Filed 9/13/18 P. v. Randolph CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GERSHON RANDOLPH, Defendant and Appellant.	B283499 (Los Angeles County Super. Ct. No. YA095174)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan B. Honeycutt, Judge. Affirmed in part, reversed in part, and remanded.

Eileen Manning-Villar, 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, William H. Shin and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Gershon Randolph (defendant) challenges one of his two convictions for second degree robbery. Specifically, he argues that the evidence did not show any use of "force" or "fear" in the robbery he challenges. We reject his claim that the evidence of force or fear was so weak that *no* rational jury could convict him of robbery but agree with him that this is such a close case that the trial court should have instructed the jury on the lesser included crime of grand theft from a person. We accordingly reverse and remand his conviction for this robbery, but otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Robbery/theft of Beats Headphones*

In July 2016, Priscila Azuaga (Azuaga) offered to sell a pair of Beats headphones for $150 using an app called "OfferUp." After a person named "G" expressed interest in buying the headphones, Azuaga and "G" exchanged messages through the app and agreed to meet in the parking lot outside of a sports bar in Gardena, California around 7:00 p.m. After Azuaga got out of her car, defendant and another male emerged from an alleyway near the back of the sports bar and approached her. Defendant asked if the headphones worked, and Azuaga handed him the headphones so he could plug them into his phone. Azuaga was standing two or three feet away from defendant, still "holding" or "gripping" the headphones case in one of her hands. Azuaga began to notice that defendant was "looking too much" at her Apple watch, and "got a little scared." Without warning, defendant "grabbed" or "snatched" the headphones case out of Azuaga's hands, and defendant and his friend ran away with Azuaga's headphones and the case. As they ran away, a third

male met up with them as all three ran across a foot bridge. Azuaga tried to follow them in her car, but lost sight of them. Later that night, she found another OfferUp profile for a person named "Marvin" that had a photo of her Beats headphones and case as well as other items that "G" had previously been trying to sell; Azuaga reached out to "Marvin," feigned interest in buying one of his items, and asked for his address and phone number. Azuaga passed along the contact information to law enforcement, who verified that the phone number belonged to defendant, and the address belonged to defendant's grandmother.

B. *Robbery of iPhones*

The next day, defendant and another man met with a person who had listed two iPhones for sale on Craigslist. Defendant, his friend, and the seller met in the parking lot of a Chase Bank around 7:00 p.m. Defendant asked to hold the iPhones, and once he had both of them in his hands, defendant's companion pulled out a gun; defendant and his companion then ran off with the iPhones.

II. Procedural Background

The People charged defendant with two counts of second degree robbery (Pen. Code, § 211),[1] one for each incident.[2] The

---

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

[2] The People also charged defendant with two additional robberies, but the jury was unable to reach a verdict as to those robberies, and the trial court ultimately dismissed them. The People also charged a second defendant for the iPhones robbery, but subsequently dismissed him.

People further alleged that a principal was armed with a firearm as to the incident with the iPhones.[3]

The matter proceeded to a jury trial. Defendant moved for a judgment of acquittal on the robbery count involving the iPhones after the People rested, but the trial court denied the motion. The trial court instructed the jury on the crime of robbery but was not asked to—and did not on its own—instruct on the lesser included crime of grand theft from a person (§ 487). The jury found defendant guilty of both robberies and found the firearm allegation to be true.

The trial court sentenced defendant to seven years in prison, comprised of six years for the iPhones robbery (a base term of five years plus one year for the firearm allegation) followed by one year for the Beats headphones robbery (calculated as one-third of the middle term of three years).

Defendant timely appealed.

DISCUSSION

Robbery "is the felonious taking of personal property in possession of another, from his person or immediate presence, and against his will, accomplished by *means of force or fear*." (§ 211, italics added.) Defendant attacks his robbery conviction for the taking of the Beats headphones on two interrelated grounds: (1) there is so little evidence of his use of force or fear that no "'reasonable trier of fact could find [him] guilty beyond a reasonable doubt' [citation] " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890 (*Covarrubias*)), such that he is entitled to an acquittal; and (2) the evidence of his use of force or fear, even if

---

[3] The People initially alleged the firearm enhancement as to the Beats headphones incident as well but struck that allegation prior to submitting the case to the jury.

constitutionally sufficient, is nonetheless still so weak that the trial court should have instructed the jury on the lesser included crime of grand theft from a person (*People v. DePriest* (2007) 42 Cal.4th 1, 50-51 [grand theft from a person is a lesser included offense to robbery]; *People v. Gomez* (2008) 43 Cal.4th 249, 257 (*Gomez*) [grand theft from a person does not require use of force or fear].)

We review each of these claims de novo (*People v. Lewis* (2001) 25 Cal.4th 610, 656; *People v. Cole* (2004) 33 Cal.4th 1158, 1218), but the prism we use for each is different: In assessing the sufficiency of the evidence (defendant's first claim), we view the evidence in the light most favorable to the verdict (*Covarrubias*, *supra*, 1 Cal.5th at p. 890); in assessing the sufficiency of the evidence warranting a jury instruction on a lesser included offense, we view the evidence in the light most favorable to the defendant (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137).

I. Sufficiency of the Evidence

As noted above, the crime of robbery requires a taking or carrying away of property "by means of force or fear." (§ 211; *People v. Prieto* (1993) 15 Cal.App.4th 210, 215 ["The 'force' or 'fear' must be the *means* by which the taking [or carrying away] was accomplished"].) Not every use of force will satisfy this requirement: Because "[g]rabbing or snatching property from the hand has often been held to be grand larceny, and not robbery" (*People v. Church* (1897) 116 Cal. 300, 303 (*Church*)), "something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property" (*People v. Morales* (1975) 49 Cal.App.3d 134, 139 (*Morales*); *People v. Anderson* (2011) 51 Cal.4th 989, 995; *People v. Lopez* (2017)

8 Cal.App.5th 1230, 1235). That "something more" exists where a defendant exerts force to overcome a victim's resistance (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1257-1259), exerts enough force to injure the victim (*People v. Jones* (1992) 2 Cal.App.4th 867, 870 [victim's finger had "'a little blood'" and her shoulder was injured "'a little bit'"]), or uses any force over and above what is needed to take (or keep) the property itself (e.g., *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [defendant pushed cashier out of the way to get access to cash register], overruled in part on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353; *People v. Welch* (1963) 218 Cal.App.2d 422, 422-423 [defendant grabbed victim by the neck]; *People v. Roberts* (1976) 57 Cal.App.3d 782, 787 [defendant used such force to snatch purse that he broke the purse's strap]). Fear typically arises from the threatened use of force (*People v. Wright* (1996) 52 Cal.App.4th 203, 210-211), and need only be "'sufficient fear to cause the victim to comply with [an] unlawful demand for [her] property'" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775).

Although it is a close question, there is sufficient evidence to support a rational jury's finding that defendant used force or fear to obtain Azuaga's headphones case. Azuaga testified that defendant "snatched" or "grabbed" the headphones case from her as she "gripp[ed]" it in her hand. This may or may not be enough to constitute force. (See *People v. Lescallett* (1981) 123 Cal.App.3d 487, 491 ["The nonconsensual snatching of a purse has been held to entail such force as to permit a jury to return a verdict of robbery"]; cf. *Church*, *supra*, 116 Cal. at p. 303 [noting that "[g]rabbing or snatching property from the hand has *often* been held to be . . . not robbery" (italics added)].) Because the question whether a particular snatching or grabbing

constitutes sufficient force is an "arguable point" rather than a definitive one (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771 (*Flynn*)), Azuaga's testimony that the headphones case was "snatched" or "grabbed" from her "grip[]" is constitutionally sufficient to sustain a robbery conviction when we view that testimony in the light most favorable to the verdict. Azuaga also twice testified that she was "scared"—at first in relation to defendant's "paying too much attention" to her watch and later in relation to the entire incident. Again, construing this testimony in the most verdict-friendly way, this is sufficient evidence of fear to sustain the robbery conviction. (See *People v. Brew* (1991) 2 Cal.App.4th 99, 102-105 (*Brew*) [defendant standing two and a half to three feet away from victim as he moved past her to get to register; sufficient use of fear]; see generally *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [jury may consider physical characteristics of defendant and victim].)

Defendant raises four arguments in response. First, he argues that the use of force requires a struggle, and that his theft occurred so fast that Azuaga had no opportunity to resist and thus cause a struggle. As the above described cases illustrate, while a struggle is sufficient to constitute a use of force, it is not necessary. Second, he contends that grabbing and snatching is never enough to constitute force. As detailed above, however, sometimes they *can* be enough, and we are required to construe the evidence in support of the verdict. Third, he asserts that Azuaga's fear stemmed from his seeming obsession with her watch, not from the overall incident. That assertion accurately describes Azuaga's first description of the source of her fear, but not her second description, which was more generally applicable to the entire incident. Lastly, he posits that Azuaga's post-

robbery conduct of chasing defendant in her car and then tracking him down online belie any fear. But neither of those attempts at sleuthing involved physical confrontation, and Azuaga testified that her intent all along was simply to report what she learned to the police, not to confront defendant herself.

II. Lesser Included Offense Instruction

A trial court has a duty to instruct the jury on any lesser included offense to a charged crime if there is substantial evidence from which a rational jury could find that "'the defendant committed [that] lesser offense, and that he is not guilty of the greater [charged] offense.' [Citations.]" (*People v. Whalen* (2013) 56 Cal.4th 1, 68.) Because it is the defendant's use of force or fear that differentiates the crime of robbery from its lesser included offense of grand theft (*Gomez*, *supra*, 43 Cal.4th at p. 257), whether the trial court in this case erred in not instructing the jury on the lesser included crime of grand theft from a person turns on whether there is substantial evidence from which a jury could find that defendant took the headphones and case from Azuaga but did not use force or fear to do so.

We conclude there is. As noted above, it is a very close question whether defendant used force or fear. With regard to the use of force, there was no struggle, Azuaga was not injured, and the sole use of force was the force needed to snatch or grab the headphones case from Azuaga's grip. Although mere snatching or grabbing can be enough to sustain a robbery verdict (where the evidence is viewed in the light most favorable to the verdict), it is not enough to foreclose the need for a lesser included instruction on grand theft from a person (where the evidence is viewed in the light most favorable to the defendant). This is undoubtedly why the case law has consistently

emphasized the importance of submitting such close questions to the jury. (*Flynn*, *supra*, 77 Cal.App.4th at p. 771; *Brew*, *supra*, 2 Cal.App.4th at pp. 104-105; see generally *Church*, *supra*, 116 Cal. at p. 303.) The jury's finding that defendant was guilty of robbery does not make this any less of a close question because the jury was given "no opportunity to convict [him] of the lesser offense" and was thus faced with an "'all or nothing' choice" between convicting him of robbery or acquitting him. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1345.)

The People assert that a lesser included grand theft from a person instruction was not necessary because no rational jury could fail to find either force or fear. More specifically, the People contend that defendant used sufficient force and point to the following exchange: When asked, "Did [defendant] sort of—did he use force to rip it from your hand?" Azuaga answered, "Yeah. He grabbed it, yeah. I didn't give it to him. He just snatched it and ran away." The People latch on to Azuaga's alleged affirmation of the words "use[d] force to rip," but ignore that Azuaga immediately clarified that "he grabbed it." Construed in the light most favorable to defendant, this does not preclude a rational jury from finding that defendant used no more than "that quantum of force which is necessary to accomplish the mere seizing of the property" (*Morales*, *supra*, 49 Cal.App.3d at p. 139). The People alternatively assert that defendant used fear because Azuaga said she was "scared" and because defendant selected the location and circumstances of their meeting in a manner that would isolate and intimidate Azuaga. As noted above, it was unclear whether Azuaga's fear stemmed from the entire encounter or just defendant's prolonged stares at her Apple watch. More to the point, the evidence does not support the

assertion that defendant engineered all of the circumstances of the meeting: While it was defendant's idea to meet at the sports bar parking lot, nothing suggests his idea was nonnegotiable. What is more, the lot was next to a presumably open restaurant while it was still light outside, and Azuaga's decision to come alone and to select a particular parking spot were her, not defendant's.

The People finally argue that any error in not instructing on the lesser included offense was harmless. We disagree because the question whether defendant used any force or fear is a very close one.

DISPOSITION

Defendant's conviction for the second degree robbery of Azuaga (count 2) is reversed with the following directions: If the People do not retry defendant for second degree robbery pursuant to section 211 within the statutory time period, or if the People file a written election not to retry defendant, the trial court shall proceed as if the remittitur modified the judgment to reflect a conviction for misdemeanor theft of Azuaga rather than second degree robbery, and resentence defendant accordingly. (See *People v. Edwards* (1985) 39 Cal.3d 107, 118.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

I concur:

_____, P. J.
LUI

I concur and dissent.

I concur in the majority's conclusion that sufficient evidence supports the jury's decision that defendant committed robbery when he snatched or grabbed the headphone case from the hands of a frightened Azuaga -- a woman alone in a parking lot with two men who had looked "too much" at her Apple watch.

I differ from the majority view that this is "a very close question whether defendant used force or fear." In my assessment this is a typical strong arm robbery and there was thus no sua sponte obligation on the trial court to give the jury an instruction of grand theft from a person. Despite the efforts of the majority to cast defendant's behavior as something less than forceful or fearful, it should be noted that a jury of 12 (a panel that was unable to reach unanimous verdicts on either the attempted robbery charged in count 3 or the robbery charged in count 4), found in the evidence presented, beyond a reasonable doubt, all of the elements necessary for a conviction on this count.

Clearly it is the duty of a trial court to instruct the jury on any lesser included offenses to a charged crime when there is substantial evidence on which a rational jury could find the defendant committed the lesser crime, rather than the one charged. However, "'the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense . . . .' [Citation.] Such instructions are required only where 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. [Citations.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) The crime of grand theft from a person (Pen. Code, § 487, subd. (c)) is lesser to robbery and lacks the requirement of use of "force or fear." I

share the view expressed by the respondent that there was no ambiguity as to the use of force or fear in the taking of the headphone case here.

Finally, the failure to instruct on a lesser included offense in a noncapital case is evaluated for prejudice under the *Watson*[1] standard of what a reasonable jury was *likely* to have done absent any purported error. Not what a jury *could* have done. (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868; *People v. Breverman* (1998) 19 Cal.4th 142, 165). The strength of the evidence supporting the lesser included offense is compared with that of the evidence presented by the prosecutor. As set forth above, there was evidence that the victim, a lone woman, met the defendant and his male companion in a parking lot to potentially transact a sale of the headphones and case. After both men intimidated the victim by eying her Apple watch, the defendant forcibly grabbed the headphone case from the hands of the victim and both men ran to join their third male companion and seek safety. No reasonable jury would have found that defendant committed only grand theft rather than robbery. Any error by the trial court in not giving the lesser instruction was harmless.

I would affirm the judgment.

_____, J.
CHAVEZ

---

1 *People v. Watson* (1956) 46 Cal.2d 818, 836-837.