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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LENDWARD ALTON MIXON, Defendant and Appellant.	B229727 (Los Angeles County Super. Ct. No. YA075585)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Reversed with directions.

Steven A. Brody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Lendward Alton Mixon challenges his conviction for attempted robbery with a firearm enhancement. We find no merit to his arguments that (1) the prosecution failed to present sufficient evidence to warrant jury consideration, (2) his counsel rendered the ineffective assistance of counsel, (3) the court erred in failing to sua sponte instruct the jurors on battery, and (4) the court abused its discretion in limiting his closing argument to 15 minutes. His argument that the court applied the incorrect standard to evaluate his motion for a new trial has merit and requires a limited reversal for the trial court to consider the motion under the appropriate standard. We otherwise affirm.

PROCEDURE

On December 18, 2009, appellant was charged with attempted second degree robbery. (Pen. Code, §§ 664, 211.)[1] Firearm use (§ 12022.53, subds. (b) & (e)(1)) and gang enhancements (§ 186.22) were alleged. It also was alleged appellant suffered two prior serious robbery convictions and failed to remain free of prison custody for a five-year period.

The jury found the attempted second degree robbery and firearm use enhancement true. The jury found the alleged gang enhancement not true.[2] Appellant admitted the priors.

The trial court sentenced appellant to 16 months doubled for the prior strike on robbery, 10 years for the firearm use enhancement, and 5 years for the section 667.5 prior.

FACTS

1. Prosecution Case

On July 8, 2009, Q.J. went to a market near his mother's home. Inside the market, appellant asked Q.J. where he was from, (a question about Q.J.'s gang membership), and

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[1] Undesignated statutory citations are to the Penal Code.

[2] Because the jury found the gang enhancement not true, we need not summarize the evidence relevant to it.

Q.J. responded, "nowhere," meaning that he was not a member of any gang. Appellant then identified his gang and moniker.

As Q.J. walked out of the store, he heard a woman say "he [*sic*] got a gun," and immediately afterwards appellant pressed a gun to the back of Q.J.'s head. Appellant said "get down before I kill you." Appellant's friend then patted down Q.J.'s pockets but did not take anything from inside Q.J.'s pockets. Q.J. had a wallet, but neither appellant nor his friend took the wallet. Q.J. testified that the woman who said "he [*sic*] got a gun" could have been referring to Q.J.

Q.J. did not see appellant's gun, could not identify its color, but felt it pressed against his head. Q.J. did not own a gun and did not know how to use one. On cross-examination, Q.J. acknowledged that he previously told a detective the gun was chrome, but reaffirmed his testimony that he did not see the gun. Q.J. also testified that the gun was not plastic and stated that he had seen guns on television. On cross-examination, Deputy Sheriff Victor Rodriguez testified that Q.J. had told him appellant used a chrome gun.

2. Defense Case

A defense investigator testified that Q.J. had told her he saw appellant's gun. Appellant's sister testified that she was at the store with appellant and saw Q.J. holding a gun in his right pocket. Appellant's sister told appellant's girlfriend that Q.J. had a gun.

Appellant testified in his defense. He testified that he previously had been shot four times. On July 8, 2009, he walked to the store with his girlfriend. He had his girlfriend's son's plastic toy gun in his pocket. The plastic gun looked like a real gun. Appellant did not ask Q.J. where he was from but asked him how he was doing.

When appellant's girlfriend told him that Q.J. had a gun, appellant grabbed Q.J.'s hand and shoved the plastic gun in Q.J.'s ribcage. Appellant was concerned that he or his sister might have been shot. Appellant's friend patted down Q.J.'s pockets. When they realized that Q.J. was unarmed, they left. Appellant did not try to rob Q.J. That night, appellant moved to Arkansas even though it was a violation of his parole. Appellant

explained that he was afraid if he stayed in his neighborhood, he may be killed or may kill someone in self-defense.

When asked whether he would have taken Q.J.'s gun if Q.J. had a gun, appellant testified that he would have taken either the gun or the clip.

DISCUSSION

1. Motion to Dismiss

Appellant argues the court erred in denying his section 1118.1 motion to dismiss for lack of substantial evidence.[3] Appellant emphasizes the well-established principle that "mere speculation cannot support a conviction." (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) Instead, "[t]o be legally sufficient, evidence must be reasonable, credible, and of solid value." (*Ibid*.)

We conclude that there was sufficient evidence to allow the jury to decide the case. Based on the evidence at the end of the prosecution case, a rational trier of fact could have found the elements of robbery and of the firearm enhancement beyond a reasonable doubt. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213 [challenge to denial of § 1118.1 motion made at the close of the prosecution's case is determined by reviewing evidence as it stood at that point under same standard as review of sufficiency of the evidence to support a conviction].)

A. Robbery

The elements of attempted robbery are "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a; *People v. Medina* (2007) 41 Cal.4th 685, 694.) "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.)

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3 Section 1118.1 provides in pertinent part: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

Appellant argues that the elements of robbery cannot be established because there was no evidence he intended to permanently deprive Q.J. of his property. Appellant states the fact that he "may have been attempting to take a gun from [Q.J.] does not by itself amount to a robbery if his intent was to disarm [Q.J.] for his own safety or that of another." Appellant emphasizes that an intent to temporarily deprive an owner of property is insufficient to support a robbery conviction.

The record supported the inference that appellant intended to take a gun from Q.J. and permanently deprive Q.J. of the weapon. At the time of the section 1118.1 motion, a reasonable juror could have inferred appellant intended to take Q.J.'s weapon, not merely deprive Q.J. of the weapon for a temporary period of time. Q.J. acknowledged that the woman who said "he [*sic*] got a gun" could have been referring to Q.J. Right after those words were uttered, appellant put a gun to Q.J.'s head and ordered him to the ground to avoid being killed. Then, appellant's friend looked through Q.J.'s pockets for something that he did not find. The evidence supported the inference that appellant and his friend intended to take a gun from Q.J.

Appellant's reliance on *People v. Long* (1944) 65 Cal.App.2d 241 is misplaced. In that case, the court held the defendant was *not* entitled to an instruction that taking a knife for the purpose of disarming someone did not constitute robbery. (*Id*. at p. 244.) The court rejected the instruction finding it confusing. While *Long* focused on the facts before it, the court never held that such an instruction would be proper under any scenario, and appellant cites no case that supports his view that disarming a person is inconsistent with robbery. Moreover, while appellant testified to his intent to disarm Q.J. in the defense case, at the time he made the section 1118.1 motion there was no evidence that appellant intended only to disarm Q.J. and the trier of fact was not required to necessarily conclude appellant's intent was to temporarily deprive Q.J. of his property.

B. Firearm Use Enhancement

Appellant argues that, at the end of the prosecution's case, there was no evidence to support the firearm use enhancement. A firearm means "any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of

any explosion or other form of combustion." (§ 16520.) Toy guns are not firearms. (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*).)

The following evidence presented in the prosecution's case-in-chief supported the finding that appellant used a firearm. Q.J. testified that appellant put a gun to the back of his head and said "get down before I kill you." Although Q.J. did not see the gun, he felt it. Evidence that Q.J. felt the gun at the same time that appellant threatened to kill him was sufficient for a reasonable trier of fact to conclude that appellant used a firearm. Appellant's own words suggested that he was using a firearm.

Monjaras, supra, 164 Cal.App.4th 1432 supports this conclusion. In that case, the defendant argued that because the victim could not state whether the pistol was a gun or a toy, the record lacked sufficient evidence to support the firearm enhancement. (*Id*. at p. 1435.) The court explained that circumstantial evidence is often necessary to prove an object was a firearm "because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation." (*Id.* at p. 1436.) The court further concluded "[t]he jury was not required to give defendant the benefit of the victim's inability to say conclusively the pistol was a real firearm. This is so because 'defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a [firearm].'" (*Id*. at pp. 1436-1437.) Because the pistol in the defendant's waistband looked like a firearm "and it in effect communicated that it was a firearm when defendant menacingly displayed it and ordered the victim to give him her purse. While it is conceivable that the pistol was a toy, the jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the pistol was a real, loaded firearm and that he was prepared to shoot the victim with it if she did not comply with his demand." (*Id*. at p. 1437.)

Here, as in *Monjaras*, appellant's conduct as testified to by Q.J. supported the inference that appellant was using a firearm. A trier of fact was entitled to infer from appellant's statement that the gun was a real gun. Appellant's argument that *Monjaras* is

distinguishable because Q.J. did not see the gun but only felt it is not persuasive. A jury was entitled to credit Q.J.'s testimony that what he felt pressed to his head was a real gun, not a plastic one. "[T]he victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm" regardless of whether Q.J. saw or felt the gun. (*Monjaras, supra*, 164 Cal.App.4th at p. 1437.)

2. Alleged Ineffective Assistance of Counsel

Appellant argues defense counsel rendered ineffective assistance by asking Q.J. whether he previously told officers that appellant had used a chrome gun, and eliciting the same testimony from officers and a defense investigator. A claim of ineffective assistance of counsel has two requirements: "'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391.) If the alleged ineffective conduct resulted from an informed tactical choice within the range of reasonable competence, the ineffective claim must fail. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.)

The record shows that defense counsel had a tactical reason for eliciting the evidence: she sought to discredit Q.J. She argued: "[A]ll he did was lie and he did lie. He testified to so many different versions of events, it doesn't make any sense." Counsel argued that Q.J. lied multiple times about seeing a gun. Counsel argued that Q.J. was

trying to save face by testifying that it was a gun. Counsel's strategic decision to discredit Q.J. although ultimately unsuccessful was not unreasonable.

Even assuming that defense counsel was deficient in eliciting testimony against appellant in an effort to impeach Q.J., the key witness, appellant was not prejudiced by the conduct. Appellant's argument that he suffered prejudice is based on the incorrect assumption that absent Q.J.'s prior statements the record lacked evidence to support the firearm enhancement. As we have explained, the evidence was sufficient to support the firearm allegation without Q.J.'s prior statements.

3. Motion for New Trial

Appellant filed a motion for a new trial in which he argued that there was insufficient evidence to support the finding that appellant used a firearm (§ 12022.53, subds. (b), (e)). On appeal, appellant argues that the trial court applied the wrong standard when it denied his motion.

A. Background

In a motion for a new trial, appellant argued that pursuant to subdivision (6) of section 1181, the trial court should grant a new trial or modify the judgment based on the insufficiency of the evidence.[4] Specifically, appellant argued that "there was not enough evidence to support the gun allegation . . . ." Appellant also argued the jurors improperly shifted the burden to prove that the gun was fake onto him. The latter claim was supported by defense counsel's declaration that she spoke to three jurors who stated "that they did not think [appellant] had a real gun" but believed defense counsel "should have brought the gun into court" to "assure[]" them.

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[4] Section 1181 provides, in pertinent part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

The court rejected appellant's motion, finding that jurors believed one witness over another and "that's not a place when the court can intervene to determine a verdict." The court explained: "the question is whether or not a reasonable jury could have found the way it did with what they had." "[I]f it couldn't, then the court has to stand in and say there's no evidence at all on which a jury could have reached that verdict. . . ." But in this case, the court found there was evidence supporting the jury verdict: "There's evidence about feeling a metal object pressed to the back of his head, along with the circumstances surrounding it." Ultimately, the court found that because the "jury believed the victim's version of the story" the new trial motion should be denied. When sentencing appellant, the court stated, "There's really nothing the court can do about the jury's finding on the gun, which is the biggest thing that affects him."

B. Analysis

"Penal Code section 1181, subdivision (6) permits a defendant to move for a new trial on the ground that the verdict is contrary to the evidence. In deciding such a motion, the trial court's function is to 'see that the jury intelligently and justly perform[ed] its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict.' [Citation.] The trial court's duty is to review the evidence independently and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. [Citation.] [¶] Although the trial court is to be 'guided' by a presumption in favor of the correctness of the jury's verdict [citation], this means only that the court may not *arbitrarily* reject a verdict which is supported by substantial evidence. The trial court is not bound by the jury's determinations as to the credibility of witnesses or as to the weight or effect to be accorded to the evidence. [Citations.] Thus, *the presumption that the verdict is correct does not affect the trial court's duty to give the defendant the benefit of its independent determination as to the probative value of the evidence.* [Citation.] If the court finds that the evidence is not sufficiently probative to sustain the verdict, it must order a new trial." (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251-1252, italics added.) Our high court has made clear that a trial "court extends no evidentiary deference in ruling on a section 1181(6) motion for new trial." (*Porter v.*

Superior Court (2009) 47 Cal.4th 125, 133.) Instead, the trial court judge sits "in effect, as a '13th juror.'" (*Ibid*.)

The trial court applied the incorrect standard to analyze appellant's motion for a new trial. The court determined whether any evidence supported the jury verdict instead of independently determining the probative value of the evidence.[5] Under such circumstances, a limited remand is required to allow the trial court the opportunity to rehear the motion for a new trial. (*People v. Robarge* (1953) 41 Cal.2d 628, 635.) Respondent's argument that the trial court would "still have denied the motion for new trial if it had" applied the correct standard of review lacks merit in this case where the evidence supporting the firearm enhancement – though sufficient – was weak. Q.J. testified he never saw the gun, was unfamiliar with guns, and knew it was a gun because he had seen guns on television.

Given the circumstances, the trial court may have reached a different conclusion had it applied the proper standard. At sentencing, the court repeatedly stated it had no discretion but to impose the gun enhancement stating, "There's nothing I can do about that," and then repeating "there's really nothing the court can do about the jury's finding on the gun, which is the biggest thing that affects him." The trial court's statements imply that it may have changed the imposition of the firearm enhancement if it had understood that it was required to sit as a 13th juror. Therefore, contrary to respondent's argument, appellant's testimony was not so inherently improbable that the court would necessarily have rejected it.[6]

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[5] Respondent's argument that when read in context the record indicates the court applied the correct standard is not supported by the record. As summarized, the court repeatedly stated that the basis for denying the new trial motion was that evidence supported the jury's verdict.

[6] By this analysis, we do not mean to express any opinion on how the court should rule on the motion upon remand, only that it should apply the appropriate standard when doing so.

4. Alleged Instructional Error

Appellant argues the trial court erred in failing to sua sponte instruct the jury on battery, which according to appellant is a lesser included offense of robbery as alleged in the accusatory pleading. "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.)

Even if we were to assume that battery is a lesser included offense of robbery as alleged in the accusatory pleading, appellant does not show that he was prejudiced by the failure to give such an instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 178 [in noncapital case, failure to instruct on lesser included offense is reversible only if the defendant shows prejudice].) In analyzing prejudice, this court considers "not . . . what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may 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." (*Id.* at p. 177.)

Applying this standard, there was no prejudice from the alleged error. Appellant testified that if Q.J. had a gun as appellant believed, appellant would have taken either the gun or the clip. Additionally, appellant told his friend to check Q.J.'s pockets, and his friend followed the instruction. Based on this evidence, a jury was not likely to have concluded that appellant's intent was only to use unlawful force on Q.J. but instead would likely have concluded that appellant's intent was to take the gun or clip from Q.J. The only reason appellant did not take anything from Q.J. is that Q.J. did not have what appellant wanted.

5. Closing Argument

Over defense objection, the trial court limited both sides to a 15-minute closing argument. The court explained that it set the time limitation because of court and juror scheduling.

During her closing argument, defense counsel explained the concept of reasonable doubt: "Ladies and gentlemen, what is required in criminal cases is that you have an abiding conviction for the truth of the charge. An abiding conviction means something that is long lasting. That means that tomorrow when you are out there drinking your coffee or two weeks from now or three weeks from now and you really have doubts about gosh, I really made a mistake, that's not abiding. And in order for [you to decide] this case, you have to have an abiding conviction. [¶] A conviction is a belief, something very strong. And unless you have that, you can't find Mr. Mixon guilty. There is no evidence of an attempted robbery, attempt to take anything. There is no evidence that he is anymore in [a gang]. And believe me if there was, they would have brought it up and they didn't. If there was any evidence that there was a gun, they would have brought it up and they didn't, because you know why, they can't." Jurors were given an instruction on reasonable doubt, which referred to an abiding conviction.

In arguing that appellant was entitled to a new trial because of the alleged error in restricting closing arguments, defense counsel claimed that if the time restrictions had not been placed on her she "maybe [would have placed] more emphasis on reasonable doubt." Counsel did not identify any additional argument she would have made had she been afforded more time. The court stated that defense counsel used only 11 or 12 minutes of the allotted 15, and the court rejected appellant's argument that he was denied a fair trial because of the time restriction.

On appeal, appellant again argues that he was denied a fair trial because of the time restriction. We disagree. Defense counsel did not use the 15 minutes allotted suggesting that 15 minutes was sufficient in this case. Even assuming that the court should have allowed counsel more time, appellant does not show that he was prejudiced. The only argument his counsel thought was lacking was a greater emphasis on reasonable doubt. But counsel argued that point and additionally, it was the subject of a jury instruction. Failure to place greater emphasis on reasonable doubt was harmless under either the state or federal standard.

DISPOSITION

The judgment and order denying appellant's motion for a new trial is vacated. The trial court is to rehear and redetermine appellant's motion for a new trial applying the appropriate standard. If the court grants appellant's motion for a new trial, it shall order a new trial. If the court denies the motion for a new trial, it shall reinstate its order denying the new trial motion and reinstate the judgment.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.