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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DACOSTA THEOPHILUS BORROUGHS,

Defendant and Appellant.

2d Crim. No. B281355
(Super. Ct. No. 2016012807)
(Ventura County)

Dacosta Theophilus Borroughs appeals from the judgment entered after a jury convicted him of second degree robbery (Pen. Code, §§ 211, 212.5)[1] and making a criminal threat. (§ 422.) The jury found true an allegation that he had personally used a deadly weapon - a knife - in the commission of the robbery. (§ 12022, subd. (b)(1).) The trial court found true two prior prison terms (§ 667.5, subd. (b)), one prior serious felony conviction (§ 667, subd. (a)(1)), and one prior serious or violent felony

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

conviction ("strike") within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court struck the two prior prison terms and sentenced appellant to prison for 11 years, 4 months. It ordered him to stay away from the victim of the criminal threat and the store where the robbery had occurred.

Appellant contends that the trial court erred in instructing the jury on the robbery charge, issuing the stay-away orders, and calculating his presentence custody credit. We strike the stay-away orders and award appellant additional presentence custody credit. In all other respects, we affirm.

Facts Underlying Robbery Conviction

Terri Stone was a supervisor at a Rite Aid store in Oxnard. At closing time (10:00 p.m.) she closed the door to the store to prevent shoppers from entering. Appellant was inside the store with a shopping cart containing items taken from the store. He walked past the cash register without paying and approached Stone, who was standing by the door. He asked her if she "was locking him in." Stone replied that she "was getting ready to close." Appellant said, "[D]on't make me do something stupid." Stone responded, "[J]ust pay for your stuff, and I'll open the door." Appellant said, "[D]on't make me do something stupid. I have a knife in my hand." Stone saw that appellant was holding a knife in his left hand "at shoulder height." Stone was afraid that appellant would stab her if she blocked him from exiting the store. She "got out of his way." Appellant opened the door and ran out of the store with the shopping cart.

Facts Underlying Criminal Threats Conviction

Marlene Guido parked her car in a parking lot. Appellant approached her and asked for money. Guido replied

that she did not have any money. Appellant said he was hungry, so she gave him a banana. Appellant "started cursing." He put his fist a few inches away from her face and said: "I'm going to fucking kill a bitch right now. I'm ready to kill a bitch. . . . I'm going to smash your fucking face. I'm going to . . . kill you." Guido dialed a phone number on her cell phone. Appellant "started attacking [her] and hitting [her] head" with his closed fist.

Jury Instruction

Section 211 defines robbery 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." An "*Estes* robbery" occurs where, as here, a "defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*People v. Estes* (1983) 147 Cal.App.3d 23, 27-28.)

The trial court modified element 5 (the force or fear element) of the standard jury instruction on robbery (CALCRIM No. 1600) to add the following italicized language (the first modification): "5. The defendant used force or fear to take the property or to prevent the person from resisting *or to resist the person's attempts to regain the property*." Appellant concedes that the first modification "accurately states the law set out in *Estes*."

Appellant claims that the trial court erred in making a second modification that added the following sentence to the standard instruction: "Mere theft may become a robbery if the perpetrator, having gained possession of the property without the use of force or fear, uses force or fear to resist the person's

attempts to regain the property." Appellant acknowledges that "the second modification was an accurate statement of the law, taken nearly verbatim from a previous appellate opinion." But he argues that, by putting the "*Estes* robbery theory front-and-center," the second modification "was argumentative because it improperly highlighted one of the prosecutor's theories of the case, and unfairly nudged the jury toward finding an *Estes* robbery when it otherwise may not have." Appellant maintains that the second modification was repetitive because the first modification adequately explained the *Estes* robbery theory. "Stating it a second time, in more detail, unfairly argued the prosecution's case to the detriment of appellant" and "unfairly overemphasized *Estes*-style force or fear."

"'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citations.]" (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) "'In a proper instruction, "[what] is pinpointed is not specific evidence as such, but the *theory* of the defendant's [(or the prosecution's)] case."' [Citation.]" (*People v. Santana* (2013) 56 Cal.4th 999, 1012, brackets and italics in original.) The second modification complied with these requirements. It did not, as appellant alleges, "unfairly nudge[] the jury toward finding an *Estes* robbery when it otherwise may not have."

The second modification was not merely repetitive of the first modification, which stated that the force or fear required for robbery may be used "to resist the person's attempts to regain the property." The second modification informed the jury that what starts out as a mere theft (i.e., the unlawful taking of another's property without force or fear) may escalate to a

robbery if the perpetrator "uses force or fear to resist the person's attempts to regain the property." This distinction between theft and robbery was important because the jury was instructed on the lesser included offense of petty theft.

Stay-Away Orders

After sentencing appellant to prison, the trial court ordered him to "stay away" from the Rite Aid store where the robbery had occurred. The prosecutor requested "a stay away [order] from Marlene Guido," the victim of the criminal threat. In response to the request, the court ordered: "Stay away from Marlene Guido as well. No contact. Stay 100 yards away from her." Appellant did not object to the stay-away orders, which were of unlimited duration. No evidence was presented that the orders were necessary to protect Guido or the employees of the Rite Aid store.

Pursuant to this court's decision in *People v. Ponce* (2009) 173 Cal.App.4th 378, the stay-away orders were unauthorized. In *Ponce* the defendant was sentenced to prison for robbery. At the time of sentencing, the trial court issued a protective order requiring the defendant to stay away from the victim of the robbery. We concluded that the order was statutorily unauthorized. (*Id.* at pp. 382-383.) We rejected the Attorney General's contention that the trial court had the inherent authority to issue the protective order: "An existing body of statutory law regulates restraining orders. "'[I]nherent powers should never be exercised in such a manner as to nullify existing legislation . . . .'" [Citation.] Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising

their inherent powers to invent alternatives. [Citation.]" (*Id.* at p. 384.)

We noted that, even if the trial court had the requisite inherent authority, no evidence had been presented in support of the stay-away order. As in the instant case, "[t]he prosecutor did not make an offer of proof or any argument to justify the need for a protective order. He simply said, '[W]e'd also like to have a stay-away order in this case . . . .' But a prosecutor's wish to have such an order, without more, is not an adequate showing sufficient to justify the trial court's action. [Citation.]" (*People v. Ponce*, *supra*, 173 Cal.App.4th at pp. 384-385.)

The People concede that the trial court here "did not provide any reasons for the two stay-away orders" and that the prosecutor's request for a stay-away order "does not constitute good cause" for the issuance of the order. The People request that we "remand the case, so the parties and the trial court can create a proper record as to why the stay-away orders were necessary." We decline to do so. *Ponce* was decided years before appellant's sentencing hearing. Our published opinion placed both the trial court and prosecutor on notice that, if a court has the inherent authority to issue a stay-away order when sentencing a defendant to prison, there must be a "valid showing to justify the need for the order. [Citation.]" (*People v. Ponce*, *supra*, 173 Cal.App.4th at p. 384.) Moreover, in view of appellant's lengthy prison term (11 years, 4 months) and the lack of evidence in the record warranting the stay-away orders, it appears that remand would be an idle act because the requisite showing cannot be made. (*People v. Ledbetter* (2014) 222

Cal.App.4th 896, 904 [remand improper if it would "be an idle act and 'a waste of ever-more-scarce judicial resources'"].)

Because appellant failed to object to the stay-away orders, the People claim that the issue has been forfeited. In *Ponce* we rejected the same claim: "As a general rule, an appellant waives issues on appeal that he or she did not initially raise in the trial court. [Citation.] But there are exceptions to this rule for unauthorized sentences and sentencing decisions that are in excess of the trial court's jurisdiction. [Citation.] Because this case involves the jurisdictional validity of the trial court's decision to issue a three-year protective order during sentencing, we will consider Ponce's claim on the merits." (*People v. Ponce*, *supra*, 173 Cal.App.4th at pp. 381-382.)

Presentence Custody Credit

Appellant received 336 days of presentence custody credit, consisting of 293 days of actual custody and 43 days of conduct credit. Appellant argues, and the People concede, that he is entitled to 338 days of presentence custody credit, consisting of 294 days of actual custody and 44 days of conduct credit. We accept the People's concession.

Disposition

The judgment is modified to strike the stay-away orders and to award appellant 338 days of presentence custody credit, consisting of 294 days of actual custody and 44 days of conduct credit. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment showing the modification and shall send a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Nancy L. Ayers, Judge

Superior Court County of Ventura

Robert L. Hernandez, under appointment by the Court of Appeal for Defendant and Appellant.

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