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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LEJON DESANO PETERSON, Defendant and Appellant.	2d Crim. No. B266150 (Super. Ct. No. 2015002472) (Ventura County)

Lejon Desano Peterson appeals his conviction by jury for possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)) and second degree robbery (Pen. Code, § 211)[1] with personal use of a deadly and dangerous weapon (§ 12022, subd. (b)(1)). In a bifurcated proceeding, the trial court found that appellant had suffered six prior prison terms (§ 667.5, subd. (b)) and sentenced appellant to eight years state prison. Appellant contends that the trial court erred in not instructing on mistake of fact and self defense. We affirm.

Facts

On January 24, 2015, Eric Preciado, a Ventura Target asset protection specialist, observed appellant steal merchandise inside the store and put the goods in his backpack. Appellant carried the backpack past the cashiers and exited the front door.

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

Preciado followed, walked up next to appellant, and shouted "Target security" three times. Appellant continued walking.

When Preciado reached to grab the backpack, appellant turned and looked Preciado in the eye. Brandishing a two foot metal rod, appellant swung the metal rod at Preciado. Fearing imminent injury, Preciado put his hands up to protect himself and backed up as appellant fled.

Ventura Police Officer Joshua Butler responded to the 911 call and saw appellant hide near a wall. The officer detained appellant at gunpoint and found Target merchandise worth $165 (ear buds, CDs, and personal hygiene products) and a pipe for smoking methamphetamine on appellant's person.

Preciado reviewed the store surveillance video and determined that appellant was in the store 45 minutes. Preciado testified that he identified himself when he approached appellant and was wearing a blue navy uniform with a Target security badge and nameplate. Preciado had a flashlight, handcuffs, a glove pouch, and radios on his utility belt -- typical security guard attire.

At trial, appellant claimed that he did not know that Preciado was a Target loss prevention officer and was frightened by the sound of footsteps approaching him. When Preciado grabbed at the backpack, appellant spun around and brandished the metal rod.[2] Appellant claimed that Preciado ran off when he asked Preciado who he was and what he wanted. The store surveillance video (less than 5 seconds) of the confrontation was played to the jury.

Discussion

The central element of the crime of robbery is the use of force or fear to deprive the victim of his property. (*People v. Ramos* (1982) 30 Cal.3d 553, 589; *People v. Estes* (1983) 147 Cal.App.3d 23, 27 [store security guard has standing to be a robbery victim].) "[M]ere theft becomes robbery if the perpetrator, having gained possession of

[2] Appellant was homeless and said he used the metal rod to collect cans from trash bins.

the property without use of force or fear, resorts to force or fear while carrying away the loot. [Citations.] In order to support a robbery conviction, the taking, either the gaining possession or the carrying away, must be accomplished by force or fear. (See § 211.)" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8.)

Self-Defense

Appellant argues that the trial court erred in not instructing on self-defense (CALCRIM No. 3470). The trial court declined to give the instruction because self-defense is not a defense to robbery and the instructions on self-defense "speak only to the use of force. We have no evidence of the use of force here." There was no instructional error.

It is well settled that self-defense is not a defense to the charge of robbery. (*People v. Costa* (1963) 218 Cal.App.2d 310, 316.) In *People v. Gomez* (2008) 43 Cal.4th 249, our Supreme Court rejected the argument that the defendant can "shift the blame to the victim. It is the conduct of the perpetrator who resorts to violence to further his theft, and not the decision of the victim to confront the perpetrator, that should be analyzed in considering whether a robbery has occurred." (*Id.*, at p. 264.)

The same analysis applies here. As a Target security officer, Preciado had the right to detain appellant and "use a reasonable amount of nondeadly force necessary to protect himself" and to prevent appellant's escape with the stolen property. (§ 490.5, subd. (f)(2).) Because Preciado was making a citizen's arrest, appellant was "'obliged not to resist, and ha[d] no right of self-defense against such force. [Citations.]'. . . ." (*People v. Adams* (2009) 176 Cal.App.4th 946, 952.) Although appellant retained the right to defend himself against excessive force based on the reasonable belief that he was in imminent danger of suffering bodily injury (*id.*, at p. 953), appellant offered no evidence to support such a defense. "It is not error to refuse a request for instructions on self-defense when there is no evidence from which it can be inferred that the defendant feared great bodily harm or death at the hands of the victim. . . ." (*People v. Sedeno* (1974) 10 Cal.3d 703. 718.)

Mistake of Fact

Appellant's argument that the trial court erred in not instructing on mistake of fact is equally without merit. Appellant claimed that he was frightened by the sound of footsteps approaching and was "mistaken" as to who was accosting him. The mistake of fact instruction was a pinpoint instruction similar to imperfect self-defense and not supported by the evidence or the law.[3] (*People v. Burney* (2009) 47 Cal.4th 203, 246 [pinpoint instruction that misstates the law, is argumentative, or not supported by substantial evidence need not be given].) Imperfect self-defense, which is a form of mistake of fact, has no application to robbery. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 126.) "Unreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant's mind." (*People v. Elmore* (2014) 59 Cal.4th 121, 137.) In the case of robbery, the unreasonable belief that appellant was acting under the mistaken belief that he was in peril, does not negate the requisite specific intent for robbery, i.e., the intent to deprive the owner of the property taken. (*People v. Bacigalupo, supra*, 1 Cal.4th at p. 126.)

Mistake of fact can negate criminal intent but requires a showing that the defendant's conduct would have been lawful under the facts as he believed them to be. (CALCRIM No. 3406; *People v. Givan* (2015) 233 Cal.App.4th 335, 345 [mistake of fact instruction not appropriate where the defendant's mistaken belief does not negate an

[3] Under appellant's construction of the law, a thief could assault a store employee, janitor, night watchman, or security guard while fleeing with the stolen goods and claim there was no intent to commit a robbery due to the mistaken identity of the victim. There is no requirement that the shoplifter/robber know the victim is a store employee or has actual or constructive possession of the goods. (*People v. Estes*, *supra*, 147 Cal.App.3d at pp. 26-27.) "Thus, a store employee may be a victim of robbery even though he does not own the property taken and is not in charge or in immediate control of the property at the time of the crime. [Citations.] Nor is it a defense that the victim was a visitor to a store and was not the true owner of money or property taken [citation.]" (*Id.*, at p. 26.)

element of the crime].) Preciado walked up next to appellant, loudly identified himself as Target security, wore a store security uniform and badge, and stood an arm's length away from appellant when he grabbed at the backpack. Preciado stated that appellant turned and they were "face to face" when appellant raised his arm and swung the metal rod at him. Appellant claimed that he heard footsteps behind him but did not hear Preciado order him to stop. On cross examination, appellant admitted there was nothing wrong with his hearing. Other than appellant's self-serving statement that he did not hear Preciado identify himself, there was no evidence that Preciado could have been mistaken, based on his words and uniform, as anything other than a store security guard. The trial court reasonably concluded there was no evidence upon which a mistake of fact instruction could be predicated. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1145 [trial court not required to instruct on a claim-of-right defense unless there is evidence to support the inference that defendant acted with a subjective belief he had a lawful claim to the property].)

A criminal defendant has no due process right to instructions that incorrectly states the law, is argumentative or potentially confusing, or is not supported by substantial evidence. (*People v. Burney*, *supra*, 47 Cal.4th at p. 246; *People v. Moon* (2005) 37 Cal.4th 1, 30.) Appellant makes no showing that that the instructions, as given, denied him a fair trial. (*People v. Rundle* (2008) 43 Cal.4th 76, 151-152.)

The judgment is affirmed,

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David Worley, Judge

Superior Court County of Ventura

Law Offices of John Derrick, John Derrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Tannaz Kouhpainezhad, Deputy Attorney General, for Plaintiff and Respondent.