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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO BARRIENTOS, Defendant and Appellant.	B227574 (Los Angeles County Super. Ct. No. NA085320)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed as Modified.

Ellise R. Nicholson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Paul M. Roadarmel, Jr., and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Francisco Barrientos of one count of second degree robbery (Pen. Code, § 211)[1] with personal use of a firearm (§ 12022.53, subd. (b)). He was sentenced to an aggregate term of 15 years in state prison. He appeals from the judgment of conviction. We modify the judgment to award one additional day of custody credit and otherwise affirm.

BACKGROUND

On April 11, 2010, just after midnight, Henry Santiago was walking from work to his car parked in an alley in Long Beach. As he spoke to his brother on his cell phone, he heard someone say, "hey," twice. Looking back, he saw a man, whom he later identified as defendant, hurrying toward him carrying a black pistol. Defendant approached Santiago, and held the pistol about three feet from his face. The pistol was a semiautomatic and looked identical to a black 9 millimeter Baretta owned by Santiago's father.

Defendant demanded everything Santiago had. Santiago gave him $500 in cash, a chain, watch, cell phone, and a bag containing a shoe box, cigar box, and business cards. Defendant backed up, keeping the gun trained on Santiago. He got into the passenger side of a gray Mustang with red racing stripes, which turned out of the alley and headed toward the 710 freeway.

Santiago told some security guards what had happened, and they called the police. After hearing a radio broadcast of the incident, Long Beach Police Officer Nicholas Kent saw a vehicle matching the description – gray or silver Mustang with red trim – on the 710 freeway. He followed the vehicle, and saw an object resembling a white bag come out of the vehicle, though he could not tell from which window.

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[1] All further section references are to the Penal Code.

Three more police vehicles joined the pursuit. The Mustang accelerated and a chase ensued, at the end of which the Mustang went out of control, struck the rear of another vehicle, and came to a stop on the shoulder. Defendant was seated in the front passenger seat and was arrested. In the car, Officer Kent found the bag containing the shoe box and cigar box taken from Santiago. Another officer searched defendant and recovered $505 in cash wrapped in Santiago's silver necklace. No weapon was found in the vehicle, and a search of the area where Officer Kent saw the object come from the car located nothing.

Santiago was taken to the scene, and he identified defendant as the robber.

DISCUSSION

Pinpoint Instruction

Defendant contends that the trial court erred in denying his request for a pinpoint jury instruction informing the jury, in substance, that a bb gun or pellet gun is not a firearm, because it uses the force of air pressure, gas pressure, or spring action to expel a projectile. Based on this purported error, he contends that the firearm use finding must be vacated. We disagree.

"'"[A] defendant has a right to an instruction that pinpoints the theory of the defense . . . ."' [Citation.] The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].'" (*People v. Burney* (2009) 47 Cal.4th 203, 246.)

Here, the trial court denied the requested instruction, concluding that CALJIC No. 17.19 adequately defined the term "firearm." Using the statutory definition, that instruction informed the jury that "[t]he word 'firearm' includes a handgun or 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. The 'firearm' need not be operable." (See § 12001, subd. (b) (2011 version) ["'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"].)

In light of CALJIC No. 17.19, the trial court properly refused the defense pinpoint instruction because it was duplicative, in that the definition of the term firearm given to the jury necessarily excluded any device other than one that expelled a projectile by the force of explosion or other form of combustion. Moreover, there was no substantial evidence that the object used by defendant was a bb gun or pellet gun. Defendant held the pistol a mere three feet from Santiago's face, thereby implicitly threatening his life if he refused to turn over his property. Santiago testified that the pistol was a semiautomatic that looked "exactly real, and . . . exactly the same" as his father's 9 millimeter Baretta. He believed it was a real gun. Although on cross- and re-cross examination Santiago testified that the weapon could have been a bb gun or pellet gun and that he did not know if it was an actual firearm as opposed to a pellet gun, Santiago's inability to conclusively negate any possibility that the object might have been a bb gun or pellet gun was not substantial evidence that the object *was* a bb gun or pellet gun. The testimony raised, at most, only a speculative suggestion that the weapon was other than a firearm. The trial court did not err in refusing defendant's pinpoint instruction.

CALJIC No. 2.06

Defendant contends that the trial court erred in instructing the jury pursuant to CALJIC No. 2.06 regarding suppression of evidence. That instruction informed the jury: "If you find that a defendant attempted to suppress evidence against

himself in any manner, such as by destroying or concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for you to decide."

Here, as he pursued the Mustang after the robbery, Officer Kent saw an object resembling a white bag come from the vehicle. When the defendant and the vehicle were later searched, the pistol defendant used in the robbery could not be found. From this evidence, the jury could reasonably infer that defendant had tossed the firearm from the vehicle in order to conceal it. That no weapon was found in the area where Officer Kent saw the object tossed from the vehicle did not defeat the propriety of the instruction. It was simply a factor the jury could consider in determining whether defendant did in fact discard his weapon. Indeed, from the fact that no weapon was found, the jury could infer that by tossing the weapon out of the vehicle while traveling on a freeway pursued by a police officer, defendant was successful in concealing evidence against him. There was no error. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140 [evidence that defendant tossed knife used in murder out of moving car supported giving CALJIC No. 2.06].)

Presentence Credit

Defendant contends that he is entitled to one additional day of presentence conduct credit. Respondent concedes the point, and we agree. Defendant had 157 days of actual custody, and was entitled to 15 percent conduct credit under section 2933.1, a total of 23 days as opposed to the 22 days he was awarded. We order the judgment modified to reflect 23 days of good time/work time credit.

Restitution

In the pursuit after defendant took Santiago's property at gunpoint, the Mustang in which defendant was a passenger struck a vehicle in which Misotele Gapelu and Vaea Daisy Gapelu were occupants. Defendant was initially charged with felony evading (Veh. Code, § 2800.2, subd. (a)), but that count was not presented to the jury, and was dismissed under section 1385 after trial. Over defendant's objection, the trial court ordered restitution for injuries suffered by the Gapelus, in the sum of $2,003.92 to Misotele and $100 to Vaea. Defendant contends that the trial court erred in awarding such restitution. We disagree.

Because defendant was sentenced to state prison, section 1202.4 limits permissible restitution "to losses caused by the criminal conduct for which the defendant was convicted." (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1249; see *People v. Woods* (2008) 161 Cal.App.4th 1045, 1052 ["section 1202.4 limits the scope of victim restitution to the operative crime that resulted in the loss".]

Here, defendant was convicted of the robbery of Sandoval. But the criminal conduct involved in that robbery did not end with the taking of Sandoval's property. Rather, the robbery continued until defendant reached a place of temporary safety with the property taken (*People v. Anderson* (2011) 51 Cal.4th 989, 994), and the robbery was thus ongoing when the Mustang in which defendant was riding struck the Gapelus' vehicle. Therefore, the Gapelus' losses were caused by the criminal conduct (the continuing robbery) of which defendant was convicted, and the Gapelus were "victim[s who] suffered economic loss as a result of the defendant's conduct." (§ 1202.4, subd. (f).) Therefore, the trial court did not err in ordering restitution.

Defendant contends that the driver of the Mustang, not he, was the person who caused the Gapelus' losses, and that therefore defendant cannot be liable for

restitution. However, substantial evidence supports the finding that the Gapelus suffered their losses as a result of defendant's criminal conduct. It could reasonably be inferred that the driver of the Mustang was aiding and abetting defendant's robbery – providing defendant's escape and trying to avoid capture by the police while the robbery was still in progress as they fled with Santiago's property. Thus, it was as a result of the robbery of which defendant was convicted that the Gapeluses suffered their losses. In other words, the pursuit and the accident would not have occurred but for the robbery. We find no error in the award of restitution.

DISPOSITION

The judgment is modified to award defendant 23 days of good time/work time credit. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J. SUZUKAWA, J.