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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANKIE CALANCHE LOPEZ, Defendant and Appellant.	B283016 (Los Angeles County Super. Ct. No. KA113181)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas C. Falls, Judge. Affirmed.

Michael C. Sampson, 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, Shawn McGahey Webb, Supervising Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

Frankie Calanche Lopez (defendant) saw an easy mark in a 59-year-old man riding his bicycle through a park. What he did not count on was that the man was a former Olympian who fought back when defendant punched him and picked up the man's cell phone that fell to the ground during the ensuring fistfight. A jury convicted defendant of robbery. On appeal, he argues that the trial court should have instructed the jury on the lesser included crime of theft. We disagree, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

On a late afternoon in August 2016, Pedro Pineda Bernal (Bernal) rode his bicycle across a park in Azusa, California, on his way to get some ice cream. Bernal was 59 years old and was missing all but two teeth.

Defendant, then 32 years old, broke away from a group of people standing in the park and ran over to block Bernal's path; Bernal stopped his bike to yield the right-of-way. To Bernal, defendant looked like a gang member.

Without saying a word, defendant grabbed the front handlebars of Bernal's bike with one hand and sucker punched Bernal in the face with the other. Bernal, a former Olympic gymnast, responded with a punch to defendant's face. Defendant then pulled Bernal off the bicycle, and the two dropped to the ground. Defendant assailed Bernal with a barrage of punches to the face, and Bernal punched back to protect his two remaining teeth.

In the midst of the tussling, Bernal's cell phone dislodged from either his belt clip or pocket. Defendant stood up, walked over to the cell phone, and picked it up. Bernal grabbed defendant's shirt to keep him from walking away, but defendant

took two further steps. In response, Bernal demanded, "Give me my cell phone." Defendant replied, "It's mine," and put the phone in his pocket. Bernal then punched defendant, and defendant punched back. In the continued fighting, defendant squirmed out of his shirt but Bernal was able to grab defendant's pant leg.

At that moment, Bernal felt a sharp pain in his elbow, saw a shiny object, and heard a voice behind him say, "Let it go. That's [defendant's] cell." Although Bernal never saw a knife, he ended up with a quarter-inch to half-inch knife wound on his elbow. Fearing that defendant was being aided by a man with a knife, Bernal grabbed the chain-lock for his bike and starting swinging at defendant's legs. After being hit four or five times with the chain, defendant relented by giving Bernal back his cell phone.

When the other members of the group came over, one of whom was wielding a bat, Bernal grabbed defendant and used defendant's body as a shield against their blows.

Law enforcement arrived soon thereafter and arrested defendant.

Bernal was visibly anxious and panicked. Bernal was treated at a local hospital for a knife wound, bite marks on his head and hands, bruising to his ribs, and a fractured wrist. His cell phone was cracked.

II. Procedural Background

The People charged defendant with second degree robbery. (Pen. Code, § 211.)[1] The People further alleged that defendant's 2001 assault with a firearm conviction and 2010 felon-in-possession conviction constituted (1) "strikes" under our Three

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Strikes law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)), (2) prior serious felonies (§ 667, subd. (a)(1)), and (3) prior prison terms (§ 667.5, subd. (b)).

The matter proceeded to a jury trial.

The trial court instructed the jury on robbery and the lesser included offense of attempted robbery. The court refused to instruct on the lesser included offense of theft, reasoning that there was "no question . . . that" "substantial force" "and fear" were "used against the victim."

The jury convicted defendant of second degree robbery. After defendant waived a jury trial as to his prior convictions, the trial court found those allegation to be true.

After denying defendant's motion for a new trial on the basis of insufficient evidence, the trial court sentenced defendant to 11 years in prison comprised of a base term of six years (three years, doubled for a prior strike) plus five years for a prior serious felony conviction. The court struck the second prior conviction, and imposed but stayed the prior prison term sentence.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant asserts that the trial court committed instructional error by refusing to instruct the jury on the lesser included crime of theft.

A trial court errs in refusing to instruct on a lesser included crime if "'there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.'" (*People v. Whalen* (2013) 56 Cal.4th 1, 68, quoting *People v. DePriest* (2007) 42 Cal.4th 1, 50.) "[T]he 'substantial evidence' required . . . is not merely '*any* evidence . . . no matter how weak,'

[citation], but rather "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed." (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) We independently review the substantiality of the evidence for these purposes, and do so by viewing it in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137; *People v. Posey* (2004) 32 Cal.4th 193, 218.)

Theft is a lesser included offense of robbery. (*People v. Webster* (1991) 54 Cal.3d 411, 443.) What distinguishes one from the other is the defendant's use of force or fear. (*People v. Gomez* (2008) 43 Cal.4th 249, 257 (*Gomez*); *People v. Anderson* (2011) 51 Cal.4th 989, 994 (*Anderson*).) Consequently, the question before us is: Is there substantial evidence in the record that defendant did not use force or fear?

We conclude that the answer to this question is, "No." That is because no rational jury could conclude that defendant did not use force. Defendant punched Bernal; that is force. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1583 [defendant punched victim; sufficient force to preclude jury instruction on theft]; see also *People v. Jones* (1992) 2 Cal.App.4th 867, 870-871 [defendant snatched a purse causing injury to victim's finger; sufficient force to preclude jury instruction on theft]; *People v. Dorsey* (1995) 34 Cal.App.4th 694, 705-706 [defendant engaged in tug of war with victim to snatch her purse; sufficient force to preclude jury instruction on theft]; cf. *People v. Brew* (1991) 2 Cal.App.4th 99, 104-106 (*Brew*) [defendant walked close to victim to open cash register and take money; not sufficient force to preclude jury instruction on theft].) What is more, defendant punched Bernal after he grabbed the cell phone, refused to give it back, and was

in the midst of moving away from Bernal with the phone in his possession. Because a theft constitutes robbery if "force or fear was used to carry [the property] away" as well as if it is used to "acquire[]" the property (*Anderson*, *supra*, 51 Cal.4th at p. 994; *Gomez*, *supra*, 43 Cal.4th at p. 256), the only inference that can be reasonably drawn from the evidence is that defendant committed robbery, not theft.

Defendant raises six arguments in response.

First, he urges us to use the standard for whether to instruct on lesser included offenses that is set forth in *People v. Carmen* (1951) 36 Cal.2d 768, 773. *Carmen* held that "a defendant is entitled to instructions on his theory of the case as disclosed by the evidence, *no matter how weak*." (*Ibid.*, italics added.) As reflected above, however, *Carmen's* standard was subsequently and specifically rejected by our Supreme Court in favor of the more demanding substantial evidence test we must now apply. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12, superseded on other grounds by § 188.)

Second, defendant argues that Bernal used more force than *he* did and that Bernal was the one who hit defendant first after defendant started walking away with the cell phone. That Bernal may have ultimately used more force—in other words defendant erred in assessing whether Bernal was an easy target—does not in any way negate defendant's use of force in punching Bernal in an effort to hold onto the cell phone. In the same vein, that Bernal landed the first punch after defendant took the phone does not negate defendant's resort to force in response to that or that defendant did so in order to keep the cell phone (or the fact that defendant set the entire encounter in motion by sucker punching Bernal in the first place).

Third, defendant asserts that he did not use any force to acquire the cell phone because he just picked it up during a lull in the melee. This assertion ignores that "taking" has "two aspects"—(1) "achieving possession of the property," and (2) "carrying the property away." (*Gomez*, *supra*, 43 Cal.4th at p. 255.) As long as force is used in *either* phase (as it was here during the carrying-away phase), the theft is a robbery. (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 224 [force or fear rendering a theft a robbery may occur "after the defendant has initially gained possession of the victim's property"].)

Fourth, defendant posits that the assessment of whether defendant used force cannot rely upon (1) the use of force by the knife-wielding cohort (because there is no proof he was working with defendant), or (2) the use of force by the group of people who came over toward the end of the melee (because they only used force after Bernal had succeeded in whipping defendant into submission and defendant had handed back the phone). Although defendant's first point is hard to square with the evidence that the knife-wielding cohort expressly told Bernal to "[l]et" the phone "go" because it was *defendant's* "cell," we need not delve any deeper because defendant's personal use of force to hold onto the cell phone is sufficient by itself to preclude a theft instruction.

Fifth, defendant argues that he did not approach Bernal with the intent to steal his cell phone and never verbally demanded the cell phone. To begin, this argument does not deal with defendant's use of force, so it is irrelevant to the question before us regarding the lesser included instruction for theft. The argument also lacks merit. To be sure, a defendant is guilty of robbery only if he acts with "the specific intent to deprive the

victim of the property permanently." (*Anderson*, *supra*, 51 Cal.4th at p. 994.) But it is enough if the defendant has that intent at the time he uses force or fear to acquire or carry away the property. (*People v. Huggins* (2006) 38 Cal.4th 175, 216 ["robbery requires the 'intent to steal . . . either before or during the commission of the act of force"'].) Consequently, whether defendant intended to commit robbery from the moment he first approached or punched Bernal does not matter; the crime of robbery reaches all robbers, even opportunistic ones. Here, defendant's declaration that Bernal's cell phone was his and his contemporaneous conduct in putting the phone in his pocket demonstrate defendant's intent to deprive Bernal of that property permanently, and that intent preceded defendant's use of force to keep that property. That defendant did not accompany the initial taking of the phone with a verbal proclamation of his intent does not matter. (Accord, *Brew*, *supra*, 2 Cal.App.4th at p. 104 [words not needed to cause fear].)

Lastly, defendant contends that there was insufficient evidence that Bernal was in fear. In light of our conclusion that no reasonable jury could find the absence of force, we need not address the existence of fear.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ