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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALFONSO GOMEZ, Defendant and Appellant.	G034752 (Super. Ct. No. 04NF0131) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Michael Bacall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, and Gary W. Schons, Assistant Attorney General, for Plaintiff and Respondent.

The law libraries of this state are all lined with hundreds of linear feet of official reporters – testament in large measure to the bottomless ingenuity of what Justice Gardner called "the contemporary criminal culture." (*People v. Benton* (1978) 77 Cal.App.3d 322, 324, fn. 1 [perhaps the best footnote in the history of appellate literature].) That ingenuity and the vagaries of random chance combine here to present still another in the apparently endless number of variations on the theme of Penal Code section 211. Here, we deal with the permutation that has become known as an "Estes robbery."

Alfonso Gomez was convicted of commercial burglary and second degree robbery. (Pen. Code, §§ 459/460, subd. (b), 211/212.5, subd. (c).) The jury also found Gomez was armed with a firearm during the burglary and discharged a firearm during the robbery. (Pen. Code, §§ 12022, subd. (a)(1), 12022.53, subd. (c).) Gomez argues there is insufficient evidence to support his robbery conviction because the victim was not present when he initially gained possession of the loot. Under the authority of *People v. Estes* (1983) 147 Cal.App.3d 23, we reject this argument and affirm the judgment.

* * *

Just before five o'clock one morning, Gomez broke into the Burger Boy restaurant near Disneyland. First he took money from an ATM in the lobby. Then he went into the kitchen, looking for something to eat. Unsuccessful, he rummaged through an office on the restaurant's second floor. Then, heading back downstairs, he heard the front door being unlocked by manager Ramon Baltazar, who was there to open the restaurant.

Gomez took a handgun out of his backpack and readied it at his side. He then proceeded to the kitchen. Once inside the restaurant, though, Baltazar heard him. He immediately went back outside and called 911. Gomez left the restaurant but did not escape Baltazar's notice. Realizing Baltazar was following him in a car, Gomez fired

two gunshots at him from a distance of about 100-150 feet. Baltazar, no fool, drove out of harm's way, and a short time later Gomez was arrested and found in possession of the stolen money.

* * *

Gomez argues there is insufficient evidence to support his robbery conviction because he did not take the money from Baltazar's immediate presence. This is how we find ourselves revisiting the *Estes* case.

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.) In assessing the sufficiency of the evidence to support Gomez's conviction for this offense "we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find [him] guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We must uphold the conviction "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [it].' [Citation.]" (*Ibid*.)

The Attorney General argues Gomez's robbery conviction can be upheld on three theories. First, he claims Gomez committed robbery in the "classical sense" in that he armed himself and was prepared to use force against Baltazar when Baltazar entered the restaurant. But by that time, Gomez had already taken the money. The Attorney General is correct that the victim's awareness of the theft is not required for robbery. (*People v. Jackson* (2005) 128 Cal.App.4th 1326, 1330-1331.) But the defendant must still use force or fear against the victim to accomplish the taking. (*Id.* at p. 1330.) In other words, there must be a nexus between the force or fear and the theft. In this case, the initial taking was accomplished without force or fear, so it matters little that Baltazar happened to be in Gomez's immediate presence later on when they were in the restaurant

together. Later propinquity of victim and thief is, by itself, insufficient to transform a theft into a robbery.

Alternatively, the Attorney General contends the robbery conviction can be upheld on the theory Baltazar was present when Gomez was trying to steal food from the restaurant. However, there is no evidence Gomez was successful in this regard, which explains why the prosecution's robbery theory hinged on the taking of the ATM money, not foodstuffs. However ingenious, the Attorney General's second theory of culpability is simply not persuasive.

His third one is, though. We agree with the Attorney General there is sufficient evidence to support Gomez's robbery conviction under the authority of *People v. Estes* (1983) 147 Cal.App.3d 23. In *Estes*, a store security guard confronted the defendant in the parking lot after seeing him shoplift some clothing. Rather than surrender the items, the defendant pulled a knife and threatened to kill the guard, which prompted the guard's retreat. On appeal, the defendant challenged his robbery conviction on the basis "the merchandise was not taken from the 'immediate presence' of the security guard." (*Id*. at p. 27.)

The *Estes* court found: "The evidence establishes that the appellant forceably resisted the security guard's efforts to retake the property and used that force to remove the items from the guard's immediate presence. By preventing the guard from regaining control over the merchandise, defendant is held to have taken the property as if the guard had actual possession of the goods in the first instance. [Citation.]" (*People v. Estes*, *supra*, 147 Cal.App.3d at p. 27.) The court said "a robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*Id*. at pp. 27-28.)

Gomez attempts to distinguish *Estes* on the grounds the initial taking in that case may have occurred in the victim's immediate presence. (See *People v. Estes*, *supra*,

147 Cal.App.3d at p. 23 [security guard "observed" defendant take goods in store before confronting him in parking lot].) However, the court in *Estes* clearly did not base its ruling on this factual possibility. Rather, the court squarely pegged its holding to the fact the defendant forcibly "resisted the security guard's efforts to retake the property and used that force to remove the items from the guard's immediate presence." (*Id*. at p. 27.) We cannot imagine language clearer than "regardless of the means by which defendant originally acquired the property," and we agree with the *Estes* court that such should be the standard. Thus, under *Estes*, the immediate presence requirement need not be satisfied at the time of the initial taking.

Gomez argues such a rule is at odds with *People v. Cooper* (1991) 53 Cal.3d 1158, but we disagree. In *Cooper*, our Supreme Court noted, "The taking element of robbery itself has two necessary elements, gaining possession of the victim's property and asportating or carrying away the loot. [Citation.]" (*Id*. at p. 1165.) Although, the court observed the immediate presence requirement relates to the first element (*id*. at p. 1166), this was in the context of determining the duration of the crime of robbery for aiding and abetting purposes. (*Id*. at pp. 1160-1161.) The court held the crime continues as long as the loot is being carried away to a place of temporary safety and therefore, to be liable as an aider and abettor, the defendant must form the requisite intent to facilitate or encourage the robbery prior to or during that time. (*Ibid*.)

Cooper did not attempt to delineate the many ways in which the crime of robbery can be committed. That simply was not necessary to a decision pertaining to a robbery's duration. Thus, it is hard to read *Cooper* as somehow overruling *Estes*. As a matter of fact, the *Cooper* court said its holding was actually consistent with *Estes* and a "long line of Court of Appeal cases . . . holding that 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 carrying away the loot. [Citations.]" (*People v. Cooper, supra*, 53 Cal.3d at p. 1165, fn. 8.) While *Cooper* did not comment on *Estes*' holding that the

immediate presence requirement can also be satisfied during the asportation phase, it seems unlikely the *Cooper* court would have endorsed *Estes* if it disagreed with that aspect of the case.

Estes' interpretation of the immediate presence requirement actually makes great sense when one considers the nature of the crime of robbery. It has long been recognized that "[t]he gist of this crime is force or bodily fear." (Harris, Principles of Criminal Law (1880) p. 177; see also *People v. Ramos* (1982) 30 Cal.3d 553, 587 [recognizing robbery as a crime of violence against the person].) Looking at the offense from either a practical or theoretical perspective, it matters little whether force or fear is employed during the gaining possession phase or the asportation phase. Either way, it seriously transgresses the victim's right to be free from violence and intimidation. So long as the use of force or fear allows the defendant to take or retain the property from the victim's person or immediate presence, the crime is accomplished.

This is not a new concept. In *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, the majority stated, "[A]lthough the immediate presence and force or fear elements of robbery originally had to be satisfied at the time of the gaining possession aspect of a taking, [*Estes* and other cases have] long since allowed these elements to be supplied after the defendant has initially gained possession of the victim's property." (*Id*. at p. 224.) The dissenting Justice in *Miller* decried this development as an unwarranted extension of the crime of robbery, but we agree with the *Miller* majority that *Estes* was correctly decided and that *Cooper* "did not overrule or disapprove of *Estes* in any respect." (*Ibid*.; see also *People v. Jackson*, *supra*, 128 Cal.App.4th 1326 [although victim was not present when defendant initially gained possession of the property, court upheld defendant's robbery conviction where he subsequently used force to remove the property from the victim's immediate presence].)

Gomez also relies on *People v. Hayes* (1990) 52 Cal.3d 577. In that case, the trial court's instructions on immediate presence were held erroneous because they

allowed the jury to find that element satisfied so long as the victim perceived any overt act connected with the robbery's commission, such as the defendant's use of force or fear. (*Id*. at pp. 627-628.) The *Hayes* court found this "rendered the 'immediate presence' element devoid of all independent meaning, making it redundant with the 'force or fear' element." (*Id*. at p. 628.) Here, in contrast, the court's instructions did not so merge the elements of robbery. Instead, the court told the jury that a taking is from the immediate presence of the victim if it occurs in an area within the victim's reach, observation or control such that he or she could, if not overcome by force or fear, retain possession of the property. (See CALJIC No. 9.40.) As explained in *Hayes*, this was a correct statement of the law. (*People v. Hayes*, *supra*, 52 Cal.3d at pp. 626-627.)

Even so, Gomez argues there is insufficient evidence from which the jury could find he took or forcibly retained the stolen money from Baltazar's *immediate* presence. He argues Baltazar was never close enough to him to be in his immediate presence.

Granted, Baltazar was about 100-150 feet away from Gomez at the time of the shooting. At that distance, he could not reach, control or see the stolen money. Nonetheless, the money was under his general inspection and observation because he could still see Gomez, and Gomez had the money on his person. And if not overcome by Gomez's resistance, Baltazar could have caught up to him and regained the money.

The only reason this didn't happen is that Gomez – and his pistol – didn't let it. Gomez should not be rewarded for taking violent actions that prevented Baltazar from getting any closer to him. It would certainly be anomalous to say a robbery occurs if you allow the victim to catch up with you and then hit him, but not if you keep him away by shooting at him.

Moreover, Supreme Court precedent on the distance issue does not favor Gomez. In *Hayes*, the court found the immediate presence requirement was arguably met, even though "the room in which [the victim] was assaulted and killed was . . . 107

feet from the stolen property's location . . . ." (*People v. Hayes, supra*, 52 Cal.3d at pp. 628-629.) And in *People v. Webster* (1991) 54 Cal.3d 411, the court determined a reasonable trier of fact could find the immediate presence requirement satisfied where the distance between the stolen property and the murder scene was a quarter of a mile. (*Id*. at p. 440.) In light of these precedents, we cannot say, as a matter of law, the immediate presence requirement was lacking in this case. The parties' distance from each other at the time of the shooting, although considerable, was not so great as to preclude Gomez's conviction for robbery.

In sum, the record shows Gomez used force against Baltazar to retain the stolen money and remove it from Baltazar's immediate presence. Under *Estes*, that is sufficient to support Gomez's conviction for robbery.

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.