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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN SCHMIDT, Defendant and Appellant.	B281681 (Los Angeles County Super. Ct. No. SA094446)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harry Jay Ford, III, Judge. Affirmed.

Rachel Lederman, 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, Steven D. Matthews, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Jonathan Schmidt (defendant) of second degree robbery when he slapped a 7-Eleven store manager while absconding with a $2.49 can of chilled Starbucks coffee. On appeal, he argues that the trial court erred (1) in allowing the 7-Eleven store cashier and the manager to testify to what they saw on surveillance video that was never authenticated, and (2) instructing the jury, consistent with *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28 (*Estes*), that defendant could be convicted of robbery if he used force or fear in the victim's immediate presence to *carry away* the merchandise. We reject both arguments, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In the late morning of November 17, 2016, defendant entered a 7-Eleven convenience store on Venice Boulevard in Los Angeles, removed a $2.49 can of chilled Starbucks coffee from a cooler, stuffed it in his pants pocket, and started walking toward the door without paying. When the 7-Eleven store clerk asked him what he was doing, defendant told him to "fuck off." The store manager then approached defendant and told him that he "ha[d] to pay for that." Defendant told the manager, "Get out of my way. Fuck you," and then slapped the manager in the face. Defendant then kicked one of the store's two front doors with enough force to shatter it into smithereens.

Defendant fell forward into the shards of safety glass, but picked himself up and walked away.

II. Procedural Background

The People charged defendant with (1) second degree robbery (Pen. Code, § 212.5, subd. (c)),[1] and (2) vandalism with damage exceeding $400 (§ 594). The People also alleged that defendant had served a prior prison term (§ 667.5, subd. (b)) for his 2014 conviction for assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)). The trial court instructed the jury on the charged crimes, as well as on the lesser included offense of theft by larceny. A jury convicted defendant of second degree robbery,[2] but acquitted him of vandalism. The trial court sentenced defendant to prison for three years, comprised of a low-term sentence of two years on the robbery, plus one year for the prior prison term.

Defendant filed this timely appeal.

DISCUSSION

I. Evidentiary Challenge

Defendant asserts that the trial court erred in allowing the 7-Eleven clerk and the manager to testify regarding the contents of the store's surveillance video when that video had not been authenticated. We review a trial court's evidentiary rulings for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.)

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

2 Although defendant, after leaving the 7-Eleven store with the coffee, returned to the store to take a 12-pack of beer, the People at trial argued that the robbery charge was solely for the taking of the coffee.

A. *Pertinent facts*

The 7-Eleven store had two surveillance video systems, including a new system that captured the back of the store where the coolers were located. After the robbery, the 7-Eleven cashier, the 7-Eleven manager, and a police officer watched the portion of the new system's video that corresponded with the time of the robbery; that video depicted defendant removing a can of Starbucks coffee from the cooler and placing it into his pants pocket. The 7-Eleven manager mistakenly thought that the new system, like its predecessor, retained video footage for 30 days; however, the new system deleted video footage after only 10 days. Thus, the pertinent video footage was destroyed before the 7-Eleven manager or law enforcement could preserve it.

The trial court held a pretrial hearing on whether the secondary evidence rule barred the 7-Eleven clerk and 7-Eleven manager from providing oral testimony about the content of the lost video. The trial court ruled that the witnesses could testify about the video, but only that "portion . . . where they saw the defendant purportedly take an item out of the [cooler]."

At trial, the 7-Eleven clerk testified that he could see the top of a can sticking out of defendant's pants pocket, but did not know that it was a Starbucks can until he subsequently watched the surveillance video. The 7-Eleven manager testified that he "saw a Starbucks can inside [defendant's] pocket" because "[i]t was leaning out," and that he recognized the can as a product sold in the store. The manager did not refer to the video until cross-examination, when he stated that he "saw" from "the video" that defendant "took out the coffee from the cooler."

B. *Analysis*

Defendant does not challenge the trial court's ruling on the admissibility of the 7-Eleven clerk's and the manager's testimony under the secondary evidence rule; instead, he argues that their testimony was improper because the video itself was never authenticated.

As an initial matter, defendant forfeited his right to raise a lack of authentication challenge on appeal by not objecting on that specific ground before the trial court. The Evidence Code expressly requires such specificity. (Evid. Code, § 353; *People v. Tully* (2012) 54 Cal.4th 952, 1055.)

Defendant's claim also lacks merit. To be sure, oral testimony about a writing is permissible only if that writing is properly authenticated. (Evid. Code, §§ 1401, subd. (b), 1521, subd. (c).) And a video qualifies as a writing. (*Id.*, § 250; *People v. Gonzalez* (2006) 38 Cal.4th 932, 952.) But a party authenticates a video by making a showing "sufficient to sustain a finding" that the video is "a fair and accurate representation" of what it purports to depict. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267-268; *Gonzalez*, at p. 952; Evid. Code, § 1400.) This showing may be made by the testimony of a person who recorded the video, by a person who "witnessed the event being recorded," "by other witness testimony," or by "circumstantial evidence, content [or] location." (*Goldsmith*, at p. 268.) Here, both the 7-Eleven clerk and manager testified that they saw a can sticking out of defendant's pocket while he was in their 7-Eleven store; indeed, the manager even testified that he saw a *Starbucks* can. This is circumstantial evidence that the video depicting defendant, in their 7-Eleven store, removing a Starbucks can from the cooler and placing it into his pocket was a fair and

accurate representation of what it purported to depict—namely, what occurred moments before the 7-Eleven clerk and manager found defendant with a can in his pocket.

In response, defendant cites *People v. Beckley* (2010) 185 Cal.App.4th 509, 515-516, for the proposition that photographs (and, by extension, videos) may only be authenticated through the testimony of someone with "personal knowledge" of what is depicted in the photograph or video, or by expert testimony that the photograph or video has not been doctored. *Beckley* is distinguishable because it dealt with photographs and videos posted online on a website without password protection, not a video from a surveillance system that is circumstantially corroborated by what witnesses personally observed moments later. To the extent defendant asks us to extend *Beckley* to reach this case, we decline to do so because *Beckley* imposes a specific method by which authentication must occur and such restrictions contravene the Evidence Code's direction that the methods of authentication be flexible. (Evid. Code, § 1410 ["Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved"]; accord, *In re K.B.* (2015) 238 Cal.App.4th 989, 996-998 [declining to follow *Beckley*].)

Lastly, any error in allowing the 7-Eleven clerk and manager to testify about what they saw on the video is harmless because the 7-Eleven manager said he saw a Starbucks can in defendant's pocket with his own eyes and because the 7-Eleven clerk testified that he saw a can of some sort in defendant's pocket with his own eyes.

II. Continued Viability of the *Estes* Doctrine

Defendant next asserts that *Estes*, *supra*, 147 Cal.App.3d 23, was wrongly decided. Because he is liable for robbery only if *Estes* remains good law, defendant reasons, his conviction should be overturned. The continuing viability of *Estes* is a question of law we review de novo. (*People ex rel. Lockyer v. Shamrock Foods* (2000) 24 Cal.4th 415, 432.)

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." (§ 211.) "'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.'" (*People v. Gomez* (2008) 43 Cal.4th 249, 255 (*Gomez*).) *Estes* held that the "force or fear" and "immediate presence" elements of robbery could be satisfied during the asportation phase of the robbery. (*Estes*, *supra*, 147 Cal.App.3d at pp. 27-28.)

We reject defendant's various challenges to *Estes* because they are addressed to the wrong court. Although *Estes* itself is a Court of Appeal decision, our Supreme Court has repeatedly endorsed *Estes*'s interpretation of the law of robbery. (E.g., *Gomez*, *supra*, 43 Cal.4th at p. 261; *People v. McKinnon* (2011) 52 Cal.4th 610, 686-687.) Because we are bound by our Supreme Court's rulings (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we must decline defendant's invitation to revisit *Estes*.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ