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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY PEATE, Defendant and Appellant.	B267094 (Los Angeles County Super. Ct. No. BA433171)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed.

Janet R. Gusdorff, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xaiver Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

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Anthony Peate (defendant) appeals his conviction for second degree robbery and the resulting 15-year prison sentence. He challenges the sufficiency of the evidence, contests three of the jury instructions, and alleges that the trial court mishandled issues arising during the jury's deliberations. Because these arguments lack merit, we affirm.

FACTS AND PROCEDURAL BACKGROUND

At approximately 3:45 a.m. on January 23, 2015, defendant entered a produce warehouse in downtown Los Angeles and grabbed cash from the register. A warehouse employee came over to investigate a noise he heard, and saw defendant duck down behind the register. The employee "grabb[ed]" defendant "as best as [he] could" and started to "pull[] him" "towards the outside" of the warehouse; the employee managed to get his arms around defendant, but the two men continued to struggle. Defendant tried to hold on to the cash. As the men passed by a crate filled with avocados, defendant tried to grab a knife sticking out of the crate, but the employee pulled defendant away. The employee was "concerned" for his safety. Once outside, defendant kneed the employee three times in the lower back. Defendant was finally subdued when a passerby who happened to have a black belt in Judo brought defendant to the ground. At that point, defendant, when ordered to drop the remainder of the money, did so.

The People charged defendant with second degree robbery (Pen. Code, § 211.)[1] The People further alleged defendant's 1991 and 1995 first degree burglary convictions constituted strikes

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1 All further statutory references are to the Penal Code unless otherwise indicated.

within the meaning of California's Three Strikes law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)) as well as prior serious felonies (§ 667, subd. (a)(1)). The People also alleged a total of five prior prison terms (§ 667.5, subd. (b)).

The jury convicted defendant of the robbery, and defendant admitted his prior convictions.

The trial court sentenced defendant to state prison for 15 years. After granting defendant's motion to strike his two prior strike convictions, the court imposed a five-year base term, plus two consecutive five-year terms for each of his two prior serious felony convictions. The court struck the remaining enhancements.

Defendant filed this timely appeal.

DISCUSSION

I. Sufficiency of the Evidence

Defendant argues there was insufficient evidence to support his second degree robbery conviction. Our task in evaluating this claim is to determine whether the record "'contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890 (*Covarrubias*), quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27 (*Lindberg*).) In so doing, we view the record in the light most favorable to the verdict. (*Ibid.*)

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; *People v. Jackson* (2016) 1 Cal.5th 269, 343.) "'Taking,' in turn, has two aspects: (1) achieving possession of the property,

known as 'caption,' and (2) carrying the property away, or 'asportation.'" (*People v. Gomez* (2008) 43 Cal.4th 249, 255 (*Gomez*).) Because "robbery . . . is a continuing offense," "[t]he force or fear" and "immediate presence" elements "of robbery can be satisfied during either the caption or the asportation phase." (*Id.* at pp. 254, 261.) What is more, "the slightest movement may constitute asportation." (*Id.* at p. 255; *People v. Pham* (1993) 15 Cal.App.4th 61, 65 ["very slight movement" sufficient].)

There was sufficient evidence to find defendant guilty of robbery beyond a reasonable doubt. Although defendant did not use force or fear when removing the cash from the till, he used both fear *and* force, respectively, when he tried to grab the knife and kicked at the warehouse employee while holding the money and struggling to get away. (*People v. Anderson* (2011) 51 Cal.4th 989, 994 ["It . . . is robbery when the property was peacefully acquired, but force or fear was used to carry it away"]; see generally *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28 (*Estes*).)

Defendant raises two categories of objections. First, he argues that there is insufficient evidence of force or fear. With regard to force, he notes that the sole evidence of "force" is the warehouse employee's testimony that defendant kicked him, and goes on to assert that this testimony is "inherently improbable"—and must therefore be rejected—because the employee elsewhere testified that he had his arms around defendant at "chest level, all the time." We disagree. To begin, the employee's testimony is not inherently improbable given that the two men were "grabbing each other" and "fighting"—and thus not locked in a permanent embrace—the whole time. Further, although courts may gainsay a jury's credibility call when the testimony is "physically

impossible" or when its "inherent improbability plainly appears" (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1233), any inconsistency in the employee's testimony here does not rise to this level and is instead the type of internal inconsistency which we must leave to the jury to resolve and thereafter defer to the jury's resolution. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878 ["It is for the trier of fact to consider internal inconsistencies in testimony"].) With regard to fear, defendant contends that the employee's "concern" for his safety when defendant grabbed for the knife was unconnected to the robbery itself because, at that time, defendant was just trying to get away and did not care about the money. This ignores that defendant was still holding on to the cash at that point in time; consequently, defendant's efforts to get away are indistinguishable from his efforts to asportate with the cash, and were thus in furtherance of the robbery.

Second, defendant contends that there is insufficient evidence of asportation because (1) he was only trying to get away without any money by the time he grabbed for the knife and kicked the employee, and (2) the sole asportation was when the employee dragged him out of the warehouse, which was not voluntary (and thus not attributable to defendant). We reject the first argument because, as noted above, defendant was still holding on to the cash when he was trying to get away. We reject the second because defendant voluntarily asportated when he ducked down behind the register. This "slight[] movement" is enough. (*Gomez*, *supra*, 43 Cal.4th at p. 255; *People v. Clark* (1945) 70 Cal.App.2d 132, 133 ["Whether appellant conveyed the money one yard or one mile from the presence of his victim is immaterial insofar as the element of asportation is concerned"].)

What is more, defendant's asportation continued during his subsequent struggle with the employee as they moved—together—toward the area outside the warehouse.

II. Instructional Issues

Defendant asserts that the trial court erred in (1) not giving an instruction on the crime of attempted robbery as a lesser included offense to robbery, (2) not instructing the jury that it had to unanimously agree on which of defendant's acts constituted "force" or "fear," and (3) instructing the jury it could infer consciousness of guilt from defendant's flight. We independently review instructional errors. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581 (*Manriquez*).)

A. Attempted Robbery as a Lesser Included Offense

As part of its duty to instruct the jury on general legal principles related to a case, a trial court is required to instruct the jury on any crimes that are lesser included offenses to a charged crime if "there is substantial evidence that would absolve the defendant from guilt of the greater [charged offense], but not the lesser [uncharged] offense." (*People v. Simon* (2016) 1 Cal.5th 98, 132.) For these purposes, we review the evidence in the light most favorable to the defendant. (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1483.) The crime of "[a]ttempted robbery requires the 'specific intent to commit robbery and . . . a direct but ineffectual act toward the commission of the crime.'" (*People v. Sanchez* (2016) 63 Cal.4th 411, 470, quoting *Lindberg*, *supra*, 45 Cal.4th at p. 27.) It is a lesser included offense to robbery. (See *People v. Licas* (2007) 41 Cal.4th 362, 366; cf. *People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1247-1248 [noting that attempt is not a lesser included offense to general intent crimes].)

The trial court did not err in declining to instruct the jury on the lesser included offense of attempted robbery. For these purposes, defendant was entitled to an instruction on attempted robbery only if the record, viewed in the light most favorable to him, showed it was possible for a rational jury to find that he only took a "direct but ineffectual act toward" robbery but did not commit the complete crime. The record did not. Defendant asserts that he only attempted to use force or fear but failed, and that he only attempted to asportate with the money but failed because he was dragged. As explained above, however, defendant's acts either did or did not fully satisfy both elements. Defendant's efforts to grab the knife (whether or not he succeeded) constituted the use of fear because those efforts caused the warehouse employee to be "concerned" for his safety, and defendant's kicks (which the jury could credit or not credit) constituted force. There was no *attempted* fear or *attempted* force. And defendant's ducking down and subsequent movement toward the warehouse's exterior during the melee with the employee constituted asportation. This evidence precludes a finding that he could be absolved of the greater crime (of completed robbery) while being convicted of the lesser crime (of attempted robbery). Defendant urges that the jury "could reasonably have disbelieved" the employee's testimony regarding his safety concerns, but our mandate to view the evidence in the light most favorable to the defendant does not empower us to reject as incredible all of the People's evidence, particularly when there is no evidence to the contrary.

B. Unanimity Instruction

Criminal defendants have a constitutional right to have any guilty verdict against them be unanimous. (Cal. Const., art.

I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) To effectuate that right, a trial court is required to give a unanimity instruction "if there is evidence that more than one crime occurred, each of which could provide the basis for conviction under a single count," unless the People inform the jury which act of the defendant's to use as the basis for that count. (*People v. Grimes* (2016) 1 Cal.5th 698, 727; *Covarrubias*, *supra*, 1 Cal.5th at pp. 877-878.) However, no unanimity instruction (or prosecutorial election) is required "'where multiple . . . acts may form the basis of a guilty verdict on one discrete criminal event'"—that is, "where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed . . . ." (*Russo*, at pp. 1132, 1135.)

No unanimity instruction was required in this case. There was only one taking of property—namely, defendant's removal of cash from the warehouse's register. (*People v. Curry* (2007) 158 Cal.App.4th 766, 782-783 [taking of multiple items at the same time; unanimity not required]; cf. *People v. Davis* (2005) 36 Cal.4th 510, 561-562 ["two distinct takings"; unanimity required].) Defendant argues that there were multiple acts that might constitute force or fear—namely, his attempt to grab the knife (fear) or his three kicks to the warehouse employee's back (force). That the jury had several different instances of force or fear to choose from did not change the fact that "the evidence show[ed] only a single discrete crime" (*Russo*, *supra*, 25 Cal.4th at p. 1132), especially when "robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety." (*Estes*, *supra*, 147 Cal.App.3d at p. 28.) Notwithstanding this analysis, defendant asserts that the prosecutor told the jury there were two different robberies.

The prosecutor told the jury that "we have two *areas* now, . . . where the robbery [was] actually occur[ring]" (emphasis added); he did not say there were two separate robberies.

C. Flight Instruction

An instruction on the defendant's flight is appropriate ""'where [substantial] evidence shows that [a] defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.'"'" (*People v. Cage* (2015) 62 Cal.4th 256, 285, quoting *People v. Bradford* (1997) 14 Cal.4th 1005, 1055; see generally § 1127c.) A flight instruction was appropriate in this case because defendant ducked behind the cash register, and attempts to hide constitute "flight." (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1030.) Even if we assume a flight instruction was *not* appropriate, any error was harmless beyond a reasonable doubt because the standard instruction the trial court read in this case by its very terms only applies "if [the jury] conclude[s] that the defendant fled." "In the absence of any evidence of flight after accusation," our Supreme Court has noted, "the jury would have understood that the instruction was to that extent inapplicable. The superfluous reference to flight . . . caused defendant no prejudice." (*People v. Elliott* (2012) 53 Cal.4th 535, 584; *People v. Visciotti* (1992) 2 Cal.4th 1, 61 [finding erroneous flight instruction harmless because "the instruction did not assume that flight was established, leaving that factual determination and its significance to the jury"].)[2]

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[2] Because there are no instructional errors, we have no occasion to consider defendant's further request that we evaluate the cumulative impact of multiple errors. (Accord, *People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

III. Jury Deliberation Issues

A. Additional Background

The trial court instructed the jury on the charged crime of robbery as well as on the lesser included crime of theft by larceny (§ 484), and provided the jury with verdict forms for each of the two crimes. The trial court's initial instructions to the jury did not explain how to fill out the verdict forms.

The jury sent a note indicating it "cannot come to agreement on [the force or fear element] of the second degree robbery count . . ." and asking, "How do we complete [the verdict] form for this count if we are [a] hung jury?" The trial court summoned the jury, and asked whether it could do "anything further" to "assist . . . in arriving at [a] verdict." The foreperson indicated his belief that nothing further could be done and, in response to the court's questions, indicated that the jury had taken three ballots, the last of which was ten to two. The court then began to query individual jurors to see whether they agreed with the foreperson's belief that further deliberations would be of no assistance. Juror Nos. 1, 2, and 3 agreed, but Juror No. 4 indicated that "more explanation" of the force element "could probably brighten our minds." The court provided additional instructions on this element, and asked Juror No. 4 if he thought he could "go back and deliberate and perhaps discuss this further." When Juror No. 4 said, "yes," the court "ask[ed] the majority and the dissenting jurors to reconsider their positions" and to "engage in reverse role playing in order to better understand each other's positions." Deliberations resumed.

The jury then returned guilty verdicts on *both* the robbery and theft-by-larceny counts. Upon recognizing this, the court told the jury, "if you find [defendant] guilty of a higher [offense], you

cannot find him guilty of the lesser [offense.]" The court provided the jury with a supplemental instruction on how to fill out the verdict forms.[3] Among other things, this instruction explained that (1) "[a] defendant may not be convicted of both a greater and a lesser [offense] for the same conduct"; (2) the court "can accept a verdict of guilty of a lesser crime only if [the jury] ha[s] found the defendant not guilty of the corresponding greater crime"; and (3) "if [the jury] cannot agree whether the People have proved that the defendant is guilty of a charged *or* lesser crime, inform [the court] that [the jury] cannot reach an agreement and do not complete or sign any verdict form."[4] (Italics added.) This

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[3] Although the clerk's transcript contains a written jury instruction corresponding to CALCRIM No. 3517, the reporter's transcript indicates that the jury was never given this written instruction.

[4] In full, the court's instruction provided:

"If you[] find that the defendant is not guilty of the greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and a lesser for the same conduct.

"[Theft by larceny] is a lesser crime of the charge of [robbery].

"It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

"You have received verdict forms.

"If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the

instruction did not specifically tell the jury what to do if it hung on the *greater* offense (robbery) alone, but agreed on the lesser crime. Deliberations resumed.

The jury again informed the court it had reached a verdict. The trial court had the clerk read the guilty verdict for theft by larceny, and asked the jury as a whole if the verdict was its verdict. The verdict was not recorded. The court then realized that the jury had not filled out any verdict form for the robbery count, and reread the supplemental instruction it had read previously except for the portion pertaining to what to do if the jury could not agree on whether the People had proven either the greater or lesser crime. The court asked the foreperson whether the jurors had found the defendant not guilty of robbery or were instead unable to agree; the foreperson responded, "They could not agree." Based on that answer, the court asked the jury "to go back and deliberate appropriately" and, after an overnight break, "come back tomorrow with fresh heads and see if [it] can arrive at some kind of a disposition on this." Defendant argued that the

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verdict form for guilty of that crime. Do not complete or sign any other verdict form.

"If all of you agree that the People have not proved that the defendant is guilty of the greater crime and also agree that the People have proved that he is guilty of the lesser crime, complete and sign the verdict form for guilty of the lesser crime. Do not complete or sign any other verdict form for that count.

"If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty.

"If all of you cannot agree whether the People have proved that the defendant is guilty of a charged or lesser crime, inform me only that you cannot reach an agreement and do not complete or sign any verdict form."

jury's guilty verdict on the lesser theft-by-larceny count amounted to an implied acquittal of the greater robbery charge, but the trial court rejected the argument.

The next morning, the jury returned a guilty verdict on the robbery count.

B. Analysis

Defendant argues that the trial court mishandled the jury's notes and deliberations in three ways: (1) it did not correctly instruct the jury on how to fill out the verdict forms; (2) it erred in allowing the jury to continue deliberating after the jury returned the guilty verdict on the theft-by-larceny count; and (3) it abused its discretion in denying a mistrial motion on the ground that the robbery verdict was coerced. We review the first two instruction-related claims de novo (*Manriquez*, *supra*, 37 Cal.4th at p. 581), and the last claim for an abuse of discretion (*People v. Peoples* (2016) 62 Cal.4th 718, 802).

1. Instruction on how to fill out verdict forms

Although a jury confronted with a charged crime and its lesser included offense may discuss those crimes during deliberations in any order, "the jury may not return a verdict on the lesser offense unless it has agreed beyond a reasonable doubt that [the] defendant is not guilty of the greater crime charged." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329, italics omitted.) In this case, the trial court's initial instructions did not contain any discussion of how to fill out the verdict forms, and thus did not set forth this principle. The court's subsequent instructions set forth this principle, but provided the jury no specific guidance on what to do if it hung on the greater offense but could reach a decision on the lesser offense. A trial court is not obligated to instruct a jury at the outset on how to fill out the verdict forms

and has the discretion to take a "wait and see" approach. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 519-520.)

However, even if assume for the sake of argument that the trial court's failure to provide sufficient instruction after the jury expressed confusion constituted instructional error, that error was not prejudicial because there is no """reasonable likelihood that the jury was misled to [the] defendant's prejudice."""" (*People v. Landry* (2016) 2 Cal.5th 52, 95, quoting *People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.) The court's first supplemental instruction on how to fill out the verdict forms specifically told the jury that it could not convict defendant of theft by larceny until and unless it acquitted him of robbery. It also informed the jury what to do if it could not reach a verdict on either crime—that is, tell the court of its indecision. When the jury ignored this instruction, the court's second supplemental instruction told the jury once again that it could only convict defendant of theft by larceny if it first acquitted him of robbery. This second instruction did not again tell the jury what to do in the event it could not reach a verdict on the greater offense or on *both* offenses, but the jury did precisely what it would have done had it been properly instructed on this point—that is, the jury told the court it was hung. Any prejudice is further mitigated by the fact that the jury was able, after further deliberations, to reach a verdict on the greater offense.

Defendant asserts that the court's instructions presented the jury with an "all-or-nothing choice" that coerced it to convict him of robbery. It did not. There was no such all-or-nothing choice: Both the first and second supplemental instructions gave the jury the options of finding defendant guilty of the greater (robbery) and not guilty of the lesser (theft by larceny), not guilty

of the greater and guilty of the lesser, or not guilty of both. Defendant suggests that the trial court's failure to "accept" the jury's verdict on the lesser included offense and direction to deliberate further was coercive but, as we discuss below, the court's refusal to accept a defective verdict and instead to order the jury to resume deliberations was entirely appropriate.

2. Order to continue deliberations

As pertinent here, there are two doctrines that limit when a trial court may order a jury to continue deliberations. First, a trial court loses jurisdiction to order a jury to continue deliberations once a verdict is read and recorded and the jury has been discharged. (§ 1164, subd. (a) [requiring verdict to be "receiv[ed]" and "record[ed]" by the court clerk]; cf. *People v. Bento* (1998) 65 Cal.App.4th 179, 188-189 [court retains jurisdiction, even after reading and recording of guilty verdict, as long as the jury is not "exposed to new evidence"]; see also § 1163 [empowering court to poll the jury prior to the recording of the verdict].) Until that time, the court may order the jury to continue deliberating. (*People v. Anzalone* (2013) 56 Cal.4th 545, 551.) Second, a trial court may not order a jury to continue deliberating on a greater offense if the jury has returned a guilty verdict on a lesser included offense and thereby impliedly acquitted him of the greater offense. (*People v. Fields* (1996) 13 Cal.4th 289, 299 (*Fields*).)

The trial court's reading and group polling of the jury as to its guilty verdict on the theft-by-larceny count did not divest it of jurisdiction to order further deliberations under either of the above-detailed doctrines. The court did not lose statutory jurisdiction to order further deliberations for the simple reason that the theft-by-larceny verdict was never recorded. And our

Supreme Court has held that the doctrine of implied acquittal does not apply where, as here, "the jury expressly deadlocks on the greater offense but returns a verdict of conviction on the lesser included [offense]." (*Fields*, *supra*, 13 Cal.4th at p. 302.) In this situation, the Court has noted, "the trial court may properly decline to receive and record this verdict of conviction pending further deliberations by the jury." (*Id.* at p. 310.) That is precisely what the trial court did.

3. Coerced verdict

A trial court has the power to discharge a jury if "it satisfactorily appears that there is no reasonable probability that the jury can agree" on a verdict. (§ 1140.) "The determination whether there is a reasonable probability of agreement rests in the discretion of the trial court." (*People v. Breaux* (1991) 1 Cal.4th 281, 319.) The court is not required to take the jury's claim of deadlock at face value and may, upon a finding of reasonable probability that a verdict might yet be reached, order the jury to keep deliberating as long as it "exercise[s] its power . . . without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.'" (*Ibid.*; *People v. Valdez* (2012) 55 Cal.4th 82, 159.)

In this case, the trial court did not abuse its discretion in ordering further deliberations or otherwise coerce a verdict. When the jury initially indicated it was deadlocked on the "force or fear" element of robbery after three ballots, the court ordered further deliberations only after one of the jurors indicated that the court's further instructions might make further deliberations and discussion fruitful. The court also "ask[ed]" the "majority" and "dissenting" jurors to "reverse role play[]" to understand one

another's positions. When the jury returned the first set of incorrect verdict forms, the court instructed the jury on how to fill out the verdict forms and ordered further deliberations. When the jury returned the second set of incorrect forms, it largely repeated its supplemental instructions on how to fill out the forms; learned that the jury was still hung on the greater robbery charge; and sent the jury back to "deliberate appropriately," "see if [it] can arrive at some kind of a disposition on this," and fill out the forms properly. It was at that point that the jury returned a guilty verdict on the greater charge. None of these instructions was coercive, and the record does not reveal that the trial court abused its discretion in asking the jurors to continue deliberating after the first report of deadlock or after the two times they incorrectly filled out the verdict forms.

Defendant argues that the trial court abused its discretion in ordering further deliberations after merely repeating its additional instructions on the force or fear element (rather than providing additional examples), in refusing to accept the jury's guilty verdict on the theft-by-larceny offense, and in urging the jury to "deliberate appropriately" and "arrive at some kind of disposition on this." These actions were not coercive. The additional instructions on force gave three different examples of what was and was not sufficient force. Further examples might have encroached upon the jury's function; more to the point, the absence of further examples does not mean the court was coercing a verdict, particularly when Juror No. 4 indicated the court's rereading of the additional instruction made further deliberation worthwhile. As discussed above, the court did not err in rejecting the defective verdict. And the court's urging to "deliberate appropriately" and "arrive at some kind of

disposition" did not presage *which* disposition the court wanted, particularly when the jury simultaneously received instructions on how to acquit defendant of robbery while convicting him of the lesser crime of theft by larceny.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.