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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SEAN SUTTON, Defendant and Appellant.	B284343 (Los Angeles County Super. Ct. No. NA103542)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura L. Laesecke, Judge. Affirmed.

Kenneth J. Sargoy, 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, Senior Assistant Attorney General, Marc A. Kohm and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Sean Sutton (defendant) of second degree attempted robbery based on evidence he tried to take a purse from elderly victim Keiko Murphy (Murphy), who resisted. Defendant testified in his own defense and claimed, apparently in earnest, that while helping Murphy across the street he was "fluffing" a flower he had given Murphy and attached to her purse, rather than attempting to take it. We are asked to decide whether there is substantial evidence defendant attempted to take Murphy's purse without the requisite force or fear, such that trial court should have sua sponte instructed the jury on the elements of the lesser included offense of attempted grand theft.

I. BACKGROUND

A. The Charges Against Defendant

The Los Angeles County District Attorney charged defendant in a single-count information with attempted second degree robbery in violation of Penal Code sections 664, 211, and 213, subdivision (b).[1] The information alleged defendant had previously sustained two serious and/or violent felony convictions, as well as a prior conviction for battery upon a peace officer by gassing.

B. The Offense Conduct, as Presented During the Prosecution's Case-in-Chief

Witness Deanna Bonachea (Bonachea) was driving southbound on Orange Avenue on February 5, 2016, when two

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[1] Undesignated statutory references that follow are to the Penal Code.

people on the right-hand side of the street caught her attention. Those individuals, who Bonachea had never met before, were later identified as defendant and Murphy. Murphy was an octogenarian, under five feet tall, and weighed around 100 pounds; unbeknownst to Bonachea at the time, she also suffered from dementia, which rendered her no longer capable of driving and in need of care for many of her waking hours during the day.[2]

When Bonachea first saw defendant, he appeared to be grabbing Murphy's purse.[3] He was pulling the purse toward him, while Murphy was leaning forward toward defendant and holding onto her shoulder as though holding her purse strap. Bonachea drove closer and yelled words to the effect of "let it go" or "leave her alone." Defendant let go of the purse and stepped back.

Bonachea then pulled over. As she got out of her truck, she saw defendant move back toward Murphy. Once Bonachea was fully out of her truck, she saw Murphy was crying, defendant had hold of Murphy's purse again and was pulling it toward him, and

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[2] According to a doctor who testified at trial, Murphy was eventually diagnosed with Alzheimer's disease and she was unable to testify as a witness herself.

[3] During a prior proceeding in this case, Bonachea testified defendant was "holding on to" Murphy's purse. When asked at that time what motion, if any, the defendant was making with respect to the purse, she testified, "He was at the purse part of it, like pulling it towards him." When asked at that time what, if anything, Murphy was doing, she testified, "She was just like leaning forward." At trial, Bonachea testified "holding" and "grabbing" meant the same thing to her, stating, "Well, if he was grabbing towards it or holding on to it, yes, they would mean the same thing to me."

Murphy was holding onto the strap of her purse and pulling it away from defendant. Bonachea told defendant to let go of Murphy's purse and to take off. Defendant let go, and Murphy grabbed Bonachea's arm, crying. Bonachea thought Murphy's grip was strong for an elderly lady.

Defendant did not immediately leave the area. After Bonachea again told him to leave and stated she was going to stay by Murphy, defendant walked across the street. Bonachea tried to calm Murphy down and attempted to learn where she lived. Murphy was crying and couldn't really speak. While Bonachea was standing with Murphy, she saw a police car driving down the street and flagged it down.

Long Beach Police Department Officer Piper was driving the patrol car Bonachea signaled. The other officer in the car happened to be Bonachea's son, Officer Raff. Officer Piper pulled over when Officer Raff said he saw his mother flagging them down.

The officers came over to Bonachea and Murphy, and in Officer Raff's estimation, Murphy "seemed very upset." He observed her to be "very frightened" and "clinging onto [Bonachea's] arm." The officers located defendant across the street, arrested him, and called other officers to assist in taking Murphy home.

C. The Defense

Defendant testified in his own defense.[4] By his own account, he was about five feet eleven inches tall and a little under 200 pounds in February 2016 when he encountered Murphy.

According to defendant, he was using his cellphone on the day in question when he saw Murphy park her car across the street. Defendant had met Murphy before, and understood from their prior interaction that she would need assistance crossing an intersection. Defendant crossed the street, waited for Murphy to exit her car, gave her a hug, and proceeded to walk down the street with her.

Defendant told the jury that at some point while he and Murphy were walking together, defendant took it upon himself to attach a flower that was on his scarf to Murphy's purse. Not long after he was, as he put it, "fluffing the flower on the purse to make it more presentable," Bonachea approached and began shouting at defendant. According to defendant, Murphy started crying after Bonachea began shouting.

As defendant told it, this was not the first time he encountered Bonachea. Rather, he claimed that some five to seven months earlier—on the previous occasion when he claimed to have met Murphy and helped her down the street—Bonachea had walked up and "acted like she had more business" with Murphy than defendant. Based on that prior experience, defendant testified he was concerned on the date of the charged

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[4] During his testimony, defendant admitted he had sustained prior convictions for "stalking," battery on an officer, and attempted kidnapping.

attempted robbery that he would be labeled the aggressor if the police arrived and he remained near Murphy and Bonachea. That was why he crossed to the other side of the street.

Defendant maintained he did not try to take Murphy's purse, nor did he intend for any harm to come to her. He added that it would not have been hard to take anything from Murphy if he had wanted to because she is small and does not walk very fast.[5]

D. Rebuttal, Sur-rebuttal, and More

The prosecution called several rebuttal witnesses to contest various aspects of defendant's testimony.

Multiple witnesses, including a police officer and Bonachea, testified they had not seen a flower on Murphy's purse on the day of the alleged attempted robbery. Bonachea contradicted defendant's claim to have previously encountered Bonachea and Murphy, and her testimony was at least partially corroborated by a police detective. Multiple witnesses also contradicted defendant's assertion that he saw Murphy parking her car prior to the incident. A doctor opined Murphy was incapable of safely operating a car and Murphy's son testified her car was inoperable because he had previously disconnected the cable to the battery and taken her keys.

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[5] Defendant also called one of Murphy's neighbors as a witness. Her testimony was not particularly favorable to defendant, and it is inconsequential for the issue we decide on appeal.

Defendant testified again in sur-rebuttal and maintained he had twice seen Murphy parking a black car that looked like "a combination of a Gremlin and Pinto." In further rebuttal, the prosecution recalled Murphy's son, and he testified Murphy's car was a light silver Toyota.

E. Verdict and Sentence

The jury found defendant guilty of the single charged count of attempted robbery. Prior to sentencing, the prosecution struck one of the prior Three Strikes law-eligible convictions alleged against defendant. Defendant admitted the remaining prior strike but asked the trial court to dismiss it in furtherance of justice. The trial court declined.

The trial court sentenced defendant to nine years in state prison, consisting of the mid-term of two years for the attempted robbery charge, doubled because of his prior strike offense, plus an additional five-year enhancement for having sustained a prior serious felony conviction.

II. DISCUSSION

Disregarding his trial testimony that he made no attempt to take Murphy's purse at all, defendant's argument on appeal is that a lesser included attempted grand theft instruction was necessary because there was evidence that would permit a reasonable jury to find he attempted to take Murphy's purse without using any more force than necessary to accomplish the taking. Defendant's argument for reversal is triply deficient. First, there is no substantial evidence on which a reasonable jury could rely to find defendant did not intend to use force sufficient to be guilty of attempted robbery. Second, a robbery may be

committed through use of force *or* fear, and here there is uncontroverted evidence of fear that averted any need for a lesser included offense instruction even if a jury could find defendant intended to use no more force than necessary to take Murphy's purse. Third, even were we to agree it was error not to instruct on attempted grand theft, there is no reasonable probability the jury would have returned a more favorable verdict had the instruction been given—defendant's testimony at trial was highly implausible on its own terms and incompatible with an attempted grand theft theory.

A. Governing Law and the Standard of Review

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.] Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed. [Citations.] Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense. [Citations.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132; accord, *People v. Moye* (2009) 47 Cal.4th 537, 553; *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*) [trial court must provide "'instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged'"].) Our review of lesser included instruction error claims is de novo, and we consider the evidence in the light most favorable to the

defendant. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

"In noncapital cases, 'the rule requiring sua sponte instructions on all lesser necessarily included offenses supported by the evidence derives exclusively from California law.' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) Thus, to establish prejudicial error from a failure to instruct on a lesser included offense in a noncapital case, the defendant "'must show it is reasonably probable a more favorable result would have been obtained absent the error.'" (*Ibid*., citation omitted; see also *Breverman*, *supra*, 19 Cal.4th at p. 165.) When assessing prejudice under this standard, we "focus[ ] not on what a reasonable jury *could* do, but what such a jury is *likely* to have done" and we "consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, *supra*, at p. 177.)

B. The Trial Court Was Not Obligated to Instruct on Attempted Grand Theft

"An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission." (*People v. Medina* (2007) 41 Cal.4th 685, 694 (*Medina*).) 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." (§ 211.) "Theft by larceny may be committed without force or the threat of violence and may be completed

without the victim ever being present. [Citation.] To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his presence." (*People v. Gomez* (2008) 43 Cal.4th 249, 254.)

Evidence of actual force or fear is not indispensable to prove an attempted robbery charge. "[A]n element of force or fear must be proved in order to establish a conviction for robbery under . . . section 211. It is not necessary, however, for this element to be reflected in the overt act of an attempted robbery if the crime has not progressed to that point." (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862.) "Under general attempt principles, commission of an element of the crime is not necessary. . . . As such, neither a completed theft [citation] nor a completed assault [citation], is required for attempted robbery." (*Medina*, *supra*, 41 Cal.4th at p. 694; see also *People v. Bonner* (2000) 80 Cal.App.4th 759, 764 [the overt act necessary for an attempt "need not . . . be the last proximate or ultimate step toward commission of the crime"].)

Defendant's argument for reversal focuses on the evidence regarding the level of force he applied during his altercation with Murphy. He argues the jury could have concluded his act constituted grand theft because his failure to remove the purse from Murphy's grasp demonstrates he did not use sufficient force to overcome Murphy's resistance. Defendant further argues the prosecution's evidence regarding Murphy's physical strength and mental state was equivocal, and he believes the differing testimony alone suffices to require an attempted theft instruction.

There is no merit in these arguments. Even in the light favorable to defendant, the evidence at trial supports only a

specific intent to commit robbery, not a specific intent to commit theft. If defendant had only "held" and pulled Murphy's purse once, perhaps a reasonable jury might have been able to infer defendant assumed he could snatch Murphy's purse without resistance and had not intended to apply any force beyond that necessary to seize the purse. (*People v. Anderson* (2011) 51 Cal.4th 989, 995 [robbery requires "exert[ing] some quantum of force in excess of that 'necessary to accomplish the mere seizing of the property'"].) But Bonachea's testimony reflects defendant did so twice, holding and pulling the purse a second time after initially encountering Murphy's resistance and temporarily letting go. Defendant's second attempt to remove the purse from Murphy's grasp indubitably demonstrates an intent to take it from Murphy by statutorily sufficient force, an attempt that was interrupted by Bonachea's further intervention.[6]

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[6] Defendant relies on *People v. Morales* (1975) 49 Cal.App.3d 134 to argue the contrary, but that decision is factually inapposite. In that case, there were "[s]everal discrepancies" between the trial testimony of the only witness who observed a purse-snatching and the witness's earlier statements, and the testimony of various other witnesses suggested the defendant may not have used force by pushing the victim. (*Id.* at p. 139.) Defendant characterizes Bonachea's testimony in this case as "equivocal," but the substance of her testimony was consistent. She used slightly different terminology to describe defendant's actions, alternately stating he was grabbing on to Murphy's purse and holding on to it, but the important thing is she described more specifically what defendant was doing: pulling the purse toward him while Murphy was holding the strap and pulling it away from him.

Furthermore, defendant's argument on appeal addresses only the force element of robbery, neglecting established law that allows a robbery to be established by either force or fear. (*People v. Tuggle* (1991) 232 Cal.App.3d 147, 155 ["Force is not a necessary element of the offense of robbery because the offense may be committed by fear alone"], disapproved on another ground in *People v. Jenkins* (1995) 10 Cal.4th 234, 251-252.) Here, there was uncontroverted evidence that the elderly, diminutive Murphy was crying and appeared fearful ("very frightened" and "clinging onto [Bonachea's] arm," as Officer Raff put it) after defendant's attempts to pull the purse away from her. Thus, even if defendant were right that a reasonable jury could find he intended to use no more force than necessary to pull the purse off Murphy's arm, there is still no substantial evidence on which a jury could rely to conclude defendant had no intention to take the purse by fear. (*People v. Morehead* (2011) 191 Cal.App.4th 765, 775 ["The requisite fear [for robbery] need not be the result of an express threat or the use of a weapon"]; see also *People v. Dorsey* (1995) 34 Cal.App.4th 694, 705 ["On this evidence, [the defendant] was either guilty of robbery or he was not the perpetrator and was innocent of any crime"].)

C. In Any Event, Defendant Cannot Demonstrate Prejudice Warranting Reversal

As our Supreme Court explained in *Breverman*, *supra*, 19 Cal.4th 142, a prejudice analysis of a lesser included instructional error claim focuses on what a jury was likely to have done if the instruction were given, not what it could have done. (*Id.* at p. 177.) Here, in light of the implausibility of defendant's "fluffing the flower" defense at trial, we have no

doubt the jury was not likely to have returned a more favorable verdict had an attempted grand theft instruction been given. Reversal would be unwarranted even assuming error.

DISPOSITION

The judgment is affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

SEIGLE, J.*

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