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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**  
**Plaintiff and Respondent,**

v.

**CURTIS WHITEHEAD,**  
**Defendant and Appellant.**

**A129054**

**(San Francisco County  
Super. Ct. No. 211154)**

Appellant Curtis Whitehead was convicted of robbing a bank and was sentenced to a lengthy prison term due to his prior serious felony convictions. He argues that his robbery conviction must be reversed or reduced to the lesser crime of grand theft because the evidence presented at trial was insufficient to prove the required element of force or fear. Appellant alternatively claims the trial court should have given sua sponte instructions on grand theft as a lesser included offense of robbery. We order the sentence modified in one respect, but otherwise affirm.

*I. FACTS AND PROCEDURAL HISTORY*

Appellant, who was wearing a hooded sweatshirt and appeared to be homeless, walked into a downtown San Francisco branch of U.S. Bank holding an orange in his hand. He approached the first teller's window and was greeted by Cheryll Pagua, the assistant manager. Appellant said, "Give me money, " and Pagua, believing he was a

customer who wanted to make a withdrawal, directed him to join her at another window where she had cash available. There were no other customers in the bank at the time.

Standing at the window behind a bullet-proof “bandit barrier,” Paguia gave appellant a deposit slip. Appellant again said, “Give me money,” and slipped her a piece of paper on which he had written “\$10,000,” or “I want \$10,000.” His voice had changed and Paguia knew appellant was robbing her. Appellant said he wanted large bills like \$100s and \$50s and told her to hurry up. His eyes were “groggy” and his demeanor was different from a person who was simply trying to withdraw money. Paguia, who had been robbed three times before, was “really scared” for herself and for other employees who were in the open lobby area and unprotected by bandit barriers.

Paguia had been trained by the bank to comply with a robber’s demands for money. She gave appellant about \$5,000 in cash, which included a tracking device between two \$20 bills. As she was giving him the bills, appellant kept telling her to “hurry up,” and said, “I don’t have all day. Give me the money.” He continued to hold the orange in his hand. Paguia thought that if she didn’t hurry up, he might hurt one of the employees working on the floor of the bank. When she finished giving appellant the money, he asked her for his note back and wiped the counter where he had touched it before walking out of the bank.

After appellant left, Paguia hit the alarm button and told her manager, Christianne Barroga, what had happened. Paguia seemed “panicked.” Barroga reviewed the security camera photographs of the robbery and noticed that appellant appeared to be eating an orange while he waited for Paguia to hand him the money. According to Barroga, a homeless person begging at a teller window would not be given cash and would be asked to leave.

Paguia later identified appellant’s picture in a photographic line-up.

Appellant was charged with second degree robbery and second degree burglary, along with allegations that he had suffered prior felony convictions and a third burglary count relating to a separate incident that was later dismissed. (Pen. Code, §§ 211, 459,

667, subd. (a), 1170.12, 667.5, subd. (b).)<sup>1</sup> Before the trial commenced, appellant admitted three prior serious felony enhancements under section 667, subdivision (a) and a Three Strike allegation under section 1170.12. A jury convicted him of second degree robbery and second degree burglary, and the court imposed an aggregate prison term of 21 years, consisting of the three-year middle term on the robbery count, doubled to six years under the Three Strikes law, plus three separate five-year serious felony enhancements. Sentence on the burglary count was ordered to run concurrently, as were sentences on counts in two unrelated cases in which appellant's probation was violated.

## II. DISCUSSION

### A. Sufficiency of the Evidence to Support the Robbery Conviction

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, italics added.) It is unnecessary to prove *both* force and fear, as either will support a robbery conviction. (*People v. Davison* (1995) 32 Cal.App.4th 206, 214 (*Davison*)). Appellant argues that his robbery conviction must be reversed because there was no suggestion that he used force to obtain the money from Paguaia and the evidence was insufficient to show that the taking was accomplished by means of fear. We disagree.

When the sufficiency of the evidence is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible and of solid value—from which a rational trier of fact could find guilt beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) We may not reweigh the evidence or evaluate the credibility of witnesses. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) If the circumstances support the findings by the trier of fact, reversal is not warranted simply because the evidence could be reasonably reconciled with a contrary finding. (*Ibid.*)

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<sup>1</sup> Further statutory references are to the Penal Code.

The fear necessary to support a robbery conviction is statutorily defined in section 212 as, “1. The fear of an unlawful injury to the person or property of the person being robbed, or of any relative of his or member of his family; or [¶] 2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.” The extent of the victim’s fear does not need to be extreme so long as it is sufficient “to cause the victim to comply with the unlawful demand for [the] property.” (*Davison, supra*, 32 Cal.App.4th at pp. 212, 216.)

Pagua testified without contradiction that she gave the money to appellant because she was afraid he would hurt her or her fellow employees if she did not do so. This testimony alone, which was obviously credited by the jury, was sufficient to show that the taking was accomplished because Paguia was afraid. (See *People v. Vega* (2005) 130 Cal.App.4th 183, 189-190 [testimony of a single witness is sufficient to support a jury’s finding].) Appellant acknowledges that “there is no reason to doubt that [Paguia] was[,] in fact, afraid.”

Appellant argues the evidence was nonetheless insufficient because Paguia’s fear, even if genuine, was unreasonable under the circumstances. He notes that he was unarmed; that he did not make any explicit threats to Paguia or to the other employees; that Paguia was standing behind a bullet-proof “bandit barrier;” and that he did not appear to notice the other employees who were working in the bank’s floor area, unprotected by a bandit barrier. Appellant reasons: “There can be no question that a bank employee receiving a note for \$10,000 will feel anxious and tense based on the situation. However, the record is simply devoid of any evidence that this apparently homeless, scruffy-looking man holding a half-eaten orange, acted in any manner that could support a reasonable belief he was about to harm two bank employees that he did not even seem to notice. If Ms. Paguia was actually – but unreasonably – in fear for the safety of her colleagues, then the element of fear was not met.”

The problem with this argument is its premise that the fear required to support a robbery conviction must be objectively reasonable. “[T]he fear necessary for robbery is subjective in nature, requiring proof ‘that the victim was in fact afraid, and that such fear

allowed the crime to be accomplished.’ ” (*People v. Anderson* (2007) 152 Cal.App.4th 919, 946; see also *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709-1710, fn. 2; *Davison, supra*, 32 Cal.App.4th at p. 212 [jury instruction to the effect that robbery may be accomplished through “intimidation” was erroneous because it did not clearly convey that the jury had to find the victim was actually afraid].) “Of course, if the circumstances are such that a reasonable person would not be scared, a jury might properly infer that the victim, in spite of his testimony to the contrary, was not in fact scared. . . . But if the victim is actually frightened by the defendant into parting with his property, the defendant’s crime, on principle, is robbery, even though an ordinary person, with more fortitude than the victim, would not have been thus frightened.” (3 LaFave, *Substantive Criminal Law* (2d ed. 2003) § 20.3(d), pp. 188-189.)

Appellant gleans a reasonableness requirement from case law stating, “ ‘ “Where intimidation is relied upon [to show fear], it must be established by proof of conduct, words, or circumstances reasonably calculated to produce fear.” ’ ” (*People v. Brew* (1991) 2 Cal.App.4th 99, 104 (*Brew*); see also *People v. Borra* (1932) 123 Cal.App. 482, 484.) This language “simply establishes that a jury may *infer* actual fear ‘from circumstances despite even superficially contradictory testimony of the victim.’ ” (*Davison, supra*, 32 Cal.App.4th at pp. 214-215; see also *People v. Renteria* (1964) 61 Cal.2d 497, 499.) It does not suggest the fear itself must be objectively reasonable.

Even if we assume that a victim who relinquishes money based on an unreasonable fear of harm has not been robbed, substantial evidence supports a determination that Paguia’s fear was objectively reasonable. Appellant’s trial counsel suggested during closing argument that that appellant was simply begging and took advantage of an opportunity to walk away with a large sum of money. But this interpretation does not jibe with the evidence when it is viewed in the light most favorable to the judgment. Appellant walked into a bank, told a banker he wanted money, handed her a note indicating an amount of \$10,000, and directed her to give it to him in large bills. His voice changed during the transaction and he told her several times

to hurry up. His somewhat unusual behavior in eating an orange and the lack of an explicit threat of violence does not render her fear objectively unreasonable. (See *People v. Flynn* (2000) 77 Cal.App.4th 766, 771-772 [explicit threat not required].)

Appellant suggests in his reply brief that the People were required to prove that he committed a willful act that caused the victim to experience fear. Assuming without deciding that such a requirement is implicit in the robbery statute, we do not find the evidence deficient in this respect. Section 7, paragraph 1 provides, “The word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate the law, or to injure another, or to acquire any advantage.” Appellant clearly intended to commit the acts that produced the fear in Paguaia, whether or not he specifically intended her to be afraid.<sup>2</sup>

*B. Failure to Instruct on Theft as Lesser Included Offense*

“ ‘Theft is a lesser and necessarily included offense in robbery; robbery has the additional element of a taking by force or fear. [Citations.] It is well settled that the trial court is obligated to instruct on necessarily included offenses—even without a request—when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.’ ” (*Brew, supra*, 2 Cal.App.4th at p. 105.) Appellant argues that the court should have instructed on theft as a lesser included offense of robbery because the jury could have reasonably determined the element of fear was lacking. We are not persuaded.

Preliminarily, the claim is barred by the doctrine of invited error. Notwithstanding the sua sponte nature of the court’s duty to instruct on a lesser included offense supported by the evidence, “the doctrine of invited error still applies if the court accedes to a defense attorney’s tactical decision to request that lesser included offense instructions not

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<sup>2</sup> Issues concerning the intent, if any, necessary for the “force or fear” element of robbery, are pending before the California Supreme Court in *People v. Anderson* (S175351), review granted October 14, 2009.

be given.” (*People v. Prince* (2007) 40 Cal.4th 1179, 1265; see also *People v. Beames* (2007) 40 Cal.4th 907, 927-928.) Here, defense counsel specifically advised the court that he was not asking for instructions on any lesser offense, a position he reiterated at a sidebar conference held during closing argument. Counsel stated that he would be asking the jury to find that appellant’s conduct did not amount to a robbery due to the prosecution’s failure to prove the element of fear, but that he was not asking the jury to find appellant guilty of a lesser theft offense. From these remarks, it is apparent that counsel was pursuing a deliberate all-or-nothing strategy in the hopes of securing a complete acquittal.

We would also reject the claim on the merits. Instructions on a lesser included offense are required “when the evidence raises a question as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense committed was less than that charged.” (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) Evidence that the defendant is guilty of only the lesser crime is substantial enough to merit consideration by the jury when reasonable jurors could conclude the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).)

Apart from defense counsel’s decision to forego an instruction on theft, the trial court specifically found the evidence did not warrant such an instruction. The court relied primarily on *People v. Bordelon* (2008) 162 Cal.App.4th 1311, in which a defendant convicted of robbing a bank teller argued on appeal that the trial court should have granted his request for an instruction on theft as a lesser offense based on the lack of force or fear. In *Bordelon*, the victim testified that the defendant walked into her bank, pushed aside a customer at a window, and told her, “This is a robbery. Put your money in the plastic bag.” (*Id.* at pp. 1315-1316, 1320.) The teller complied, as she had been trained to do, even though she did not see a weapon or know whether the robber was armed. (*Id.* at p. 1320.) The court of appeal concluded an instruction on theft was unnecessary because the defendant’s words and conduct were reasonably calculated to intimidate the teller and the teller had testified she was in fact “shocked” and

“traumatized” by the event. (*Ibid.*) “The element of fear was proven here, and no instruction on mere theft was warranted.” (*Ibid.*) Similarly, the evidence in the case before us established that Paguia was placed in actual fear as a result of appellant’s conduct, which was reasonably calculated to produce fear and intimidate her into giving him money.

Appellant suggests a different result is required by *Brew*, *supra*, 2 Cal.App.4th at pp. 102-105, in which the court reversed a robbery conviction based on the failure to instruct on theft as a lesser included offense. In *Brew*, the defendant approached a cashier in a drug store and handed her some money for the ostensible purpose of making a purchase. (*Id.* at p. 102.) There was no barrier between them, and when the cashier opened the register drawer, the defendant stepped into the register area. (*Id.* at p. 103.) Scared, the cashier moved away, and the defendant reached inside the drawer and took money, checks, and credit card receipts. (*Ibid.*)

The appellate court in *Brew* concluded that an instruction on theft should have been given, accepting the defense argument that although the cashier testified she was scared, the jury could construe her reaction of stepping away as merely “the shock of somebody reaching and making an unexpected movement toward the cash register drawer[.]” (*Brew*, *supra*, 2 Cal.App.4th at p. 105.) The case before us is distinguishable because there is no reasonable basis for inferring that Paguia’s decision to give appellant over \$5,000 in cash was motivated by anything other than her fear and her belief that she was being robbed.

Moreover, the result in *Brew* would very likely be different if that case came before an appellate court today. When *Brew* was decided, the failure to instruct on a lesser included offense was deemed prejudicial unless “ ‘the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.’ ” (*Brew*, *supra*, 2 Cal.App.4th at p. 105.) Current law does not require reversal unless prejudice is established under the less stringent standard of *People v. Watson* (1956) 46 Cal.2d 818, 836; i.e., when it is reasonably probable the

defendant would have obtained a more favorable result if instructions on a lesser included offense had been given. (*Breverman, supra*, 19 Cal.4th at p. 165.)

As for the prejudice in this case, Paguia testified that she was afraid and the evidence is overwhelming that she gave the money to appellant because of her fear. It is not reasonably probable the jury would have found the element of fear was lacking had it been instructed on theft as a lesser offense. In addition to CALCRIM No. 1600, the standard instruction on the elements of robbery, the trial court gave a special instruction at counsel's request that advised the jury, "The crime of robbery requires that the defendant use force or fear. [¶] A defendant uses fear within the meaning of the robbery statute when he affirmatively acts in a way that is reasonably calculated to produce fear in another person. [¶] The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for the property." Had the jury doubted that Paguia was actually placed in fear, that the taking was accomplished as a result of this fear, or that appellant's conduct produced that fear, it would have acquitted him under the special instruction given.

### *C. Stay of Sentence on Burglary Count*

The trial court ordered that the sentence imposed on the burglary count would run concurrently with the sentence on the robbery count. Appellant argues that the court should have instead stayed the sentence for burglary under section 654, because the robbery and burglary were committed during the same course of conduct and were incident to a single criminal objective. (See *People v. Perry* (2007) 154 Cal.App.4th 1521, 1525-1527.) The People appropriately concede the issue.

### **III. DISPOSITION**

The judgment is modified to stay the sentence for burglary under count 2 pursuant to section 654. The superior court shall amend the abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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NEEDHAM, J.

We concur.

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SIMONS, Acting P. J.

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BRUINIERS, J.