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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CHRISTOPHER L. HONG, Defendant and Appellant.	B230592 (Los Angeles County Super. Ct. No. GA078229)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed in part, reversed in part.

Carey D. Gorden, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Christopher Hong appeals from a judgment after having been convicted of robbery (Pen. Code, § 211),[1] petty theft with a prior (§ 666) and burglary (§ 459), with a personal use weapon enhancement attached to each conviction. Plaintiff concedes, and we agree with, defendant's argument that the petty theft with a prior conviction and the weapon use enhancement attached to it must be reversed since petty theft is a lesser included offense of robbery. Defendant also argues that the trial court did not independently weigh the evidence in denying his motion for a new trial because its statement indicated the court was bound by the jury's verdict. We disagree.
We shall reverse defendant's conviction of petty theft with a prior and strike the weapon use enhancement attached to it. In all other respects, we affirm the judgment. The abstract of judgment must be corrected to reflect these changes and to show that the court imposed a $10, rather than $120, fine under section 1202.5.

FACTUAL AND PROCEDURAL SUMMARY

On October 20, 2009, defendant walked up to the counter at a 7-Eleven store in Alhambra, showed the clerk a knife and told him, "Fuck you, bitch." The clerk could not see defendant's other hand, but defendant walked out of the store without paying for a 12-pack of beer.

A second clerk, who was in the break room at the time, followed defendant after he heard someone say, "beer run." He saw defendant drop the beer while riding away from the store on his bicycle. Some of the bottles broke, but the clerk tried to pick up those that did not. He saw defendant return on his bicycle and defendant threatened him with a knife from across the street. Frightened, the clerk ran back to the store, leaving the bottles behind. Through the store window, he saw defendant put bottles in his pants pockets and ride away. The clerk called police, and defendant was arrested shortly after that. He tried to toss a knife into a garbage bin at the time of his arrest. Defendant

[1] Statutory references are to the Penal Code unless otherwise indicated.

admitted that he stole the beer but denied threatening the clerk. He claimed the knife fell out of his pocket when he went back to get the beer he had dropped.

After a jury trial, defendant was convicted, as charged, of second degree robbery, petty theft, and second degree commercial burglary. The jury found true the weapon use allegations attached to each count. The court found the alleged prior serious felony conviction to be true.

Defendant was sentenced to 12 years in prison. The court imposed the midterm of three years on count 1, doubled under sections 667, subdivision (e)(1) and 1170.12, subdivision (c)(1), as well as a consecutive five-year term based on the prior serious conviction under section 667, subdivision (a)(1), and a one-year term for the weapon use under section 12022, subdivision (b)(1). On counts 2 and 3, the court doubled the midterm of two years, added a one-year term for the weapon-use enhancement, and stayed the sentence under section 654. Defendant received 543 days of custody credit. The court imposed various fines and fees, including a $10 crime prevention fee under section 1202.5.

This timely appeal followed.

DISCUSSION

I

The parties agree that defendant's conviction of petty theft with a prior must be reversed and the attached weapon use enhancement stricken.

A defendant cannot be convicted of both a greater and a lesser offense if the lesser offense is necessarily included within the greater. (*People v. Reed* (2006) 38 Cal.4th 1224, 1228–1229.) If a defendant is convicted of both, the conviction of the lesser offense must be reversed and any attached enhancements stricken. (*People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1150-1151.) Theft is a lesser necessarily included offense of robbery, and the prior conviction on which petty theft with a prior is based is a sentencing factor rather than an element of the offense. (*People v. Villa* (2007) 157 Cal.App.4th 1429, 1433-1434.)

Because defendant was improperly convicted of both a lesser and greater offense, we reverse the conviction of petty theft with a prior and strike the weapon use enhancement attached to that conviction.

II

Defendant argues the trial court did not independently weigh the evidence supporting the robbery conviction when it denied his motion for a new trial, in which he asserted that the conviction was based on insufficient evidence.

"In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.] [¶] A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. '"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 523–524 (*Davis*).)

Defendant analogizes this case to *People v. Robarge* (1953) 41 Cal.2d 628, 634 (*Robarge*), where the trial court expressed serious doubts about the credibility of the sole witness who identified the defendant, yet repeatedly stated that it was bound by the jury's contrary conclusions. Our Supreme Court held the trial court misapprehended its role on a motion for a new trial and "failed to give defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict." (*Ibid*.)

Plaintiff in turn relies on *People v. Price* (1992) 4 Cal.App.4th 1272 (*Price*), where the trial court denied a motion for a new trial by ruling, '"I think the evidence was sufficient, and *I think that the jury—there was enough evidence there for the jury to do what the jury did . . .*' (Italics added.)" (*Id*. at p. 1275.) The appellate court held that "the court's exercise of its independent judgment is reflected in its statement that the

evidence was sufficient. The court's further comment there was substantial evidence to support the jury's determination is surplusage." (*Ibid*.)

Here, the trial court ruled as follows: "The jury spoke and I think that there was sufficient evidence for them to rely upon when they made the determination. [¶] This court is not going to overturn the determination of the jury because I believe there is sufficient evidence for them to make that finding." Defendant argues this statement is an indication of the court's belief that it was bound by the jury's conclusions. But unlike the trial court in *Robarge*, the court in this case did not say it "was not in a position where it could upset" the jury's verdict. (*Robarge*, *supra*, 41 Cal.2d at p. 634.) The court's statement that it was "not going to" overturn the verdict does not demonstrate a belief that it could not do so. Fairly read, the statement indicates only that, in the court's opinion, there is sufficient evidence to support the verdict.

References to the verdict, by themselves, do not establish that the court believed itself bound by it as the court may consider the verdict in ruling on a motion for a new trial. (*Davis*, *supra*, 10 Cal.4th at p. 524.) The trial court in *Davis* made repeated references to the jury and the verdict in ruling that '"there was sufficient evidence to support the verdict on [kidnapping] . . . . [t]he jury was instructed that the crime of kidnapping could be committed if the movement was consensual at first and but later turned into something less than consensual. And I think the evidence supports that, and I think the jury finding of that [was] supported by the evidence."' (*Ibid*.) None of these references was found to have bound the court to the verdict. (*Ibid*.)

In this case, too, the court stated nothing more than its independent belief that sufficient evidence supported the verdict. While the court could have said that it weighed the evidence independently, "its failure to do so . . . cannot be equated with having applied the wrong standard." (*Price*, *supra*, 4 Cal.App.4th at p. 1276.)

III

Citing the abstract of judgment, defendant argues that the court incorrectly imposed an excessive $120 crime prevention fund fine under section 1202.5. Plaintiff concedes that the amount on the abstract of judgment is incorrect but notes that, because

the court imposed a $10 fine on the record, only the abstract of judgment rather than the judgment needs to be modified. The trial court actually imposed a "$10 plus men at [sic] assessment theft fee," on which the minute order imposes an additional $28 penalty assessment.

Section 1202.5, subdivision (a) states: "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211 . . . , the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." The $10 crime prevention fine is to be imposed only once per case. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) Thus, the fine imposed in this case should be reduced to $10.[2]

DISPOSITION

The conviction on count 2 is reversed and the weapon use enhancement attached to that count is stricken. In all other respects, the judgment is affirmed. We direct that the abstract of judgment be amended accordingly. It also should reflect a $10, rather than $120, fine under section 1202.5.

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EPSTEIN, P. J.

We concur:

WILLHITE, J. SUZUKAWA, J.

[2] The $10 fine is subject to additional penalty assessments based on a defendant's ability to pay. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528–1532.) Here, while the minute order added $28 in penalty assessments on the $10 fine, the reporter's transcript does not clearly indicate the imposition and amount of such assessments, and they do not appear on the abstract of judgment. Since neither side raises the issue of penalty assessments, we do not consider it.