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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALFIE FRANCIS, Defendant and Appellant.	B216557 (Los Angeles County Super. Ct. No. LA061029)

APPEAL from a judgment of the Superior Court of Los Angeles County, Darlene Schemp, Judge. Affirmed.

Maria Morrison, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Alfie Francis appeals the judgment entered following his conviction by jury of robbery. (Pen. Code, § 211.) Francis contends the conviction is not supported by substantial evidence and the trial court committed instructional error. We reject these claims and affirm the judgment.

BACKGROUND

1. *The testimony of the victim.*

On January 14, 2009, Ivan Flores rode a bicycle to the Big Lots store on Vineland Avenue in North Hollywood, arriving before the store opened at 9:00 a.m. Flores removed the front wheel of the bicycle and placed the bicycle and the wheel between shopping carts in front of the store. Flores entered the store when it opened and was inside for no more than five minutes. When he returned to the shopping cart area, the bike and the front wheel were gone. Flores walked south on Vineland Avenue and stood in the center of the median. From there he saw Francis carrying the bicycle on his right shoulder and the front wheel in his left hand. Francis put the front wheel onto the bicycle and began riding it south on Vineland Avenue. Flores followed Francis on foot to Magnolia Boulevard, which is about two city blocks from the Big Lots store. Francis crossed Vineland Avenue and stopped near a video store to conceal a backpack and a black plastic bag he had been carrying.

Francis then rode the bicycle past a Ralph's grocery store on Magnolia Boulevard. Flores enlisted the assistance of a male exiting the Ralph's parking lot in a car. Flores and the male followed Francis on Magnolia Boulevard to the traffic light at Riverton Avenue. Francis crossed the street on the bicycle and entered the parking lot of a motel. Flores got out of the car at the corner of Riverton Avenue and Magnolia Boulevard and confronted Francis as Francis rode out of the motel parking area. Flores stood in the path of the bicycle and told Francis the bicycle was his. Flores put his hands on the handlebars to prevent Francis from leaving. Francis asked Flores to move and, when Flores refused, Francis twisted Flores's finger causing Flores to release the handlebars. Flores again demanded the bicycle but Francis pushed him and said he found the bike and

it was his. Francis got off the bicycle and began walking it. Flores grabbed Francis, tripped him and put him in a headlock.

As Francis and Flores struggled, retired Los Angeles Police Officer Lyle Killpatrick, who was in the area providing security for a film crew, told Flores to release Francis. Other police officers arrived and took Francis into custody. Flores indicated Francis smelled of alcohol and seemed to be intoxicated.

Flores estimated the distance between the Big Lots and the confrontation at a little more than half a mile. Flores first saw Francis approximately four minutes after he noticed his bike was missing and estimated the confrontation occurred less than 15 minutes after he noticed his bike was missing. Flores did not yell at Francis during the pursuit. Flores testified he was 50 yards from Francis during the pursuit and sometimes farther.

2. *Other evidence*.

Officer Killpatrick testified he arrived at the filming site at approximately 10:00 a.m.

Francis waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] and told a detective he saw the bicycle in front of the store and thought it probably belonged to someone but decided to take it anyway. Francis said the owner of the bicycle attacked him and they started wrestling.

3. *Instructions and verdict*.

The trial court instructed the jury on robbery and the lesser included offense of theft. Over Francis's objection, the trial court defined robbery in a modified version of CALJIC No. 9.40 offered by the prosecutor.

4. *Defense counsel's argument*.

Defense counsel argued the time and distance between the theft and the confrontation suggested Frances did not intend to rob Flores and, where circumstantial evidence permits two reasonable conclusions, the jury must adopt the one pointing to innocence. Defense counsel noted it initially was unclear who was at fault in that Officer Kilpatrick ordered Flores to release Francis and Francis told the detective Flores attacked

him. Also, Francis claimed the bike was his during the confrontation and in the statement to the detective. Defense counsel concluded the evidence showed Francis did not know the bike belonged to Flores and there was no evidence Francis had the intent to deprive Flores of the bike at the time of the confrontation, which might have occurred as much as an hour after Francis obtained the bike. Defense counsel also noted Flores admitted Francis was drunk and referred the jury to the instruction on voluntary intoxication which provides: "If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether the defendant had the required specific intent."

DISCUSSION

1. *The evidence supports the conviction of robbery.*

Francis claims the theft of the bicycle was complete before Flores confronted him because Francis had reached a place of temporary safety and there was no substantial evidence he used force or fear during the asportation of the bicycle. Francis claims Killpatrick's testimony he arrived at the location at 10:00 a.m. supports the inference the confrontation occurred an hour after the initial taking. Francis notes Flores was never closer than 50 yards from Francis and he said nothing to Francis while he followed him on foot or in the car. At the point of the confrontation, Francis was riding the bicycle back in the direction from which he had come. Francis concludes the evidence showed he subjectively believed he had reached a place of temporary safety. Further, given the spatial and temporal distance from the initial taking, as well as the absence of any indication he was being pursued, this belief was objectively reasonable. Francis concludes the force or fear element did not arise during the asportation and the conviction of robbery must be reversed.

Francis's argument is not persuasive. Robbery is defined as "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." (Pen. Code, § 211.) A robbery continues until " 'the loot [has been] carried away to a place of temporary safety.' " (*People v. Gomez* (2008) 43 Cal.4th 249, 256.) Thus, "robbery can be

accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away." (*Ibid.*) The force or fear employed to effectuate the removal of the possessor's property need not occur simultaneously with the asportation. "It is sufficient to support the conviction that [the defendant] used force to prevent the . . . retaking [of] the property and to facilitate his escape." (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.)

Viewed in the light most favorable to the judgment (*People v. Johnson* (1980) 26 Cal.3d 557, 578), the evidence discloses Flores exited the Big Lots store, found the bicycle missing and went to the median of Vineland Avenue. From there he saw Francis carrying the bicycle and the front wheel. Flores followed Francis and saw Francis put the front wheel on the bicycle and thereafter ride it on Vineland Avenue and Magnolia Boulevard. At the corner of Magnolia Boulevard and Riverton Avenue, Francis entered a motel parking lot, turned around and rode out of the parking lot without alighting from the bicycle. At that point, Flores confronted Francis and demanded the bicycle. Thus, Flores pursued Francis continuously, first on foot and then in a car, and Francis continuously was in flight after he took the bicycle. Francis remained on the bicycle except when he stopped to conceal a backpack. He did not alight, even at traffic lights, until Flores blocked his path and put his hands on the handlebars. Flores testified this occurred 15 minutes after he found the bicycle missing and half a mile from the Big Lots store.

From this evidence, it is clear Francis did not reach a place of temporary safety with the bicycle prior to the confrontation with Flores. Francis asserts he is unaware of any case that has affirmed a conviction of robbery on facts similar to those presented here. However, we find *People v. Gomez, supra,* 43 Cal.4th 249, not only similar but controlling.

In *Gomez*, the defendant broke into a restaurant and took property in the early morning hours when no one was present. While the defendant remained on the scene, the manager of the restaurant arrived and noticed damage. The manager returned to his vehicle and called 911. While speaking to the police dispatcher, the manager saw the

defendant leave by a side door. The manager drove behind the defendant while the manager remained on the phone with the dispatcher. The manager did not intend to apprehend the defendant but wanted to help the police find him. As the manager followed at a distance of 100 to 150 feet, defendant fired two shots at him. *Gomez* rejected the claim this evidence was insufficient to support a robbery conviction because the victim had not been present when defendant took the money. *Gomez* held the evidence was sufficient to support the finding the defendant used force to retain stolen property that was in the manager's immediate presence when the force was used.

Francis seeks to distinguish *Gomez* on the ground the manager was in immediate pursuit of the defendant and the defendant was aware he was being pursued. However, the defendant in *Gomez* was not immediately aware he was being pursued. The defendant left by a side door while the manager was in a vehicle calling 911. At some point thereafter, the defendant "realized he was being followed" and fired two shots at the manager. (*People v. Gomez, supra,* 43 Cal.4th at p. 265.) Here, although Francis may initially have been unaware he was being pursued by Flores, he realized he had been followed when Flores confronted him at Riverton Avenue and Magnolia Boulevard. Thus, Francis used force to retain stolen property in the owner's immediate presence. This evidence abundantly supports the robbery conviction. (Accord *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 224 [immediate presence requirement of robbery satisfied where the defendant, after stealing property belonging to the victim but not from the victim's presence, uses forcible resistance to keep the property]; *People v. Estes, supra,* 147 Cal.App.3d at p. 28 [use of force to retain stolen property and remove it from the immediate presence of a security officer is sufficient to support a conviction of robbery].)

2. *Instructional error*.

Over Francis's objection, the trial court gave a modified version of CALJIC No. 9.40 offered by the prosecutor. The prosecutor's modification of the instruction is italicized in the following quotation of the instruction as given:

"Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property is guilty of the crime of robbery in violation of Penal Code section 211.

"The word 'takes' or 'taking' requires proof of (1) taking possession of the personal property, and (2) carrying it away for some distance, slight or otherwise.

" 'Immediate presence' means an area within the alleged victim's reach, observation or control, so that he could, if not overcome by violence or prevented by fear, retain possession of the subject property.

" ' Against the will' means without consent.

"In order to prove this crime, each of the following elements must be proved:

"1. A person had possession of property of some value however slight;

"2. The property was taken against the will of that person;

"3. The taking occurred from the person or his immediate presence and was accomplished through the use of force or fear; or *Force or fear was used in order to prevent a person from recapturing his property, and the force or fear was used in the person's immediate presence; and*

"4. The property was taken with the specific intent permanently to deprive that person of the property." (Italics added.)

Francis contends the instruction given by the trial court erroneously failed to require the jury to find the "force or fear" and "immediate presence" elements were met during the initial taking or asportation of the property. Thus, the instruction permitted the jury to convict Francis of robbery even if the force or fear occurred after Francis had reached a place of temporary safety. Francis claims the modified instruction relieved the prosecution of its burden of proving an element of the offense and thereby deprived Francis of his right to due process and jury trial.

Francis notes the current version of CALJIC No. 9.40 requires the jury to find, inter alia, "The property was taken from that person or from [his] [her] immediate presence, either at the time of the taking or while the property was being

carried away . . . .” The current version of CALJIC No. 9.40 additionally states, in a provision that appears in brackets: “[The carrying away phase of a robbery continues for as long as the property is being carried away to a place of temporary safety.]” (CALJIC No. 9.40.)

Francis complains the prosecutor seized on the erroneous instruction and argued Francis was guilty of robbery if the property was taken with the specific intent to deprive and force was used to prevent recapture of the property in the immediate presence of the owner. The prosecutor told the jury: “You have to decide whether he stole the bicycle and whether he used force or fear to prevent Mr. Flores from recapturing his property. That’s what you have to decide. Nothing more, nothing less.” Francis argues it was questionable whether force was applied during the asportation of the property. Therefore, the People cannot show the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 22-24 [17 L.Ed.2d 705].)

We conclude the instruction given by the trial court correctly stated the elements of robbery and the failure of the instruction to address the concept of reaching a place of temporary safety does not require reversal. In reaching this conclusion, we note Francis did not defend on the ground he could not be convicted of robbery because he had reached a place of temporary safety. Rather, Francis claimed he was not guilty of robbery because he lacked the intent to deprive Flores of the bicycle in that he was intoxicated and was unaware Flores was the owner of the bicycle, and Francis did not forcibly retain the bicycle, rather Flores attacked him.

Consistent with these theories of defense, Francis did not request an instruction that addressed the duration of the asportation phase of robbery or the concept of reaching a place of temporary safety. “A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]” (*People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. Jones* (1996) 42 Cal.App.4th 1047, 1055.)

Instead, Francis requested instruction in the words of CALCRIM 1600, which, like the modified instruction given by the trial court, does not state asportation continues until a place of temporary safety has been reached. Francis has therefore forfeited the claim of instructional error.

Francis seeks to avoid this conclusion by pointing out the Bench Notes for CALCRIM 1600 indicate: "If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28 . . . .)" However, Francis did not refer to the Bench Notes when he requested CALCRIM 1600 or request instruction on the asportation issue or reaching a place of temporary safety.

Francis next contends defense counsel rendered ineffective assistance in failing to seek instruction on the issue of reaching a place of temporary safety. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance was deficient and the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218.)

Here, it appears defense counsel made a tactical decision to defend on the basis that Francis lacked the intent to rob Flores rather than on the ground Francis had reached a place of temporary safety. In reviewing a claim of ineffective assistance of counsel that involves strategic or tactical decisions by counsel, " ' "there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " [Citation.] . . . [¶] In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. ([Citation]; see also *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [on appeal, a conviction will be reversed on the ground of ineffective assistance of counsel "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission"].)' [Citation.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.)

Because defense counsel's decision regarding the manner in which to approach the defense of this case appears reasonable, the claim of ineffective assistance of counsel fails. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437 [we reverse only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission].)

In sum, although instruction in the words of the current version of CALJIC No. 9.40 might have been preferable to the instruction given, the trial court's use of the modified instruction offered by the prosecutor does not require reversal.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.