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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.

RONNIE GEORGE REYES,

Defendant and Appellant.

B290827

(Los Angeles County
Super. Ct. No. NA107924)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard M. Goul, Judge. Affirmed and remanded with directions.

Carolyn D. Phillips, 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, Assistant Attorney General, Colleen M. Tiedemann and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ronnie George Reyes was convicted by a jury of two counts of attempted robbery (Pen. Code, §§ 664/211),¹ as lesser included offenses of robbery. Defendant admitted two prior robbery convictions for purposes of the “Three Strikes” law (§§ 667, subds. (b)-(j), 1170.12), one of which was also the basis for a prior serious felony enhancement (§ 667, subd. (a)). On defendant’s motion, the trial court dismissed the two “strikes” in the interests of justice. Defendant was sentenced to a total of six years four months in state prison, based on the low term of 16 months for one robbery count, plus a five-year prior serious felony enhancement (§ 667, subd. (a)). The sentence on the second robbery count, the only count challenged in this appeal, was stayed under section 654.

Defendant timely filed a notice of appeal. On appeal, defendant contends that his conviction for the second robbery count must be reversed because there was insufficient evidence that the attempted taking was accomplished by the use of force or fear. He also asserts that the matter must be remanded for resentencing pursuant to the newly amended section 1385, which gives the trial court discretion whether to strike his prior conviction enhancement (§ 667, subd. (a)(1)).

Because the second attempted robbery count is supported by substantial evidence, we affirm defendant’s conviction. However, we agree with defendant that the matter must be remanded for resentencing. As the parties agree, the trial court must be given the opportunity to exercise its newly-authorized discretion to strike the enhancement imposed pursuant to section

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

667, subdivision (a)(1). (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393).)

FACTUAL BACKGROUND

Tina Davis (Davis) was a manager at an Albertson's grocery store in Long Beach. One of her duties was to watch for shoplifters. On November 26, 2017, she saw defendant, who was in one of the store aisles, put on a blue denim jacket that the store was carrying as merchandise. Davis approached defendant and asked him if she could have her merchandise back. Defendant told her, in an aggressive tone, that he did not have her "f-ing stuff" and that he was not going to give anything back. Davis replied that if he did not give her the merchandise, she would call the police. Defendant appeared to be under the influence of something.

Davis met with security guard Ruben Ramirez (Ramirez), who was standing near the front doors, and told him to keep an eye on defendant while she went to check the surveillance cameras. The surveillance videos showed defendant had been looking up and down the aisles in an anxious manner.

Defendant walked past the cashiers' stations wearing the jacket and headed towards the exit, without making any effort to pay. At that point, Davis could see a container of beer protruding from defendant's pants. As defendant was exiting the store, Davis again asked him to give her back the merchandise or she would call the police. Ramirez was standing by the exit with Davis at that time. Defendant told Davis that he did not care if she called the police and that he had a gun. Davis called 911. While she was on the phone, defendant again stated that he had a gun and asked Davis if she wanted to see it. Davis then asked defendant if he was threatening her and told him that she was on the phone with the police. Defendant responded that it would

take a while before the police arrived and that he would have a seat in the meantime.

Defendant told Davis at least three times during the incident that he had a gun. He further said that he would use the gun. Davis believed him and, as a result, she was afraid for her life. Davis and Ramirez were each about three feet from defendant when defendant stated that he had a gun.

The police arrived almost immediately after Davis's 911 call. Defendant was in front of the Albertson's grocery store. He was belligerent towards the police officers and refused to follow their commands. Eventually, the police were able to handcuff him. When a police officer asked him where the gun was, defendant told the officer that he had a Colt .45, but then added that it was only a Colt .45 beer. The police found a Modelo beer, still cold, in defendant's waistband. He was wearing a blue denim jacket with a price tag on it. Davis identified the jacket and the beer as the store's merchandise.

DISCUSSION

I. Substantial evidence supports defendant's attempted robbery conviction

Defendant contends that the evidence was insufficient to support his conviction of the attempted robbery of Ramirez.² Specifically, he claims that there was no evidence that any use of force or fear was directed against Ramirez, particularly given that Ramirez did not testify.

² Defendant's opening brief mistakenly refers to the victim as Ruben Sanchez, but, as the People point out in their respondent's brief and as defendant agrees in his reply brief, he intended to refer to Ramirez.

A. Standard of review and applicable law

In reviewing a challenge to the sufficiency of the evidence, the appellate court must examine the record, the findings of fact, and reasonable inferences from the evidence in the light most favorable to the judgment, and affirm the judgment if any rational trier of fact could have found guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.) We do not reweigh the evidence or reevaluate the credibility of the witnesses. (*Ibid.*)

“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.) For attempted robbery, however, “commission of an element of the crime is not necessary. [Citation.]” (*People v. Medina* (2007) 41 Cal.4th 685, 694.) The only two elements of any attempted crime are “a specific intent to commit [the crime] and a direct, [but] ineffectual act [done] toward its commission. [Citations.]” (*Ibid.*; see also *People v. Dillon* (1983) 34 Cal.3d 441, 453–454; *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 489 [attempted robbery requires a specific intent to commit robbery and a direct but ineffectual act towards the commission of that crime].) The direct but ineffectual act must go beyond mere preparation (*id.* at p. 454), but need not be an actual element of the crime attempted (*People v. Medina, supra*, at p. 694).

Thus, neither force nor fear is an element of attempted robbery. (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 863 (*Vizcarra*)). In *Vizcarra*, the defendant hid a rifle under his poncho, stood a few feet away from the entrance to a liquor store, attempted to hide when a customer left the store, and then returned to his car, which he had parked across the street. He did not enter the store or attempt to use force on anyone, and he left before he could cause the intended victim or victims to feel

fear. (*Id.* at pp. 861–862.) These acts were found sufficient to support a conviction of attempted robbery because they “reach[ed] far enough for the accomplishment of the offense to amount to the ‘*commencement* of its consummation.’ [Citations.]” (*Id.* at p. 862.) The *Vizcarra* court explained: “It is true that an element of force or fear must be proved in order to establish a conviction for robbery under Penal Code 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.” (*Vizcarra*, at p. 862.)

B. Analysis

Pursuant to the foregoing legal authorities, the People were not required to prove that defendant used either force against Ramirez or put him in fear; the People only had to prove that defendant specifically intended to do so and that he committed an overt act towards accomplishing the completed crime. And there is ample evidence to support these elements.

As Davis testified, Ramirez was right next to her when defendant threatened to use a gun; Ramirez was about three feet away from defendant. And, at the time defendant referred to the gun, both Davis and Ramirez were confronting him for the purpose of preventing him from getting away from the store with stolen merchandise. From Davis’s testimony, a jury could reasonably find that when defendant stated that he had a gun and that he was willing to use it, he had the specific intent to put both Davis and Ramirez in fear in order to facilitate the robbery.

Furthermore, defendant’s act of taking the denim jacket and beer out of the store without paying for them, coupled with his statement about a gun, constituted direct, overt acts, beyond mere preparation, towards the completion of the robbery.

It follows that defendant’s conviction is supported by substantial evidence.

II. *The matter must be remanded for the trial court to exercise its discretion to strike defendant's serious felony enhancement pursuant to SB 1393*

Under the law that existed at the time of defendant's sentencing, trial courts had no authority to strike a prior serious felony conviction in connection with the imposition of a five-year enhancement under section 667, subdivision (a)(1). (§ 1385, subd. (b); *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045–1047.) SB 1393, effective January 1, 2019, changed the law, now giving judges that discretion.

Defendant requests that, pursuant to SB 1393, his case be remanded so that the trial court can have the opportunity to exercise its discretion to strike or impose the previously mandatory enhancement. The People agree.

We agree with the parties that the matter must be remanded to the trial court so that it can exercise its discretion to strike or impose the previously mandatory five-year enhancement under section 667, subdivision (a)(1). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973.)

DISPOSITION

The matter is remanded for resentencing pursuant to section 667, subdivision (a), as amended by SB 1393. In all other respects, the judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT