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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARDO SALMERON,

Defendant and Appellant.

B284926

(Los Angeles County  
Super. Ct. No. VA143932)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed.

Susan Morrow Maxwell, 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, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

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Leonardo Salmeron was convicted of kidnapping to commit robbery (Pen. Code,<sup>1</sup> § 209, subd. (b)(1)) and second degree robbery (§ 211). He challenges his robbery conviction on the ground that the trial court failed to give an instruction sua sponte on attempted robbery as a lesser included offense of robbery. We affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

In January 2017, Jose Martinez had stopped his truck at an intersection to make a right turn when Salmeron opened the passenger door and got in the truck. Salmeron pointed what appeared to be a firearm at a frightened Martinez and told Martinez to drive and to give him money. Martinez told Salmeron that he had not been paid and did not have any money. Salmeron took Martinez's cell phone from the center console and put it in his pocket. Martinez had not given Salmeron permission to take the phone, but he felt unable to prevent him from taking it because he feared Salmeron would shoot him.

Martinez drove as Salmeron directed. Salmeron kept the weapon pointed at Martinez continuously. Martinez was afraid of what would happen if he did not follow Salmeron's demands. He did not feel free to leave the truck.

After approximately half an hour, Martinez saw a police patrol vehicle with a uniformed officer sitting inside. He stopped the truck, immediately exited, and ran to the officer, waving his hands in the air to get the officer's attention. To the police officer, Martinez looked upset and was so scared that he did not

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<sup>1</sup> All further statutory references are to the Penal Code.

want to accompany the officer to confirm that the officer had identified the correct truck.

Police arrested Salmeron and returned the cell phone to Martinez at the scene. Officers found a weapon in the truck's glove box and determined that it was an imitation firearm similar to a pellet gun.

Salmeron was charged with kidnapping for robbery, kidnapping (§ 207, subd. (a)), and second degree robbery. The jury convicted him of both kidnapping for robbery and robbery. Salmeron appeals.

## DISCUSSION

A trial court must instruct on all lesser included offenses supported by substantial evidence. [Citations.] The duty applies whenever there is evidence in the record from which a reasonable jury could conclude the defendant is guilty of the lesser, but not the greater, offense. [Citations.]” (*People v. Duff* (2014) 58 Cal.4th 527, 561.) The court has no duty to instruct on a lesser included offense when there is no evidence the offense was less than that charged. (*People v. Eid* (2014) 59 Cal.4th 650, 656.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

The trial court instructed the jury on robbery (CALCRIM No. 1600) and the lesser included offense of theft (CALCRIM No. 1800). “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,” with the intent to permanently deprive the victim of the property. (§ 211.) Theft, however, does not require force, threats of violence, or the victim’s presence. (§ 484, subd. (a).) As defined

for the jury here, theft consists of taking of property owned by another without the owner's consent and with the intent to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property; moving the property, even a small distance; and keeping the property for any period of time, however brief. (CALCRIM No. 1800.) Evidence of force or fear elevates a taking from a theft to a robbery. (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255; *People v. Webster* (1991) 54 Cal.3d 411, 443 ["Theft is a lesser included offense of robbery, which includes the additional element of force or fear"].)

Salmeron argues on appeal that the court had a duty to instruct the jury sua sponte on attempted robbery as a lesser included offense of robbery, and he claims that by failing to give that instruction the court improperly deprived the jury of the opportunity to "properly weigh the evidence to determine whether the act of placing Martinez's cell phone in his pocket was an attempted robbery." The evidence, however, would not permit a reasonable jury to convict Salmeron of attempted robbery but not robbery. If the jury believed that Salmeron attempted to commit robbery—that is, that he had the intent to commit robbery and took at least one direct but ineffective step toward committing that crime—we are unable to conceive of any way that the jury could have concluded that the robbery was not completed: after entering Martinez's car without permission and demanding money, Salmeron took Martinez's cell phone and placed it in his own pocket while holding Martinez at gunpoint. As there was no substantial evidence to support the theory that Salmeron committed attempted robbery but not robbery, the trial

court did not have a sua sponte duty to instruct the jury on attempted robbery as a lesser included offense.

Salmeron asserts, however, that the evidence left open the questions of whether he used force or fear to take Martinez's cell phone and whether the phone was taken against Martinez's will. The instructions given by the trial court fully guided the jury in addressing these two questions. If the jury had concluded that Salmeron committed an unlawful taking but the element of force or fear was absent, then the jury would have found him not guilty of robbery and convicted him of the lesser included offense of theft. If the jury had concluded that Salmeron did not take the phone against Martinez's will, the jury would either have convicted Salmeron of theft, if it believed that he took the phone without Martinez's consent; or, if the jury found that Martinez consented to Salmeron taking the phone, it would have acquitted Salmeron of both robbery and theft.

Salmeron also argues that because the cell phone was given back to Martinez at the scene, no photographs were taken of the phone, and there was no evidence as to how it was recovered at the scene, there existed "a question as to whether appellant intended to permanently deprive Martinez of his cell phone." Even assuming that post-incident police activity had any relevance to Salmeron's intent at the time he took Martinez's cell phone, the existence of a question as to whether Salmeron intended to permanently deprive Martinez of his phone did not create any duty to instruct on attempted robbery because attempted robbery, like robbery, requires the intent to permanently deprive the victim of his or her property. (§ 21a [“An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual

act done toward its commission”].) If, as Salmeron argues, he had no intent to permanently deprive Martinez of the phone, then he committed neither robbery nor attempted robbery. Salmeron has not established instructional error.

### **DISPOSITION**

The judgment is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.