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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIN MARQUAY SANDERS-
BARRIOS,

Defendant and Appellant.

2d Crim. No. B283889
(Super. Ct. No. 2015009165)
(Ventura County)

A jury convicted Erin Marquay Sanders-Barrios of two counts of second degree robbery (Pen. Code, § 211). The trial court sentenced her to one year in prison. Sanders-Barrios contends: (1) she was entitled to an instruction on assault as a lesser included offense of robbery, (2) insufficient evidence supports her convictions because she only used force to facilitate her escape rather than to steal property, (3) the court erred when it admitted prior acts evidence, (4) the court should have provided jurors additional guidance after they submitted two questions and a statement indicating they were deadlocked, and

(5) the cumulative effect of the errors deprived her of a fair trial. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Sanders-Barrios entered a Target store with a blender box and a reusable bag in her cart. Loss prevention officer George Sanchez saw her put another blender of the same brand in her cart. She also put a microwave, binoculars, bags of candy, and printer ink cartridges in the cart. She removed the security device from a watch and placed it in the cart.

Sanders-Barrios returned to the blender aisle and put one of the two blenders in her cart back on the shelf. After she left the aisle, Sanchez opened the blender box and discovered that it was empty. Sanders-Barrios then put two more items in her cart and went to the cash register.

Sanders-Barrios paid for the candy in her cart, but did not pay for the other items. She covered the blender with the bag of candy and her reusable bag, and pushed her cart out of the store. Sanchez stopped her, identified himself as a loss prevention officer, and asked her to return to the store. Sanders-Barrios ignored Sanchez and continued away from the store. Sanchez grabbed Sanders-Barrios's shopping cart and repeated himself. Another loss prevention officer, Eric Preciado, arrived to assist Sanchez and told Sanders-Barrios the same information. She continued to push her cart away from the store.

Sanchez grabbed one of Sanders-Barrios's wrists, and Preciado grabbed the other. Sanders-Barrios continued to push the shopping cart forward. Sanchez told her he was detaining her for shoplifting and that he was taking her back into the store. Sanders-Barrios struggled with the two men and continued to push the shopping cart. She kicked Sanchez's shin. Sanchez and

Preciado tried to push Sanders-Barrios back to the store. She broke free from Sanchez and knocked over the cart. She and Preciado fell to the ground.

An off-duty police officer arrived and told Sanders-Barrios to stop struggling. She complied, and Preciado handcuffed her. Another police officer arrived and escorted Sanders-Barrios back to the store. At booking, a search of Sanders-Barrios's wallet revealed that the only forms of payment she had on her person were gift cards to stores other than Target and an EBT card that could be used only to purchase food. The prosecution charged Sanders-Barrios with two counts of second degree robbery committed "by means of force and fear."

Prior to trial, the court granted the prosecution's motion to admit evidence of two similar uncharged offenses. In one incident, loss prevention officer Maritza Munos testified that she monitored Sanders-Barrios as she carried a large plastic bag through a Sears store. Munos saw Sanders-Barrios remove the anti-theft device from a speaker, put the speaker into her bag, and go to a restroom. After Sanders-Barrios exited the restroom, another Sears employee went in and saw the speaker inside. Sanders-Barrios then returned to the restroom. When she exited again, the speaker was gone.

When Sanders-Barrios returned to Sears later that day, Munos detained her. Sanders-Barrios had the speaker and a bottle of perfume in her possession. Munos and another loss prevention officer, Theresa Renteria, took Sanders-Barrios to an office and waited for police to arrive.

A few minutes later, Sanders-Barrios pepper sprayed Renteria's face and headed for the door. Munos and another loss prevention officer handcuffed her. When a police officer arrived,

Sanders-Barrios admitted that she had stolen the perfume and speaker and that she pepper sprayed Renteria.

In another incident, a Kohl's loss prevention officer testified that she saw Sanders-Barrios take a jacket into a fitting room. When Sanders-Barrios exited, the jacket was gone. The loss prevention officer followed Sanders-Barrios out of the store and recovered the jacket from her purse.

At the conclusion of trial, Sanders-Barrios requested jury instructions on lesser included offenses, including battery, assault, and commercial burglary. The trial court denied her request. It provided the jury with instructions on the union of act and intent (CALCRIM No. 251), robbery (CALCRIM No. 1600), petty theft (CALCRIM No. 1800), and *Estes*¹ robberies.

During deliberations, the jury asked "Does the use of force after a petty theft raise it to second degree robbery?" and "Does moving stolen property using force constitute second degree robbery?" Counsel for Sanders-Barrios told the court: "I guess I would ask that just [CALCRIM No.] 1600 be given and say you have the law. Here's 1600 only." The court agreed, and directed the jury's attention to CALCRIM No. 1600.

Later, the jury submitted another question: "Please instruct. Vote 11-1 for robbery. What is next step?" The trial court offered to provide additional instructions about deliberations (CALCRIM No. 3551). It asked if there were any objections. There were none. The court so instructed the jury, which returned guilty verdicts the following morning.

¹ *People v. Estes* (1983) 147 Cal.App.3d 23 (*Estes*).

DISCUSSION

Instruction on assault

Sanders-Barrios contends she was entitled to a jury instruction on assault as a lesser included offense of robbery because the information alleged she used “force and fear” to commit her crime. We disagree.

An uncharged lesser offense is necessarily included in a charged offense if the facts alleged in the information encompass all elements of the lesser offense. (*People v. Parson* (2008) 44 Cal.4th 332, 349 (*Parson*).) The trial court has a sua sponte duty to instruct the jury on a lesser included offense if there is substantial evidence that the defendant was guilty of only that offense. (*Id.* at pp. 348-349.)

Robbery is “the felonious taking of personal property in the possession of another . . . accomplished by means of force or fear.” (Pen. Code, § 211.) It is a “continuing offense that [lasts] from the time of the original taking until the robber reaches a place of relative safety.” (*Estes, supra*, 147 Cal.App.3d at p. 28.) A person can thus commit robbery if they peacefully acquire property but use force to remove it, so long as their intent to steal motivates the use of force. (*People v. Anderson* (2011) 51 Cal.4th 989, 994; see Pen. Code, § 20.) Whether a defendant harbors that intent is rarely directly provable, and may be inferred. (*People v. Abilez* (2007) 41 Cal.4th 472, 506-507.) We review whether there is substantial evidence that Sanders-Barrios did not harbor the intent to steal when she used force against Sanchez and Preciado. (*Parson, supra*, 44 Cal.4th at pp. 350-351.)

There is not. Sanders-Barrios admits she intended to steal items from Target. There is no evidence she had abandoned that intent when she used force against Sanchez and Preciado;

the evidence establishes the opposite: After Sanchez identified himself as a loss prevention officer, he grabbed Sanders-Barrios's cart full of stolen goods. Preciado then arrived and identified himself as a loss prevention officer. But instead of abandoning the cart or submitting to their requests, Sanders-Barrios held on to the cart and tried to overpower Sanchez's grasp. She continued to hold on to the cart and push it forward after Sanchez and Preciado grabbed her wrists.

Sanders-Barrios's attempts to retain control over the stolen property while using force to overcome Sanchez and Preciado's resistance evidences her intent to steal the items in the cart. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1257; cf. *People v. Williams* (2013) 57 Cal.4th 776, 787 [use of force in an attempt to escape with stolen property constitutes robbery]; *People v. Pham* (1993) 15 Cal.App.4th 61, 68 [use of force to prevent victim from recovering stolen property constitutes robbery].) Her claim that she had abandoned the stolen goods and was merely trying to escape is not borne out by the evidence. There is no substantial evidence that she only committed an assault. (*People v. Waidla* (2000) 22 Cal.4th 690, 735.) The trial court therefore had no sua sponte duty to instruct the jury on assault.

Sufficiency of the evidence

Sanders-Barrios contends her robbery convictions cannot stand because the prosecution did not prove that her intent to steal—rather than her intent to escape—motivated her use of force against Sanchez and Preciado. We review this claim for sufficiency of the evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 357 (*Hughes*).) And for the reasons discussed above, we conclude that the evidence demonstrates otherwise.

Moreover, based on the instructions given in this case (including CALCRIM No. 251, regarding the union of act and intent, and CALCRIM No. 1600, defining the elements of robbery), “a reasonable juror would understand that [Sanders-Barrios] was required to possess the specific intent to steal prior to or during [her] application of the force” to find her guilty of robbery. (*Hughes, supra*, 27 Cal.4th at p. 363.) We will not disturb that finding on appeal. (*People v. Henry* (2009) 172 Cal.App.4th 530, 536.)

Prior acts evidence

Sanders-Barrios contends the trial court erred when it admitted evidence of the Sears and Kohl’s incidents because it was: (1) dissimilar to the Target robbery, where the need to establish her intent was minimal, and (2) unduly prejudicial. We disagree.

Evidence of a defendant’s prior acts is admissible to prove intent or absence of mistake. (Evid. Code, § 1101, subd. (b).) To admit prior acts evidence, the trial court must determine that: (1) the facts to be proved are material, (2) the evidence tends to prove those facts, and (3) Evidence Code section 352 does not require exclusion of the evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379, abrogated on another point by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190-1191.) We review rulings under Evidence Code sections 352 and 1101 for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

The trial court properly admitted evidence of the Sears and Kohl’s thefts because it was relevant to show Sanders-Barrios’s intent and absence of mistake. Our Supreme Court has “long recognized ‘that if a person acts similarly in similar situations, [the person] probably harbors the same intent in each

instance’ [citations], and that such prior conduct may be relevant circumstantial evidence of the actor’s most recent intent.” (*People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on another ground as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.) In both of the prior incidents, Sanders-Barrios walked out of the stores with concealed, unpurchased merchandise. That tends to show that Sanders-Barrios had the intent to steal when she left Target with merchandise obscured underneath shopping bags. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.) That Sanders-Barrios conceded she had the intent to steal items from Target during her opening statement is not determinative. Her concession occurred three days after the trial court ruled on the admissibility of the prior acts evidence, not before. (*People v. Balderas* (1985) 41 Cal.3d 144, 172, superseded on other grounds as stated in *People v. Martin* (1998) 64 Cal.App.4th 378, 385.)

Moreover, that Sanders-Barrios sprayed a loss prevention officer with pepper spray during the incident at Sears is also relevant. That tends to show that Sanders-Barrios was prepared to use force if necessary to effectuate her theft and evade capture. (*People v. Myers* (2014) 227 Cal.App.4th 1219, 1225-1226.) It also helps to negate her claim that she only used force to defend herself against Sanchez and Preciado. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1096-1097.)

The prior acts evidence was not unduly prejudicial. The testimony about these thefts consumed just two hours of a three-day trial. (*People v. Boyette* (2002) 29 Cal.4th 381, 425 [brief, factual nature of testimony lessens inflammatory impact].) The trial court instructed the jury how to analyze that evidence (CALCRIM No. 375), reducing the danger that jurors would be

misled. (*People v. Lindberg* (2008) 45 Cal.4th 1, 25-26.) And although Sanders-Barrios had not been convicted of the Sears theft at the time of trial, the evidence related to that incident was no stronger or more inflammatory than the Target robbery, decreasing its potential for undue prejudice. (*People v. Tran* (2011) 51 Cal.4th 1040, 1047.) The court did not abuse its discretion when it admitted the prior acts evidence.

Further instructions

Sanders-Barrios contends the trial court should have provided additional guidance to jurors after they submitted their inquiries and a statement they were deadlocked. But she consented to the court's responses to the jury. Her contention is forfeited. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

Cumulative prejudice

Finally, Sanders-Barrios contends the errors alleged here, considered cumulatively, deprived her of a fair trial. But because she identified no error, there was no prejudicial cumulative effect. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 910.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

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