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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. RAQUEL ANDREA ALCANTAR, Defendant and Appellant.	2d Crim. No. B293484 (Super. Ct. No. 2018007304) (Ventura County)

Raquel Andrea Alcantar appeals from the judgment after a jury convicted her of second degree robbery. (Pen. Code,[1] §§ 211, 212.5, subd. (c).) The trial court suspended imposition of sentence and placed Alcantar on three years of formal probation. It ordered her to pay a $300 restitution fine (§ 1202.4), a $10 local crime prevention fine (§ 1202.5), a $40 court operations assessment (§ 1465.8), a $534.48 booking fee (Gov. Code,

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

§§ 29550, 29550.1), and a $30 court facilities assessment (Gov. Code, § 70373).

Alcantar contends the trial court erred when it: (1) rejected her request for a jury instruction on self-defense, (2) improperly limited her closing argument, and (3) provided special jury instructions that were incorrect, ambiguous, and redundant. She contends these errors, considered cumulatively, deprived her of a fair trial. She also asks us to stay the fines, fee, and assessments imposed, and remand the case for an ability-to-pay hearing. We affirm.

FACTS

M.G. saw Alcantar pick up a phone charger on display at his Oxnard grocery store. A few minutes later he saw the charger in Alcantar's purse. He walked up to her and said, "Ma'am, I saw you put the charger in your purse. Can I please have it?" Alcantar did not respond.

As Alcantar walked away, M.G. again asked for the phone charger. Alcantar again did not respond. M.G. continued to ask her to return the charger, and said he would detain her if she left the store with it.

Alcantar ignored M.G. When she left the store, he put his hands in front of her and said, "Let's go to the office." Alcantar reached into her pocket and pulled out a taser. M.G. grabbed her arm as she attempted to turn it on. During the ensuing struggle, Alcantar fired the taser and hit M.G. in the arm and chest. He eventually pulled her back inside the store, where he and one of his employees were able to knock the taser out of her hand and handcuff her.[2]

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[2] The prosecution played surveillance video of the struggle for the jury.

M.G. took Alcantar to the store office and called the police. The responding officer found the phone charger and taser in Alcantar's purse.

DISCUSSION

Self-defense instruction

Alcantar contends the trial court erred when it rejected her request for a self-defense instruction. We independently review this contention (*People v. Manriquez* (2005) 37 Cal.4th 547, 581), and reject it.

1. Relevant proceedings

At the conclusion of testimony, Alcantar requested that the trial court instruct the jury that "self-defense is a defense to the specific intent element of robbery." She argued the evidence showed that M.G. initiated physical contact with her, thus giving her the right to defend herself.

The trial court rejected Alcantar's request. The court noted that self-defense is not a defense to robbery. Even if it were, the court said, Alcantar could not have reasonably believed she was in danger of suffering bodily injury when she brandished her taser: She did so *before* M.G. grabbed her. As such, there was insufficient evidence to warrant a self-defense instruction.

2. Discussion

It is well-established that self-defense is not a defense to robbery. (See, e.g., *People v. Arauz* (1970) 5 Cal.App.3d 523, 533, disapproved on another ground by *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 716, fn. 14; *People v. Costa* (1963) 218 Cal.App.2d 310, 316; *People v. Rivera* (1925) 75 Cal.App. 222, 228.) As our Supreme Court has stated, a robbery defendant may not "shift the blame to the victim." (*People v. Gomez* (2008) 43 Cal.4th 249, 264.) "It is the conduct of the

perpetrator who resorts to violence to further [their] theft, and not the decision of the victim to confront the perpetrator, that should be analyzed in considering whether a robbery has occurred." (*Ibid.*)

Alcantar asserts she was nevertheless entitled to a self-defense instruction because it was her belief that she needed to protect herself from M.G.—not her intent to steal—that motivated her use of the taser. (Cf. *People v. Anderson* (2011) 51 Cal.4th 989, 994 [intent to deprive victim of property must underlie use of force or fear].) But M.G. had the right to detain Alcantar because he suspected her of taking a phone charger. (§ 490.5, subd. (f)(1).) And when making that detention, M.G. had the right to "use a reasonable amount of nondeadly force necessary to protect himself . . . and to prevent [Alcantar's] escape." (*Id.*, subd. (f)(2).) Alcantar, in turn, was "obliged not to resist, and ha[d] no right of self-defense against such force." (*People v. Adams* (2009) 176 Cal.App.4th 946, 952-953.) Although she retained the right to defend against *excessive* force if she believed she was in imminent danger of suffering bodily injury (*id.* at p. 953), she offered no evidence to support that belief. The trial court thus properly rejected her request for a self-defense instruction. (*People v. Sedeno* (1974) 10 Cal.3d 703, 718, abrogated on another point by *People v. Breverman* (1998) 19 Cal.4th 142, 165.)

Closing argument

Alcantar next contends the trial court violated her due process rights when it prohibited her from discussing self-defense during closing argument. We disagree.

1. Relevant proceedings

When discussing closing arguments, Alcantar asserted she should be allowed to argue self-defense despite the trial court's rejection of her request for a self-defense instruction. The court replied that arguments "must be based on the evidence." It would "not permit argument of a defense that ha[d] not been allowed by the [c]ourt."

Alcantar objected. She claimed the trial court's ruling prevented her from arguing that she did not have the intent to steal, which violated her right to counsel, denied her a fair trial, and prevented her from mounting an adequate defense. The court said that Alcantar could argue lack of intent; she just could not argue self-defense.

During her closing argument, Alcantar argued that she did not use force or fear either to take the phone charger or to effect her escape. She pulled out her taser because she did not want M.G. to touch her.

2. Discussion

A criminal defendant has the right to present a closing argument to the jury. (*People v. Simon* (2016) 1 Cal.5th 98, 147.) A trial court may nevertheless take steps to "'ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial.' [Citations.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 743.) This includes limiting the argument to "relevant and material matters" (§ 1044), to facts in evidence (*People v. Farmer* (1989) 47 Cal.3d 888, 922, abrogated on another point by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6), and to "defenses supported by substantial evidence" (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386 (*Ponce*)). We review the court's decision to limit a

defendant's closing argument for abuse of discretion. (*Simon*, at p. 147.)

There was no abuse of discretion here. For a defendant to claim that they acted in self-defense, there must be evidence that they "actually and reasonably believe[d] in the need to defend" themselves. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) None of the evidence presented at trial showed that Alcantar harbored such a belief. Thus, because Alcantar's self-defense theory was not supported by substantial evidence, the trial court did not err when it rejected her request to address it in closing argument. (Cf. *Ponce*, *supra*, 44 Cal.App.4th at pp. 1389-1390 [trial court correctly prevented defendant from arguing he had been framed where evidence did not support that theory].)

Special jury instructions

Next, Alcantar contends the special jury instructions that defined an *Estes* robbery[3] and described the merchant's privilege[4] were incorrect, ambiguous, and redundant, and lowered the prosecution's burden of proof. We again disagree.

1. Relevant proceedings

The trial court instructed the jury that Alcantar was guilty of robbery if the prosecution proved that: (1) she took property that was not her own, (2) the property was in the possession of another person, (3) the property was taken from the other person or [their] immediate presence, (4) the property was taken against that person's will, (5) Alcantar used force or fear to take the property or to prevent the person from resisting, and (6)

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[3] See *People v. Estes* (1983) 147 Cal.App.3d 23.

[4] See section 490.5, subdivision (f)(1) & (2).

when she used force or fear, she intended to deprive the owner of the property permanently. (See CALCRIM No. 1600.)

The prosecution requested two special jury instructions on robbery. The first related to *Estes* robberies:

> Mere theft becomes robbery if the perpetrator[,] having gained possession of the property without use of force or fear, resorts to force or fear while retaining or carrying away the property. In order to support a robbery conviction, the taking—either the gaining possession of or the retaining or carrying away—must be accomplished by force or fear.
>
> The use of force or fear to escape and otherwise retain even temporary possession of the property constitutes robbery.

The second related to the merchant's privilege:

> A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises.
>
> In making the detention a merchant may use a reasonable amount of non-deadly force necessary to protect [themselves] and to prevent escape of the

person detained or the loss of tangible or intangible property.

Alcantar objected to both special instructions. As to the first, she argued that it was redundant. And the case on which it was based—*Estes*—had been "around for quite a while," thus the Judicial Council would have added it to CALCRIM No. 1600 if further instruction were necessary.

The trial court agreed that parts of the instruction were redundant. The court was nevertheless inclined to give it, though without the second sentence because CALCRIM No. 1600 already covered that issue. Alcantar responded that the court should give the instruction in its entirety if was going to do so over her objection. The court did so.

As to the second special instruction, Alcantar again argued that CALCRIM No. 1600 already covered the issue. The prosecution responded that the instruction provided clarification absent from CALCRIM No. 1600. The trial court determined that the instruction was a correct statement of law and agreed to give it.

2. Discussion

The trial court should instruct the jury on "'all general principles of law relevant to the issues raised by the evidence.'" (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) This includes providing, upon request, "legally correct and factually warranted pinpoint instructions [that] elaborate and clarify other instructions." (*People v. Hughes* (2002) 27 Cal.4th 287, 362.) But the court need not give a pinpoint instruction if it is argumentative. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1244.) An instruction is argumentative if it "recites facts drawn

from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law" or if it is "'"of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]"' [Citation.]" (*Ibid*.)

We independently determine whether jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) The abuse of discretion standard applies to whether a trial court properly grants a request for pinpoint instructions. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 497; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1297.)

a. Special instruction #1

Alcantar asserts the first sentence of special instruction #1 ("mere theft becomes robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while retaining or carrying away the property") misstates the law because: (1) its use of "becomes" implies that a robbery always occurs if the defendant uses force or fear to retain or carry away the property, and (2) the use of "while" implies that the use of force can be incidental to the taking of the property. Alcantar is incorrect. Our Supreme Court has used language almost identical to that in the special instruction to define an *Estes* robbery. (See *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8.)

Alcantar asserts the second sentence of special instruction #1 ("in order to support a robbery conviction, the taking—either the gaining possession of or the retaining or carrying away—must be accomplished by force or fear") is redundant. But when the trial court offered to remove this

sentence, Alcantar asked that it be left in. She cannot challenge it now. (*People v. Harris* (2008) 43 Cal.4th 1269, 1293.)

Alcantar argues the third sentence of special instruction #1 ("the use of force or fear to escape and otherwise retain even temporary possession of the property constitutes robbery") is ambiguous because "[i]t is unclear what 'otherwise retain' means in relation to escape, which of course is the only circumstance that would escalate the theft to a robbery." We disagree. While a robbery *continues* until the robber reaches a place of temporary safety, its *commission* does not require the robber to escape with the property. (*People v. Pham* (1993) 15 Cal.App.4th 61, 65-68.)

Finally, Alcantar asserts the third sentence of the instruction's use of "temporary" contradicts the sixth element of CALCRIM No. 1600 ("when the defendant used force or fear to take the property, she intended to deprive the owner of the property permanently"). We see no contradiction. Possession is different than intent.

b. Special instruction #2

Alcantar claims special instruction #2 is argumentative and "disproportionally weighted in favor of the prosecution" since the trial court denied any self-defense instruction or argument. But as set forth above, the court properly rejected Alcantar's request for a self-defense instruction, and properly limited her closing argument. Moreover, as Alcantar concedes, the special instruction correctly states the merchant's privilege. (§ 490.5, subd. (f)(1) & (2).) And it does so in a neutral manner, without implying that any particular conclusion should be drawn from the evidence or directing the jury to draw inferences in favor of the prosecution. The trial

court thus did not abuse its discretion when it provided the special instructions.

Cumulative error

Alcantar contends the judgment should be reversed because the errors that occurred at trial, considered cumulatively, violated her due process right to a fair trial. But we rejected all of Alcantar's claims of error. She thus cannot show cumulative prejudice. (*People v. Jablonski* (2006) 37 Cal.4th 774, 810.)

Fines, fee, and assessments

Finally, Alcantar contends the $300 restitution fine, $10 local crime prevention fine, $534.48 booking fee, $40 court operations assessment, and $30 court facilities assessment imposed at sentencing should be stayed and the case should be remanded for the trial court to conduct an ability-to-pay hearing. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164.) We disagree. Though the court found that Alcantar did not have the ability to pay the cost of the presentence investigation report, it found that she did have the ability to pay the other fines, fee, and assessments imposed. Alcantar does not substantively challenge that finding. We accordingly reject her contention.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Teresa Estrada-Mullaney, Judge

Superior Court County of Ventura

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