to fend Rojas off, hitting him with it.² At some point during the altercation, Rojas grabbed and took Singh's earbuds, which were around Singh's neck. Rojas then left. The jury viewed 7-Eleven surveillance footage showing the incident.

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

² Singh denied grabbing Rojas's shoulder, punching Rojas, or hitting Rojas with the sign. However, eyewitness Salomon Munguia observed Singh engage in these actions, and/or Singh described them to a police officer.

A customer, Salomon Munguia, called 911.³ When officers arrived, Munguia directed them to Rojas, who was crossing a nearby street. Rojas declined the officers' commands to stop. He stated that he had done nothing wrong and that Singh had punched him first. Rojas fled and took refuge in a drainage tunnel. He refused to come out until the officers deployed a tear gas canister.

Munguia's description of the incident generally corroborated Singh's. Munguia additionally testified that Rojas had asked him for money in the store, and had left some items on the counter. Munguia did not observe Rojas conceal items under his clothing; however, he observed a bulge in Rojas's sweater. When Rojas followed Singh back to the store, Rojas yelled that he would kill Singh.

The tunnel was used as a homeless encampment and contained trash and clothing. Officers opted not to search the tunnel for the allegedly stolen items because it was contaminated with tear gas. Singh's earbuds were found on Rojas's person. Singh positively identified Rojas in a pretrial photographic lineup, but not at trial.

b. *Defense evidence*

A defense investigator testified that he interviewed Munguia, who told him that when Singh grabbed Rojas's shoulder, Rojas pushed Singh away three times, precipitating a "physical altercation."

Rojas testified in his own behalf, as follows. He intended to purchase items at the 7-Eleven but, as he stood in line to pay, realized he did not have enough money. He placed the items on

³ An audiotape of the 911 call was played for the jury.

the counter and told Singh he would be back for them. He exited the store without any 7-Eleven merchandise, but Singh followed him and accused him of stealing. Rojas denied it, but Singh did not believe him. Singh kept grabbing at Rojas. Rojas pushed him away and then punched him. The men engaged in a mutual fight, with both men throwing punches. The altercation moved back toward the store. Singh picked up the “wet floor” sign and tried to hit Rojas with it. Rojas never threatened to kill Singh. Rojas decided to leave. He noticed a pair of earbuds on the ground and picked them up, but did not know they were Singh’s. He told the officers he had done nothing wrong and ran to the drainage tunnel because he was scared. He admitted suffering a prior conviction for commercial burglary in 2010.

2. Procedure

Rojas was initially charged with a single count of second degree robbery in violation of section 212.5, subdivision (c), for taking property from Singh’s person or immediate presence.⁴ It was also alleged that Rojas had served four prior prison terms within the meaning of section 667.5, subdivision (b). The trial court bifurcated the prior conviction allegations, and Rojas waived his right to a jury trial as to them.

Without objection, the People subsequently were permitted to amend the charge to a violation of section 211, rather than 212.5. At the close of evidence, the People sought to amend the information to conform to proof to add a second robbery count based on Rojas’s robbery of the earbuds. Over a defense objection, the trial court allowed the amendment.

⁴ Section 212.5 defines first and second degree robbery.

The jury found Rojas guilty of robbery in Count 2 (Singh's earbuds) and acquitted him of the robbery alleged in Count 1 (store property). Rojas admitted the prior conviction allegations. The trial court sentenced him to the midterm of three years in prison on the robbery count, and struck the sentences on the four prior prison term allegations. It imposed a restitution fine, a suspended parole restitution fine, a court security fee, and a criminal conviction assessment. It awarded 164 days of actual custody credit and 24 days of presentence conduct credit, for a total of 188 days.⁵

Rojas filed a timely notice of appeal.

DISCUSSION

After review of the record, appellant's court-appointed counsel filed an opening brief that raised no issues, and requested this court to conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We advised appellant that he had 30 days to submit by brief or letter any contentions or argument he wished this court to consider. We have received no response.

We have examined the entire record and are satisfied no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 126; *People v. Wende, supra*, 25 Cal.3d at pp. 441-442.) The evidence was sufficient to prove the offense, i.e., that Rojas took Singh's personal property, from his person, against his will, by means of

⁵ After the verdicts in the instant matter, Rojas pleaded guilty to an unrelated misdemeanor in case no. 5PY04762. The trial court imposed a six-month sentence to run concurrently with sentence in the instant matter. The trial court also found Rojas in violation of probation in three additional cases.

force or fear. (§ 211; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Anderson* (2011) 51 Cal.4th 989, 994.)

The trial court did not abuse its discretion by permitting amendment of the information to add a second count for the robbery of Singh's earbuds. (See *People v. Bolden* (1996) 44 Cal.App.4th 707, 716.) The original information charged a single count of second degree robbery based on Rojas's taking of "personal property from the possession of, and from the person or immediate presence of" Singh. Under section 1009, a trial court may, at any stage of the proceedings, permit an amendment of an information to add another offense shown by the evidence at the preliminary hearing. (§ 1009; *People v. Lettice* (2013) 221 Cal.App.4th 139, 147; *People v. Fernandez* (2013) 216 Cal.App.4th 540, 554; *People v. Villagren* (1980) 106 Cal.App.3d 720, 724.) Singh testified at the preliminary hearing that Rojas grabbed and punched him, and pulled his headphones from his person during the encounter. Singh was afraid of Rojas because Rojas had punched him and was stronger than he was. The evidence presented at the preliminary hearing was thus sufficient to prove Rojas robbed Singh of the headphones.

The trial court did not abuse its discretion by allowing Rojas to be impeached with one of his four prior convictions, for commercial burglary. A witness may be impeached with a prior felony conviction, subject to the trial court's broad exercise of discretion under Evidence Code section 352. (*People v. Edwards* (2013) 57 Cal.4th 658, 722; *People v. Hinton* (2006) 37 Cal.4th 839, 887; *People v. Clark* (2011) 52 Cal.4th 856, 931.) Burglary is a crime involving moral turpitude (*People v. Edwards, supra*, at p. 722) and reflected on Rojas's credibility. Admission of the prior

conviction did not deter Rojas from testifying. The conviction was not remote in time. Although the crime was similar to the conduct at issue, the majority of the relevant factors favored admission of the prior. (See, e.g., *People v. Clark*, *supra*, at p. 931.) The court gave an appropriate limiting instruction stating that the prior conviction could be considered only in evaluating credibility, and further advised that the fact a witness has been convicted of a felony does not necessarily destroy or impair his credibility.

Likewise, the trial court did not err by denying the defense request to exclude the audiotape of Munguia's 911 call. The evidence was probative and not unduly prejudicial. (See Evid. Code, §§ 351, 210; *People v. Williams* (2008) 43 Cal.4th 584, 633-634; *People v. Williams* (2013) 58 Cal.4th 197, 270-271.)

The trial court properly instructed on, *inter alia*, the elements of the offense, the lesser included offense of petty theft, and the reasonable doubt standard. Instruction with CALCRIM No. 376 (possession of recently stolen property as evidence of a crime), over a defense objection, was not error. CALCRIM No. 376 " 'correctly prohibits the jury from drawing an inference of guilt solely from conscious possession of recently stolen property but properly permits the jury to draw such an inference where there is additional corroborating evidence.' " (*People v. Lopez* (2011) 198 Cal.App.4th 698, 712.)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

EDMON, P. J.

GOSWAMI, J.*

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