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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL LEMUS, Defendant and Appellant.	B271416 (Los Angeles County Super. Ct. No. PA084097)

APPEAL from a judgment of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed as modified and remanded with directions.

Kimberly M. Taylor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, William H. Shin and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Miguel Angel Lemus was convicted of one count of attempted second degree robbery. On appeal, he challenges his conviction on the basis of insufficiency of the evidence, instructional error, and prosecutorial misconduct; additionally, he contends the minute order from the sentencing hearing and the abstract of judgment erroneously reflect the imposition of a $10 fine (Pen. Code, § 1202.5) and a related $29 assessment.[1] We reject his contentions, with the exception of his challenge to the sentencing minute order and abstract of judgment. We therefore affirm the judgment, and direct the preparation of a corrected sentencing minute order and abstract of judgment.

RELEVANT PROCEDURAL HISTORY

On December 4, 2015, an information was filed charging appellant with a single count of second degree robbery (Pen. Code, § 211). Accompanying the charges were allegations that appellant had suffered a conviction for robbery (§ 211) in 2012 constituting a serious felony conviction (§ 667, subd. (a)(1)) and a "strike" conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he had served a prior prison term for that offense (§ 667.5, subd. (b)). Appellant pleaded not guilty to the charges and denied the special allegations.

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[1] All statutory citations are to the Penal Code.

On February 1, 2016, prior to the presentation of evidence at appellant's jury trial, the information was amended to include a charge of attempted second degree robbery (§ 213, subd. (b)), and the charge of second degree robbery was dismissed. Appellant pleaded not guilty to the charge of attempted second degree robbery. After the jury found appellant guilty as charged, the trial court found the special allegations to be true, and sentenced appellant to an aggregate term of 11 years in prison. In addition, at the sentencing hearing, the court imposed and stayed "the minimum restitution fine," and ordered the imposition of "all mandatory court fees."

FACTUAL BACKGROUND

A. *Prosecution Evidence*

The prosecution's sole witness was Rocky Singh, who testified that on July 1, 2015, he was working as a clerk in a convenience store. At that time, a video surveillance camera was recording events within the store.

According to Singh, at approximately midnight, he was behind the store's counter, and a customer stood near the store's door. Appellant entered the store, walked to the beer case, took hold of a "32-pack" of beer, and moved toward Singh. Rather than paying for the beer, appellant walked past Singh toward the store's door. Singh requested payment from appellant, who ignored him.

The customer near the door tried to prevent appellant from leaving the store, and Singh jumped over the counter

to pursue appellant. Appellant hit the customer, who grabbed appellant. As appellant struggled to free himself, he began to fall against the store door while holding the beer. When Singh reached the location of the struggle, appellant hit Singh's leg. According to Singh, appellant "pull[ed]" him while also "pulling on the beer." Singh and the customer unsuccessfully tried to hold appellant, who eventually fled through the store's door without the beer.

During Singh's testimony, the jury viewed a video recording of the pertinent events in the store. The video recording shows that appellant looked at Singh as he carried the beer past Singh's counter toward the door, which is several feet from the counter. Singh gestured toward appellant, who did not stop, and the customer standing near the door moved forward into appellant's path. As Singh vaulted over the counter, appellant pushed the customer, who grabbed appellant and swung him toward the door. While looking in the direction of the customer and Singh, appellant grabbed the door with his right hand and held the beer with his left hand. The customer struggled with appellant, who backed partially through the door as Singh ran toward him. The grainy video recording discloses an image -- relied upon by the prosecutor -- of Singh's right hand on appellant's shoulder while appellant appears to hold the beer with his left hand and move backward through the door. Moments later, despite efforts by Singh and the customer to hold appellant, he broke away from them, leaving the beer. Outside the store, Singh and the customer

unsuccessfully pursued appellant, then returned to the store.

B. *Defense Evidence*

The defense called no witnesses, and submitted a group of still photographs derived from the video recording by the store's surveillance camera.

DISCUSSION

Appellant challenges his conviction for attempted robbery, contending (1) that there is insufficient evidence to support the conviction, (2) that the jury was misinstructed regarding attempted robbery, and (3) that the prosecutor engaged in misconduct during closing argument. Appellant further contends (4) that the minute order from the sentencing hearing and the abstract of judgment improperly reflect the imposition of a $10 fine under Penal Code section 1202.5 and a related $29 penalty assessment. As explained below, we reject his contentions, with the exception of his challenge to the fine and assessment.

A. *Sufficiency of the Evidence Regarding Attempted Robbery*

Appellant maintains that his conviction for attempted robbery fails for want of sufficient evidence. The crux of his challenge is that there is no evidence that he used force

against Singh in order to take the beer. For the reasons explained below, we reject his contentions.[2]

1. *Governing Principles*

The key issues concern the relationship between attempted robbery and two elements of robbery, namely, the specific intent to take the victim's property and the use of force or fear against the victim. Generally, "[t]he crime of attempt occurs when there is a specific intent to commit a crime and a direct but ineffectual act done towards its commission. [Citation.] "'An attempt connotes the intent to

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[2] "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

accomplish its object, both in law . . . and in ordinary language." [Citation.]'" (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764 (*Bonner*), quoting *People v. Smith* (1997) 57 Cal.App.4th 1470, 1481.)

As attempted robbery requires the specific intent to commit robbery (*Bonner*, *supra*, 80 Cal.App.4th at p. 764), we examine the latter offense. Generally, "[r]obbery 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.' [Citation.] Robbery is larceny with the aggravating circumstances that 'the property is taken from the person or presence of another . . . ' and 'is accomplished by the use of force or by putting the victim in fear of injury.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 994 (*Anderson*).) In order to constitute robbery, the victim against whom the force or fear is used must have actual or constructive possession of the property taken. (*People v. Nguyen* (2000) 24 Cal.4th 756, 761-762.) Thus, when a store's property is taken, robbery may occur when force or fear is used against a store employee in order to accomplish the taking, but not when force or fear is used against a store visitor who lacks possession of the property. (See *id.* at pp. 758-765.)

In *Anderson*, our Supreme Court elucidated two aspects of robbery pertinent to our inquiry, namely, that the application of force or fear may occur after the initial taking, and that the specific intent to deprive the victim of property need not incorporate the specific intent to use force or fear.

There, the defendant was convicted of robbery and felony-murder with the special circumstance of killing in the course of robbery. (*Anderson*, *supra*, 51 Cal.4th at p. 993.) At trial, the evidence showed that the defendant's victim arrived at her apartment, parked her car, and entered her apartment with the intention of changing her clothes before going out. (*Id*. at p. 992.) While the victim was in her apartment, the defendant broke into her car and tried to drive it out of the parking lot, but found that the parking lot gate did not open automatically. (*Ibid*.) He then backed the car into a parking space and waited for someone to open the gate. (*Ibid*.) While he did so, the victim returned to the parking lot. (*Ibid*.) When the defendant saw the gate open, he drove toward it at a relatively high speed and ran over the victim, causing her death. (*Id*. at p. 993.) The defendant did not deny hitting her, but claimed that it was an accident, stating that he was unaware of her presence prior to the impact. (*Ibid*.)

Before the Supreme Court, the defendant challenged his robbery conviction on the ground that he lacked the requisite specific intent. (*Anderson*, *supra*, 51 Cal.4th at p. 995.) He admitted that he committed a forcible act against the victim and that the act was motivated by his intent to take her property, but argued that his forcible taking was not robbery because he did not apply the force with the intent to strike or frighten the victim. (*Id*. at pp. 994-995.) In rejecting that contention, the court stated that robbery may occur "when the property was peacefully

acquired, but force or fear was used to carry it away," pointing to *People v. Gomez* (2008) 43 Cal.4th 249, 255-256 and *People v. Estes* (1983) 147 Cal.App.3d 23, 28 (*Estes*).) The court further explained that robbery requires no "element of intent to cause the victim to experience force or fear," stating: "The law does require that the perpetrator exert some quantum of force in excess of that 'necessary to accomplish the mere seizing of the property.' [Citations.] But even under his version of the facts, defendant drove [the victim's] car with more force than necessary to move it to a place of safety. And his motive for exerting the additional force was to retain the property and facilitate his escape. In short, he committed the requisite forcible act with the requisite intent. It was robbery even if, as he claims, he did not intend to strike [the victim], but did so accidentally." (*Anderson, supra,* at pp. 995-996, quoting *People v. Morales* (1975) 49 Cal.App.3d 134, 139.)

Here, appellant was charged with attempted robbery, rather than robbery. To commit that offense, a defendant must form the intent to commit robbery, and engage in an overt act that is "more than mere preparation, . . . show[ing] that the perpetrator is putting his or her plan into action." (*Bonner*, *supra*, 80 Cal.App.4th at p. 764.) Other than satisfying these requirements, "a defendant need not commit an element of the underlying offense." (*People v. Medina* (2007) 41 Cal.4th 685, 694.) Moreover, once the requirements are satisfied, the perpetrator's abandonment of the plan does not nullify the existence of an attempted

robbery. (*People v. Dillon* (1983) 34 Cal.3d 441, 450 (*Dillon*), abrogated on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1185-1186.)

Under these principles, a person may commit attempted robbery by planning to take property and engaging in conduct demonstrating the readiness to use force or fear in order to carry out that plan, without actually using force or fear against the property's possessor. In *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 860 (*Vizcarra*), the defendant was convicted of attempted robbery. The trial evidence showed that the defendant went to a liquor store wearing a poncho and carrying a rifle. (*Id.* at p. 861.) While he was standing outside the store near its door, a customer approached the door. (*Ibid.*) Upon seeing the customer, the defendant turned so that his face was close to a block wall. (*Id.* at p. 862.) The customer noticed the defendant's odd behavior and the butt of his rifle protruding from his poncho. (*Ibid.*) Rather than entering the store, the defendant returned to his car and drove away, but later drove past the liquor store. (*Ibid.*) In concluding that there was sufficient evidence to support the defendant's conviction for attempted robbery, the appellate court rejected his contention that the conviction failed for want of evidence that the potential victim was subjected to force or fear. (*Ibid.*) The court stated: "It is true that an element of force or fear must be proved in order to establish a conviction for robbery . . . . It is not necessary, however, for this element to be reflected in the overt act of an attempted

robbery if the crime has not progressed to that point." (*Ibid*.)

Furthermore, a person may commit attempted robbery by forming the specific intent to commit robbery and engaging in overt conduct furthering that plan, even though the conduct suggests the person would have preferred to acquire the property without using force or fear. In *Dillon*, the defendant was convicted of attempted robbery and felony murder. (*Dillon*, *supra*, 34 Cal.3d at p. 450.) The trial evidence showed that the defendant, while 17 years old, discovered a marijuana crop on a farm occupied by two armed men. (*Id*. at p. 451.) The defendant and several other youths decided to take the marijuana, and armed themselves with firearms, masks, and tools for harvesting the marijuana. (*Ibid*.) The defendant and his companions then went to the marijuana field, but did not enter it and, upon seeing one of the farmers in the field, took no further action. (*Ibid*.) Although some of the youths left, the defendant and several others continued to wait outside the field. (*Id*. at p. 452.) At some point, one of the defendant's companions accidently discharged his gun. (*Ibid*.) Alerted by the gunshot, a farmer discovered the defendant, who fatally shot him. (*Ibid*.) Our Supreme Court held there was sufficient evidence to establish attempted robbery, as the defendant and his companions discussed how to take the marijuana, armed themselves with weapons, and went to the marijuana field. (*Id*. at pp. 455-456.)

In so concluding, the court recognized that the defendant and his allies had hoped to avoid the use of force: "Doubtless they would have preferred to harvest the marijuana without any . . . confrontation, but this remote possibility did not negative their evident intent to rob." (*Dillon*, *supra*, 34 Cal.3d at p. 456.) In a footnote, the court elaborated, "'A person planning to steal the contents of a cash register in a liquor store which is open for business may have a generalized hope that the clerk will be away from his post when he arrives and that he will be able to snatch the money without opposition. But when, preparing for a violent confrontation, the person arms himself, dons a mask and obtains rope with which to bind the clerk, it is unreasonable to say that he has not entertained the specific intent to commit robbery.'" (*Id.* at p. 456, fn. 3.)

2. *Analysis*

We conclude that under the circumstances of this case, the video recording, coupled with Singh's trial testimony, was sufficient to establish an attempted robbery. As explained below, although appellant initially took the beer and tried to carry it from the store without using force or fear against the store clerk Singh, appellant's conduct after passing Singh's counter showed that appellant reasonably expected resistance from Singh, and was ready to overcome that resistance with force.

Appellant's unsuccessful initial effort to carry the beer from the store without using force or fear does not foreclose

the existence of an attempted robbery. As explained in *Anderson*, a robbery may occur when the property was initially "peacefully acquired" with the requisite specific intent -- to take property in the victim's possession -- but force or fear was later used against the victim in carrying it away. (*Anderson*, *supra*, 51 Cal.4th at p. 994.) In view of *Anderson*, an attempted robbery can also occur after an initial "peaceful" taking, provided the requirements for that offense are satisfied. Furthermore, in view of *Dillon* and *Vizcarra*, those requirements may be satisfied even though the perpetrator initially prefers to avoid the use of force or fear, and never actually uses force or fear against the victim, provided the perpetrator clearly demonstrates a readiness to use force or fear to overcome the victim's expected resistance. We thus conclude that an attempted robbery may occur when the perpetrator, after acquiring property with the intent to take it from the victim's possession, (1) forms the expectation that force must be used against the victim in order to carry it away, and (2) engages in conduct demonstrating a commitment to use such force against the victim.

Those requirements were satisfied here. The trial evidence establishes appellant's resolute intent to take the beer from Singh, as it shows that appellant consciously disregarded Singh and then used force against the customer in order to leave the store with the beer. The evidence also establishes that appellant, while in control of the beer, formed the expectation that force would be necessary

against Singh in order to carry away the beer, and that appellant engaged in conduct demonstrating a commitment to use force against Singh. The video recording shows that during the struggle with the customer, appellant faced Singh as he approached, and continued to use force in seeking to carry away the beer. Appellant's ongoing violent conduct, coupled with his knowledge that Singh was drawing near, supports the reasonable inference that even before Singh contacted him, appellant was committed to using force against Singh in order to take the beer.

Moreover, there is sufficient evidence that appellant *actually* applied force to Singh in seeking to retain control of the beer. Although the video recording does not show precisely when appellant finally lost control of the beer, it appears to show Singh's hand on appellant's shoulder at the same time appellant holds the beer with his left hand and moves backward through the door. In view of appellant's violent course of conduct, as shown in the video recording, the jury reasonably could have inferred that when Singh made physical contact with him, appellant applied force to Singh satisfying the "force or fear" element of robbery, that is, force "in excess of that 'necessary to accomplish the mere seizing of the property.'" (*Anderson*, *supra*, 51 Cal.4th at p. 995; see *People v. Burns* (2009) 172 Cal.App.4th 1251,1257 ["[W]here a person wrests away personal property from another person, who resists the effort to do so, the crime is robbery, not merely theft"].) That inference supports appellant's conviction for attempted robbery.

(*People v. Estrada* (2006) 141 Cal.App.4th 408, 416 [in action in which the defendant was charged with attempted robbery, rather than robbery, his "act of punching the store's security officer, in an unsuccessful attempt to thwart him from detaining defendant and regaining control over the items that defendant had unlawfully taken from the store, constituted attempted robbery"].)[3]

Appellant contends that in assessing the sufficiency of the evidence, we cannot consider his use of force against the customer, as the latter lacked actual and constructive possession of the beer. We disagree. Although appellant's use of force against the customer, by itself, would be insufficient to support a conviction for robbery, appellant was convicted of attempted robbery. To the extent that offense involves requirements relating to appellant's state of

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[3] In arguing that there is sufficient evidence of appellant's use of force, respondent notes that at one point, Singh appeared to testify that appellant "pushed" him as appellant moved toward the store door. However, that testimony cannot reasonably be regarded as demonstrating a use of force against Singh, as the video recording clearly shows that appellant hurried past Singh's counter without touching him. (*People v. Johnson* (1980) 26 Cal.3d 557, 578-579 [on review for substantial evidence, it is improper for an appellate court to sustain a conviction on the basis of an item of evidence taken in isolation, when "on the whole record no reasonable trier of fact would place credit in that evidence" (*id.* at p. 577)].)

mind, including his commitment to use force against Singh, we may properly consider inferences based on his conduct, including his use of force against the customer. (*People v. Massie* (2006) 142 Cal.App.4th 365, 371 ["The intent with which a person acts is rarely susceptible of direct proof and usually must be inferred from facts and circumstances surrounding the offense"].)

Appellant also contends that he used no force against Singh, or alternatively, that any force he used against Singh was unequivocally aimed at enabling him to escape from the store, rather than at retaining the beer. We reject those contentions as well. Because appellant was convicted of attempted robbery, not robbery, the pivotal issue is whether appellant's conduct demonstrated a commitment to using force against Singh while seeking to take the beer. As explained above, the record adequately establishes the existence of appellant's commitment to the use of force, for purposes of attempted robbery. Indeed, the record supports the reasonable inference that appellant *actually* used force against Singh in seeking to carry the beer away.

The decisions upon which appellant relies are distinguishable. In *People v. Pham* (1993) 15 Cal.App.4th 61, 63-64 (*Pham*), the defendant was convicted of two counts of robbery involving different victims. At trial, the evidence showed that after the defendant took the victims' property from their car and placed it in a bag, he saw the victims approaching and ran from the car with the bag, pursued by the victims. (*Id.* at p. 64.) When one caught hold of the

defendant's shirt, the defendant dropped the bag and then fought with the victims until police officers arrived. (*Ibid.*)

On appeal, the defendant contended the trial court erred in not instructing the jury sua sponte on attempted robbery as a lesser included offense. (*Pham*, *supra*, 15 Cal.App.4th at p. 67.) Rejecting that contention, the appellate court determined that the trial evidence potentially established only two possible offenses, theft and what the court called "an *Estes*-type robbery," that is, "a robbery committed by the use of 'force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence.'" (*Id.* at p. 68, quoting *Estes*, *supra*, 147 Cal.App.3d at pp. 27-28.) The court stated: "If the prosecution's evidence was believed, it would not support an offense less than robbery. . . . If defendant truly abandoned the victims' property before using force, then, of course he could be guilty of theft, but not of an *Estes*-type robbery. Indeed, in the situation where property is taken without the use of force or the threat thereof and thereafter such force or threat is employed to prevent the owner from recovering the property or to facilitate an escape, the offense committed simply *could not be an attempted robbery*." (*Ibid.*, italics added.)

Pointing to the phrase italicized above, appellant contends that under *Pham*, the trial evidence established no attempted robbery. We disagree. In contrast to *Pham*, appellant was charged and convicted of attempted robbery, not robbery. As explained above, there is sufficient evidence

to establish that offense, even in the absence of the video recording image supporting the inference that appellant actually used force against Singh in order to take the beer. Furthermore, because "a defendant can be convicted of an attempt to commit a crime even though the crime, in fact, was completed" (*People v. Rundle* (2008) 43 Cal.4th 76, 138, fn. 28, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), the inference based on that image -- which suffices to prove the force or fear element of robbery -- also supports the existence of an attempted robbery. Nothing in *Pham* suggests otherwise. Viewed in context, the sentence containing the italicized phrase was intended only to underscore that the offense shown by the prosecution's evidence was an *Estes*-type robbery, rather than a *mere* attempted robbery, for purposes of the trial court's duty to instruct on lesser included offenses.

Appellant also directs our attention to *People v. Hodges* (2013) 213 Cal.App.4th 531, in which the defendant was charged with robbery. At trial, the evidence showed that the defendant entered a grocery, placed several items in a bag, and left the store without paying for the items. (*Id.* at p. 535.) When store security guards followed the defendant to his car and asked him to return to the store, he threw the bag at them and began to drive away. (*Id.* at pp. 535-536.) As he did so, the car hit the guards. (*Id.* at p. 536.) After jury deliberations began, the jury submitted notes inquiring whether a robbery could occur when the defendant used

force or fear after abandoning the property taken. (*Id.* at p. 538.) The court replied that the theft continued until the defendant reached a place of safety, and the jury convicted the defendant of robbery. (*Ibid.*) Reversing, the appellate court concluded that the trial court's response was misleading because it failed to clarify that for purposes of robbery, force or fear must be used before the property taken is abandoned. (*Id.* at pp. 539-543 & fn. 4.) Here, there was sufficient evidence to establish the requirements for attempted robbery -- including appellant's commitment to use force against Singh before losing control of the beer -- and as explained below (see pt. B.2. of the Discussion, *post*), we find no reversible instructional error regarding that offense. In sum, the record discloses evidence adequate to support appellant's conviction for attempted robbery.

B. *Instructions Regarding Attempted Robbery and Prosecutor's Closing Argument*

Appellant raises interrelated contentions of instructional error and prosecutorial misconduct, arguing that the instructions and the prosecutor's closing argument misinformed the jury regarding attempted robbery. For the reasons discussed below, we discern no reversible error.

1. *Underlying Proceedings*

In addition to instructing the jury on attempted robbery with CALCRIM Nos. 460 and 1600, the trial court provided the following special instruction sua sponte: "In

order to commit attempted robbery in these circumstances, the defendant must have used force with the specific intent to retain the property or prevent its recovery. If, on the other hand, the force used was only to escape while voluntarily abandoning the property, an attempted robbery has not been committed. A visitor to the store cannot be the victim of robbery, unless he was in actual possession of the property."[4] Neither the prosecutor nor defense counsel

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[4] As provided to the jury, CALCRIM No. 460 stated: "The defendant is charged with [a]ttempted [r]obbery. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing [r]obbery; [¶] AND [¶] 2. The defendant intended to commit [r]obbery. [¶] A direct step requires more than merely planning or preparing to commit [r]obbery or obtaining or arranging for something needed to commit [r]obbery. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit [r]obbery. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person who attempts to commit [r]obbery is guilty of attempted [r]obbery even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a
(Fn. continued on the next page.)

objected to the instruction.

In closing argument, the prosecutor stated that in order to determine whether appellant engaged in attempted robbery, the jury should look at appellant's conduct within

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person freely and voluntarily abandons his or her plans before taking a direct step toward committing [r]obbery, then that person is not guilty of attempted [r]obbery. [¶] . . . [¶] T he defendant may be guilty of attempt even if you conclude that [r]obbery was actually completed."

As provided to the jury, CALCRIM No. stated in pertinent part: "To prove that the defendant is guilty of [r]obbery, the People must prove that: [¶] 1. The defendant took property that was not his own; [¶] 2. The property was in the possession of another person; [¶] 3. The property was taken from the other person or his immediate presence; [¶] 4. The property was taken against that person's will; [¶] 5. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND [¶] 6. When the defendant used force or fear to take the property, he intended to deprive the owner of the property permanently or to remove the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property. [¶] The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery. [¶] . . . [¶] A store employee who is on duty has possession of the store owner's property."

the store. The prosecutor argued that appellant's crime began as a petty theft, as he removed the beer from the store's fridge and walked toward the door intending to leave without paying for the beer. According to the prosecutor, the crime then moved into a "gray area" when appellant confronted the customer. The prosecutor stated: "[I]t's not quite an attempted robbery . . . yet because . . . A customer cannot be a victim of a robbery or an attempted robbery unless he has actual possession of the item . . . ."

After describing the "tussle" between appellant and the customer, the prosecutor argued: "It becomes a robbery when . . . [Singh] is in the immediate presence of [appellant] and this other customer, and [appellant] continues to use force to take the [beer]. And that force includes . . . a tug-of-war with this case of beer. . . . Singh testified that regarding that, and also . . . testified that either [appellant] pushed him or touched him in a certain way. . . . Force used to maintain possession of the property still counts as force for an attempted robbery. [¶] . . . I think the question comes down to[,] did [appellant] continue to use force in the immediate presence of [Singh?]"

Following that remark, appellant's counsel objected, "That misstates the law." In response, the court told the jury, "[I]f the attorneys say something that conflicts with my instructions, my instructions control."

The prosecutor resumed his argument, stating: "The question again is going to be[,] did the defendant continue to use force . . . *against* . . . *Singh* in his immediate presence[?]"

(Italics added.) Noting that appellant was charged with attempted robbery, the prosecutor discussed the elements of robbery, but observed, "I don't have to prove that a completed robbery took place." In examining the "force or fear" element of robbery, the prosecutor asserted that appellant used force in retaining the beer by "not releasing and continuing to struggle over beer." The prosecutor further stated, "So did [appellant] use force *against* . . . *Singh* by holding onto the beer case? *Yes*." (Italics added.)

Turning to the requirements for attempted robbery, the prosecutor stated that he needed to prove that appellant, before abandoning the beer, took "a direct but ineffective step toward committing robbery" with the intent to commit robbery. In describing the evidence, the prosecutor placed special emphasis on the video recording image discussed above (see pt. A.2. of the Discussion, *ante*), arguing that it clearly showed Singh's hand "grasping [appellant's] left shoulder," and appellant, "with his left hand, still holding onto the case of beer." The prosecutor urged the jury to view the video recording, stating: "Singh was in the immediate presence of [appellant]; he did have a hand on his shoulder. And [appellant] never voluntarily abandoned that case of beer. That's the bottom line. Simple case. He committed an attempted robbery."

2. *No Reversible Instructional Error*

Appellant contends the special instruction was erroneous, arguing that it failed to specify that for purposes

of attempted robbery, the force used in order to retain the beer had to have been directed against the store clerk Singh. As explained below, the instruction contains no defect prejudicial to appellant.

Generally, the adequacy of any instruction given must be judged in the context of all the instructions. (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 747, pp. 1164-1166.) Thus, an instruction is not assessed in isolation, but must be viewed in the context of the overall charge. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) When an instruction is potentially ambiguous or misleading, the instruction is not error unless there is a reasonable likelihood that the jurors misunderstood or misapplied the pertinent instruction. (*Ibid.*; *People v. Avena* (1996) 13 Cal.4th 394, 416-417.)

Here, the instruction reflected no prejudicial defect, as the prosecutor repeatedly told the jury in closing argument that an attempted robbery required the actual use of force against Singh for the purpose of retaining the beer. In view of the prosecutor's closing argument, there is no reasonable likelihood that the jurors misunderstood the instruction in the manner suggested by appellant.

In so concluding, we note that the assumption underlying appellant's contention -- namely, that no attempted robbery was committed unless appellant, while seeking to retain the beer, *actually* used force against Singh -- reflects an excessively stringent view of the requirements for attempted robbery. As explained above (see pt. A.2. of

the Discussion, *ante*), conduct by appellant clearly demonstrating his commitment to use force against Singh in order to retain the beer sufficed for an attempted robbery, in the absence of any actual use of force against Singh. To the extent the instruction in question may also have presupposed an excessively demanding understanding of attempted robbery, however, that feature of the instruction cannot reasonably be regarded as prejudicial to appellant, as it only enhanced the quantum of proof required of the prosecution to establish his guilt. In sum, appellant has shown no reversible instructional error.

3. *No Prosecutorial Misconduct*

Appellant contends the prosecutor committed misconduct in closing argument by misstating the law regarding attempted robbery. The focus of appellant's contention is on the following remarks: "It becomes a robbery when . . . [Singh] is in the immediate presence of [appellant] and this other customer, and [appellant] continues to use force to take the [beer]. . . . [¶] I think the question comes down to[,] did [appellant] continue to use force in the immediate presence of [Singh?]" Appellant argues that those remarks misinformed the jury that an attempted robbery occurred if Singh was in the immediate presence of appellant's use of force against the customer.

Appellant's contention fails for the reasons discussed above regarding his related contention of instructional error. To demonstrate prosecutorial misconduct, appellant must

show that "'"[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."'" (*People v. Cortez* (2016) 63 Cal.4th 101, 131, quoting *People v. Centeno* (2014) 60 Cal.4th 659, 667.) Here, following the remarks identified by appellant, the prosecutor repeatedly stated that the key issue was whether appellant used force against Singh in seeking to retain the beer. There is no reasonable likelihood the jury understood those remarks in the manner suggested by appellant. Furthermore, the prosecutor's acceptance of the theory that an attempted robbery occurred only if appellant actually used force against Singh -- though not mandated by the requirements from attempted robbery -- was favorable to appellant, and thus cannot reasonably be regarded as misconduct. In sum, appellant has shown no prosecutorial misconduct.

C. *Fine and Penalty Assessment*

Appellant contends the minute order from the sentencing hearing and the abstract of judgment improperly reflect the imposition of a $10 crime prevention fine under section 1202.5 and a related $29 penalty assessment. We agree.

Generally, in sentencing a defendant, the trial court is obliged to impose fees and fines in express terms. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.) Here, the court stated: "The court will order the minimum restitution fine

and all mandatory court fees. [The m]iminum parole revocation fine is imposed and stayed unless parole is ever revoked in this case." The court thus expressly imposed only a restitution fine (§ 1202.4, subd. (b)(1)), a parole revocation fine (§ 1202.45), and "all mandatory fees."

The imposition of a crime prevention fine under section 1202.5 and related penalty assessments is not mandatory, as that provision permits the court to determine whether the defendant has the ability to pay the fine. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1533 [upon a determination that defendant lacks the ability to pay, court may decline to impose section 1202.5 fine and related assessments].) Because the court ordered no fine or assessment, we presume that it found appellant lacked the ability to pay, and thus denied the fine and assessment. (See *People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) Generally, "[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) For that reason, the inclusion of the fine and related assessment in the sentencing minute order and abstract of judgment was error.

Respondent contends the error has been forfeited by appellant's failure to seek a remedy from the trial court. We

disagree.[5] The record discloses that after noticing this appeal, appellant unsuccessfully requested that the trial court modify the sentencing minute order and abstract of judgment to eliminate the fee and related assessment. Furthermore, the error here is clerical, that is, it involves a discrepancy between the trial court's rulings, as established by its oral pronouncements, and the minute order and abstract of judgment. As our Supreme Court has explained, appellate courts may correct such errors, and it is important that they do so, even when the appellant sought no relief from the trial court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.) We therefore decline to find a forfeiture.

People v. Crittle (2007) 154 Cal.App.4th 368, upon which respondent relies, is distinguishable. There, the defendant raised no timely objection when the trial court expressly imposed a $10 fine under section 1202.5, subdivision. In view of the defendant's conduct, the appellate court found that he had forfeited his contentions of error regarding the fine. In contrast, here the sentencing minute order and abstract of judgment reflect a fine and assessment not imposed by the trial court. In sum, the sentencing minute order and abstract of judgment must be

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[5] Generally, errors relating to the trial court's discretionary sentencing choices are subject to forfeiture for want of a timely objection, but an unauthorized sentence is reviewable on appeal in the absence of an objection. (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

amended to eliminate the $10 fine and the related $29 assessment.

DISPOSITION

The trial court is directed to correct the sentencing minute order to eliminate the references to a $10 fine (§ 1202.5) and the related $29 assessment, to prepare an amended abstract of judgment reflecting that modification, and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.