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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW CALLOWAY,

Defendant and Appellant.

A105382

(San Francisco County
Super. Ct. No. 190040)

I.

INTRODUCTION

Appellant Matthew Calloway appeals from his criminal conviction and subsequent sentence, arguing that: (1) the prosecutor committed prejudicial misconduct during his closing argument to the jury; (2) the trial court erred in failing sua sponte to instruct the jury on the crime of battery, which appellant claims is a lesser included offense to robbery, the charged crime for which he was convicted; and (3) his conviction for grand theft must be reversed because it is subsumed by the robbery conviction. Except for the reversal of appellant's grand theft conviction, which the Attorney General concedes, we affirm the judgment.

II.

A. Procedural Background

A three-count criminal information was filed on July 29, 2003,¹ by the San Francisco District Attorney's Office charging appellant with one count each of attempted carjacking (Pen. Code, §§ 215/664)²; robbery (§ 212.5, subd. (c)); and resisting arrest (§ 148, subd. (a)(1)). The information also alleged that appellant had three prior criminal convictions for receiving stolen property (§ 496.1); sale/transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a); and second degree burglary (§ 459), for which he was imprisoned, and that he had not remained custody free for a period of five years, within the meaning of section 667.5, subdivision (b).

A jury trial commenced on Monday, September 22. Prior to jury selection, the trial court ruled on motions in limine submitted by counsel and ruled, among other matters, that if appellant testified, he could be impeached by mention of his prior convictions for second degree burglary and sale of a controlled substance. The court reserved ruling on the admissibility of appellant's prior for receiving stolen property. The court also ruled that defense counsel could not refer to the current charges against appellants as "strikes," but could refer to them as "violent" or "serious" crimes. After jury selection, but before opening statements, at appellant's request the court agreed to bifurcate the prior prison term allegations (§ 667.5, subd. (b)) in the information, and also granted a motion to limit a proposed defense expert's testimony on the effect of appellant's voluntary intoxication to the issue of whether appellant actually formed the specific intent required for the charged crimes.

Testimony began on the afternoon of Tuesday, September 23, with the prosecution resting late that day. The defense case consumed most of the following day, while the third day was devoted largely to settling jury instructions, closing arguments of counsel,

¹ All of the events discussed in this opinion occurred in 2003 unless otherwise stated.

² All subsequent unspecified section references are to the Penal Code.

and instructions to the jury. The jury deliberated all day Friday, September 26, and returned its verdicts the following Monday, September 29, finding appellant not guilty of attempted carjacking (count one), and resisting arrest (count three), but guilty of robbery (count two), and guilty of attempted grand theft auto, which is a lesser included offense to carjacking (§§ 487, subd. (d)(1)/664).

Before the jury was discharged, appellant waived a jury trial on the three prior prison term allegations, and those allegations were tried to the court on October 29. At that time, the trial court found allegations one and two to be true, but reserved its ruling as to allegation three because of some doubt as to whether it involved a felony conviction. That remaining prior prison sentence was found to be true at the time of sentencing.

At sentencing, the court selected the robbery conviction (count two) as the principal term, and sentenced appellant to the midterm of three years. A one-year sentence was imposed for the attempted grand theft charge (lesser to count one), but stayed pursuant to section 654. Two of the prior prison term allegations were stricken by the court in the interests of justice, and the court imposed a consecutive one-year term for the remaining prior prison term allegation. Thus, an aggregate state prison term of four years was imposed.

This appeal followed.

B. Factual Background

1. Prosecution Case

Shui-Lan Lee testified that she parked her 1987 Toyota Camry on McAllister Street near Franklin at approximately 8:20 a.m. on May 21 so she could visit the San Francisco Unified School District office nearby and pick up school applications for her nephew and a friend. She first saw appellant while she was parking, and then saw him again as she was crossing McAllister Street, when he “doubled back” in her direction. He looked “well-kept,” not like a homeless person, and was not weaving when he walked. Ms. Lee was carrying a fanny pack on her shoulder. She asked appellant if the school district office was open, and he answered: “Yeah, yeah, yeah. They’re open,”

while looking at the keys she held in her hand. Appellant then jerked Ms. Lee's hand forward, causing her fanny pack to slide down to her elbow. Appellant started to pull Ms. Lee towards where her car was parked while pulling on the keys she held in her hand. As he was tugging to get her keys, appellant kicked Ms. Lee in her knee.

Finally, Ms. Lee dropped one of her keys and noticed blood on the ground. Her finger was cut from the struggle. As she stooped to pick up the key, she saw appellant at her car door fumbling with her remaining keys trying to get in. She then saw a police car heading their way through traffic, and she grabbed appellant and tried to pull him toward the advancing police car. Officers got out of the car, ran up, and subdued appellant. While the police were holding appellant down so they could handcuff him, appellant was yelling, "No. I don't want to go back there. I'm in big trouble now. I don't want to go back there."

San Francisco Police Officer Bruce Lovell was one of the officers who came to Ms. Lee's aid on the morning of May 21. The other two officers in the squad car were Honnibal and Custer. Lovell heard Ms. Lee scream and saw her struggle with appellant near her car. Lovell and Officer Custer exited their vehicle (Honnibal was driving) and ran up to the scene. A passerby had grabbed appellant in a bear hug, and the officers took control and arrested appellant. Lovell noticed that Ms. Lee's hand was bleeding. Appellant refused to comply with the officers' command to submit to arrest and tried to kick them. Nevertheless, they got him down on the ground and effected the arrest. During this process, appellant yelled, "I don't want to go back there."

Officer Custer also testified about being stuck in traffic while on patrol when they heard a woman screaming. He and Officer Lovell exited their car, ran to the scene and found appellant and Ms. Lee wrestling near a Camry. It looked like appellant was trying to get into the vehicle. As they approached, another civilian grabbed appellant and was holding him in a bear hug until the officers arrived. They then struggled with appellant while trying to effect his arrest. Appellant was struggling, kicking, and tried to bite one of the officers. Custer also heard appellant say that he "[did not] want to go back," and "[l]et me go."

Officer Custer was experienced in arresting people who were under the influence of LSD. He testified that such persons reach out, make weird gestures, or talk to themselves. Appellant did not exhibit any of that behavior.

2. Defense Case

Appellant was 40 years old and had been a professional house painter for over 17 years. He testified that from age 28 he had used drugs, including marijuana, LSD, and cocaine. Beginning on Friday, May 17, when he got off work, appellant started binging on drugs. Over the weekend he smoked crack and drank beer. On Sunday evening he bought more crack, and smoked it from about 10:00 p.m. until 3:00 a.m. He also took two tabs of LSD, one on Sunday, and the second one on Monday morning.

Early on the morning of May 21 he thought someone was knocking on his door and yelling around his window. He looked out his back window and saw people on his patio. Appellant called 911 and two police officers came to his house in response. However, they could find no one outside, and they left without further investigation. About an hour later, appellant felt someone was still outside his house. He figured these people were out to get him, so he left the house, driving first to San Francisco General Hospital. While there, he told a police officer there what he sensed. The officer said he must be drunk, and ordered him to leave the hospital. After admitting two prior convictions for burglary and receiving stolen property, appellant testified that he drove next to the police station at 850 Bryant Street to report what he had sensed at his home. They refused to arrest appellant for his own protection. At some point, his van ran out of gas near the federal appeals court building on Seventh and Mission. He next went to the Arlington Hotel to see a friend, but was denied admittance there.

Around 5:00 a.m. he found himself at the federal building. He knew once he was around security people he would feel safe. The security guard, who suspected that appellant was drunk, called MAPP to take appellant to detox. MAPP transported appellant again to San Francisco General Hospital, where the same police officer he ran into earlier was still on duty. The officer told the MAPP attendant that there was no need to admit appellant. Because appellant feared going home, he took the bus "back

downtown.” He again entered the federal building, but left when security guards threatened to arrest him if he did not leave. Before leaving, he found out where the FBI office was and went there, but it was closed. When he left he was looking for protection, and hoping a police car would come by.

It was then that appellant saw Ms. Lee leaving her car nearby. He claimed he did not see her face because it was “blurred,” but he heard her keys jingle. He thought that if he could get her keys and lock himself in her car and sit there, he would be safe. He admits struggling with Ms. Lee over her keys. He managed to take them but was stopped by the police as he tried to enter her car. As to the police officers, appellant claimed: “I don’t know these police officers. It don’t really matter. These were the same police officers out to kill me. My enemies got me now. They got me. And I know these are the people that were chasing me, because I don’t see no faces.”

At that time, appellant was still high from having ingested crack cocaine and LSD. He claimed his fear made his vision blurred, although he could hear normally. He wanted to get into Ms. Lee’s car and hide from his enemies. He felt that, with more and more people on the streets at that time of day, there was insufficient time for him to return safely to his disabled van. His fear stemmed from the fact that he lived in a bad neighborhood infested by violent gang activity. For that reason, when someone knocks on a person’s door at home unexpectedly, the person becomes fearful.

The defense also called to testify appellant’s friend, Moses Taylor. He explained that appellant’s behavior appeared normal on the Friday before the incident, but by Monday evening when he next saw him, appellant was in a rage and commented, “They’re after me.” Mr. Taylor took appellant out for something to eat. As they drove to the fast food restaurant, appellant was raging in the car talking to “someone anonymous.” During the time they were out appellant looked “spooked” or “bewildered.” Mr. Taylor never knew appellant to be violent.

The last witness called by the defense was Dr. Roland Levy, a psychiatrist. He explained that cocaine is a stimulant drug that, in excess, can cause paranoia and hallucinations. It can create a sense of fear in a long-term user. Similarly, LSD can

produce a psychotic state. In the case of appellant, the doctor concluded he was experiencing drug-induced paranoia where he believed his life was in danger, thereby placing him in a state of panic.

Upon cross-examination, Dr. Levy confirmed that he did not interview appellant until August, at which time appellant was “mentally clear.” His conclusion was based solely on his interview with appellant, and information he obtained concerning the incident from the police report. None of the information was verified from the medical records concerning appellant he had reviewed.

III.

A. Prosecutorial Misconduct

Appellant’s first contention is that his convictions must be reversed because the prosecuting attorney committed prejudicial misconduct during his closing argument to the jury. When a claim of prosecutorial misconduct focuses on comments that the prosecutor made to the jury, we must consider whether there is a reasonable likelihood that the jury actually construed or applied any of the complained-of remarks or did so in an improper manner. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) The recent Supreme Court decision in *People v. Crew* (2003) 31 Cal.4th 822, 839, sets forth the applicable principles on prosecutorial misconduct: “It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.] It is also misconduct for a prosecutor to make remarks in opening statements or closing arguments that refer to evidence determined to be inadmissible in a previous ruling of the trial court. Because we consider the effect of the prosecutor’s action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct. [Citation.] A defendant’s conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] Also, a claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]” (See also

People v. Prysock (1982) 127 Cal.App.3d 972, 996-998; *People v. Hudson* (1981) 126 Cal.App.3d 733, 741-742.) Armed with these principles, we examine appellant's individual claims of misconduct.

1. Referring to the Subject Crimes as “Brutal”

During his closing, the prosecutor stated, “Now, these are brutal crimes.” After a defense objection to this statement was overruled, the prosecutor stated, “You know, sometimes with respect to these kinds of offenses, there just isn't a rhyme or reason why folks would engage in this kind of brutal crime. . . .” He again referred to the charged crimes as “brutal crimes” in the beginning of his rebuttal closing argument as well. This last time a defense objection was sustained, and the prosecutor went on alternatively to characterize the crimes as “violent.”

2. References to Appellant's Lack of Credibility

At some point in referring to appellant's credibility, the prosecutor noted: “Here's a guy that—his credibility, frankly, isn't too wonderful. He's a guy that has lived outside the law for an extended number of years. He may feel that he has nothing to lose . . . but other people do.” Defense counsel only objected to the latter portion of this comment suggesting that appellant “has nothing to lose,” and the trial court responded by simply saying, “[I]et's move on to the facts and the law.”

3. “Left a String of Victims in His Wake”

Immediately thereafter, in specific reference to appellant's prior convictions for receiving stolen property and burglary, the prosecutor said, “[h]ere's a guy who frankly left a string of victims in his wake.” An objection was made by the defense, which was sustained by the court. The jury was also admonished to disregard the statement.

4. Reference to the Area Where Appellant Left His Van

At one point, the prosecutor offered: “Here's someone that his consciousness is not so blurred that he doesn't know what he's doing. He's able to park this car, it is parked between Mission and Market on Seventh, in one of the most notorious areas of the City with respect to drugs.” Defense counsel objected, and the trial court responded by saying, “[a]ll right. Confine your remarks to the evidence, please.”

5. Reference to Appellant's Absence of Remorse

Shortly thereafter, the prosecutor stated: “You know, the defendant said that it was really tough getting those keys out of her hand, never really expressed any feeling sorry for [Ms. Lee]. But, again, I don’t think the mentality basically allows for someone to feel any of this for someone like that but”

Defense counsel interrupted with a general objection, and the court admonished the jury in response as follows: “All right. The jury will keep instructions in mind . . . in this matter. . . . [¶] We must not be influenced by sentiment, conjecture, sympathy, passion, or prejudice. [¶] This should not come into play in this case for either party.”

6. Referring to No Drug Arrest on May 21

Later, the prosecutor remarked: “[a]pparently, he wasn’t charged with possession [on the day of the incident].” The trial court cautioned counsel to confine his remarks to the evidence, in response to a defense objection that there was “[n]o evidence.”

7. Reference to the Absence of Evidence of Appellant's 911 Call

During rebuttal, the prosecutor answered appellant’s argument that the incident was a result of appellant’s paranoid delusion and his effort to seek refuge from his enemies, in part, as follows: “He went to a lot of places, according to him, beginning at some time around 4 o’clock in the morning. Where are the 911 officers? He says he dialed 911. Wouldn’t it be nice if, in fact, those officers existed? If, in fact, these officers existed, don’t you think they would have put them under subpoena to say, yeah, this guy did call 911, and there was nobody there. He was acting crazy. Where are these 911 officers? That’s part of a police record.”

Defense counsel objected to the last sentence of this statement: “Your Honor, I’m going to object to that last statement regarding the police records, Your Honor. It’s not evidence.” The court sustained the objection.

8. Reference to “Punishment”

The last comment appellant deems misconduct came during rebuttal when the prosecutor stated, in reference to appellant’s defense that he had a psychotic condition that mitigated his acts: “And maybe [appellant] needs help. But the bottom line is, he’s

not going to get it if he's not held accountable; that you can bet, too. That's not appropriate." A general objection to the statement was sustained by the court.

We disagree with appellant that these comments, individually or collectively, constituted prejudicial misconduct. First, several of the comments were within the broad scope of permissible argument. Referring to the charged crimes as "brutal" is not misconduct. Brutal is a synonym for "violent." (The Original Roget's Thesaurus of English Words and Phrases (1962 ed.) p. 712, col. 2.) By statute, these crimes were defined as violent crimes. Similarly, referring to appellant's absence of remorse is appropriate to rebut his defense that he intended no harm to the victim, merely to seek shelter from his enemies. By the same token, lack of remorse at least arguably, and inferentially, bears on appellant's attitude towards the case. (CALJIC No. 2.20.)

To the extent the prosecutor referred to matters outside the record, the comments were few and brief, and were of little substantive consequence. In most instances, he was admonished in front of the jury to confine his remarks to the record. As to two other statements to which objections were made, the court admonished the jury to disregard the statement. We must presume the jury followed those instructions, unless there is some indication in the record to the contrary, which we do not find. (*People v. Fauber* (1992) 2 Cal.4th 792, 823.)

As to the remaining instances, in which counsel alluded to appellant having "nothing to lose" or to the need to hold appellant "accountable," we do not find these statements rise to the level of misconduct, even if they were otherwise objectionable. In this regard, we note that the few cases where misconduct and prejudice have both been found arose from "extreme instances of prosecutorial misconduct." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1220; see also *People v. Hill* (1998) 17 Cal.4th 800.)

Moreover, even were to assume these comments did constitute misconduct, they certainly were not so prejudicial as to require reversal. The several comments complained of by appellant occurred during the course of 31 transcript pages of closing argument by the prosecutor. The evidence of guilt was overwhelming. Essentially, the only disputed issue was whether appellant had the requisite intent to deprive the victim of

her property when he forcibly took her car keys and tried to enter her vehicle. Even as to that issue, the case against appellant was strong. Accordingly, there was no reasonable probability that a result more favorable to the defendant would have been reached without the assumed misconduct. (See also *People v. Prysock*, *supra*, 127 Cal.App.3d at pp. 996-998; *People v. Hudson*, *supra*, 126 Cal.App.3d at pp. 741-742.)

**B. The Trial Court Had No Sua Sponte Duty to Instruct
On Battery as a Lesser Included Offense to Robbery**

Appellant's next contention is that the court erred in not sua sponte instructing the jury on the crime of battery which, based on the accusatory pleading, is a lesser included offense of robbery. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.)

Section 211 defines robbery as “[t]he 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.” Appellant concedes that battery is not a lesser included offense to robbery when committed through the use of fear, rather than force. However, he points out that the criminal information alleges the robbery resulted from the application of both fear *and* force. For that reason, he claims battery is a lesser included offense to the robbery alleged in this particular case.

The Attorney General responds first that substantively under the “statutory definition test” battery is not subsumed by the crime of robbery because robberies can result from either the use of fear or force. Therefore, not all robberies also involve batteries. (*People v. Romero* (1943) 62 Cal.App.2d 116, 121.) He explains that the use of the disjunctive form of alleging “fear *and* force” in accusatory pleadings is required by case law to “avoid uncertainty.” (*In re Bushman* (1970) 1 Cal3d 767, 775, disapproved on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486 [“When a statute such as Penal Code section 415 lists several acts in the disjunctive, any one of which constitutes an offense, the complaint, in alleging more than one of such acts, should do so in the conjunctive to avoid uncertainty.”]; *People v. Tuggle* (1991) 232 Cal.App.3d 147, 154, disapproved on other grounds in *People v. Jenkins* (1995) 10 Cal.4th 234, 251-252.) An obvious distinction between our case and both *Bushman* and *Tuggle* is that here the

evidence supports only a *single* act of force administered by appellant to accomplish his taking. Factually, fear was not the means by which Ms. Lee came to be separated from her property.

We note that it has been recently observed that the precise argument raised by appellant has not yet been answered by our courts. Indeed, the one opinion in which this observation was made, and which then addressed the issue, was ordered depublished by our supreme court. (*People v. Fuentes* (2004) 116 Cal.App.4th 226, 233, review denied and ordered not published by *People v. Fuentes*, 2004 Cal. LEXIS 4428, 2004 Cal. Daily Op. Service 4335, 2004 D.A.R. 5998 (May 19, 2004).) However, we need not attempt our own answer because even if appellant is correct, we conclude it is not reasonably probable that he would have been convicted of battery, and not robbery. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.)

There is no question that force was applied to Ms. Lee sufficient to constitute either a battery or a robbery. Factually, what distinguishes between battery and robbery is whether, in addition to the use of force, appellant applied it to accomplish the “felonious taking” of Ms Lee’s property. (§ 211.) In other words, the jury could have rejected the crime of robbery in favor of battery only if it found that appellant’s intent in using force was not to take Ms. Lee’s property. By his own admission, there is no question that the whole purpose of appellant’s struggle with Ms. Lee was to seize her keys. Moreover, the jury expressly rejected appellant’s defense that he had a benign purpose in mind in taking her keys when, in addition to robbery, it convicted appellant of attempted grand theft auto.

Therefore, there is no reasonable probability that, had the jury been instructed on the crime of simple battery as an alternative to robbery, the jury would have found appellant not guilty of robbery, and guilty only of battery. For that reason alone we conclude no prejudicial error has been shown in failing to instruct on the crime of battery, even assuming the trial court had a sua sponte duty to do so.

C. Appellant’s Conviction of Both Robbery and Attempted Grand Theft

Appellant’s final assignment of error is that, if we do not otherwise reverse his conviction for robbery, he could not have been convicted of *both* robbery and attempted grand theft auto because the taking of more than one item from a single victim at the same time constitutes only one crime. (*People v. Ortega* (1998) 19 Cal.4th 686, 699.) Therefore, at a minimum we must reverse his attempted grand theft auto conviction. To his credit, the Attorney General conceded this point based on the facts of this case.

We are convinced as well that appellant’s grand theft auto conviction must be reversed in light of our affirmance of his robbery conviction. However, because the sentence imposed for the grand theft auto conviction was ordered stayed pursuant to section 654, we need not return the case to the lower court for resentencing.

IV.

DISPOSITION

Appellant’s conviction for attempted grand theft auto (§§ 487, subd. (d)(1)/664) is hereby reversed. The judgment is otherwise affirmed.

Ruvolo, J.

We concur:

Kline, P.J.

Lambden, J.