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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDDIE LAMAR EDWARDS, Defendant and Appellant.	B275747 (Los Angeles County Super. Ct. No. NA102279)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Modified and, as so modified, affirmed.

Melissa L. Camacho-Cheung, 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, Assistant Attorney General, Margaret E. Maxwell and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Eddie Lamar Edwards appeals his conviction for second degree robbery. He contends the evidence was insufficient to support the verdict, the trial court committed instructional errors, and the cumulative effect of the purported errors was prejudicial. The parties agree that the abstract of judgment should be amended to correctly reflect Edwards's custody credits. We order the abstract of judgment corrected as the parties request, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

Jarrod Jones was an undercover loss prevention agent at a CVS Pharmacy store located in Long Beach. Ahmad "Romeo" Obeid was the store manager. On July 27, 2015, at approximately 11:30 a.m., Jones, watching via the store's ceiling security mirrors, observed Edwards, in the store's liquor aisle, attempting to remove the security caps from bottles of liquor. Jones observed that on one of the bottles, the bottle cap came off with the security cap, and Edwards replaced that bottle on the shelf. Jones saw Edwards place two bottles of liquor in his pants.

Obeid was on the sales floor near the liquor aisle and heard the sound of security caps being removed. He moved to another aisle where he could view the liquor aisle in the security mirrors. Jones was already in the aisle, watching the mirrors. Obeid observed Edwards attempting to remove the security caps. Obeid told Jones to watch Edwards and went to just outside the store's exit, waiting for Edwards. Jones signaled to Obeid that Edwards had concealed liquor in his pants. Shortly thereafter, Edwards headed down the middle aisle and then turned onto the facial care aisle, toward the exit. Obeid had a full view of Edwards as

he walked down the facial care aisle to the exit. Jones kept Edwards in view from the point Jones placed the bottles in his pants until he reached the exit; however, Jones could see only Edwards's head and shoulders, not his hands. Neither Obeid nor Jones saw Edwards remove the liquor bottles from his pants or make movements suggesting he had done so.

When Edwards tried to exit the store, Obeid stepped into the doorway and said, "Give me the bottle." Edwards replied, " 'Get the fuck out of my way,' " placed both hands on Obeid's chest, and pushed him. Edwards was taller and bigger than Obeid. Edwards exited the store and, as Jones and Obeid watched, walked quickly toward Long Beach Boulevard. Jones and Obeid lost sight of Edwards when he turned the corner. During the incident, Jones called 911.

Obeid inspected the liquor aisle and found two security caps that had been removed from liquor bottles, one with the bottle cap still inside. Jones observed the liquor bottle Edwards had put back on the shelf, with the cap off. Jones retraced Edwards's steps but did not see any liquor bottles deposited elsewhere in the store.

Police found Edwards at a nearby Walgreens shortly thereafter. He did not have the liquor bottles in his possession. Both Jones and Obeid identified Edwards as the perpetrator in separate field show-ups.

b. *Defense evidence*

Edwards testified in his own behalf, as follows. He went to CVS to purchase beer but, because the store did not have the brand he wanted, he headed to the liquor aisle instead. He tried to remove the security caps from the bottles to prevent the store's alarm from beeping when he exited, but was unsuccessful. When

one bottle's cap came off with the security cap, he replaced that bottle on the shelf. He put another liquor bottle inside his pocket and another in his pants. He planned to steal them. As he walked down the center aisle, he heard something on the store's public address system, "sensed something wasn't right," and had a change of heart. He "dumped the bottles" in the store's middle aisle. When he got to the exit, Obeid approached him, putting his hands up and demanding that Edwards give back the bottles. Edwards told Obeid that he did not have any bottles. Edwards did not realize Obeid was a store employee. Obeid put a hand on Edwards's body and Edwards pushed him in response.

When arrested, Edwards told police officers that he had never been at CVS that day.

Edwards admitted suffering a felony conviction in 2009.

An expert testified that the video from the surveillance cameras was extracted improperly. One of the cameras was unreliable because its frame rate was only two or three frames per second, suggesting not all of Edwards's movements were captured on film. Another camera was badly maintained and had "huge frame drops" in its recording.

A defense investigator testified regarding various measurements of the CVS store's aisles, the building, and the distances in the surrounding area.

2. *Procedure*

Edwards was tried twice. His first trial ended in a mistrial after the jury deadlocked. Upon retrial, a jury convicted him of the second degree robbery of Obeid.[1] (Pen. Code, §§ 211, 212.5,

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[1] The jury also found Edwards guilty of petty theft, a lesser included offense of robbery. The trial court informed the jury it

subd. (c).)[2] In a bifurcated proceeding, the trial court found Edwards had suffered two prior convictions for robbery, both serious felonies and "strikes" (§§ 667, subd. (d), 1170.12, subd. (b)), and had served three prior prison terms within the meaning of section 667.5, subdivision (b). It denied Edwards's motion for a new trial, brought on the grounds of insufficiency of the evidence and instructional error. It sentenced Edwards to 15 years in prison, comprised of the upper term of five years for the robbery, plus two 5-year serious felony enhancements. It struck the two prior strike allegations and the section 667.5, subdivision (b) prior prison term allegations in the interests of justice. (§ 1385.) It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Edwards appeals.

DISCUSSION

1. *The evidence was sufficient to prove Edwards committed robbery*

Edwards contends the evidence was insufficient to prove robbery because there was no showing he possessed the liquor bottles when he shoved Obeid. We disagree.

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was to consider the lesser included offense only if it found Edwards not guilty of the felony charge, and therefore dismissed the petty theft conviction.

[2] All further undesignated statutory references are to the Penal Code.

a. *Standard of review*

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it 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." [Citation.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 106.) We must accept logical inferences the trier of fact might have drawn from the evidence even if we would have concluded otherwise. (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812.)

b. *Law applicable to Estes robberies*

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, with the intent to permanently deprive the victim of the property. (§ 211; *People v. Anderson* (2011) 51 Cal.4th 989, 994; *People v. Gomez* (2008) 43 Cal.4th 249, 254.) Taking has two aspects: achieving possession of the property, known as "caption," and carrying the property away, known as "asportation." (*Gomez*, at

p. 255.) "Although the slightest movement may constitute asportation [citation], the theft continues until the perpetrator has reached a place of temporary safety with the property [citation]." (*Ibid.*) The requisite intent must arise before or during commission of the act of force or fear, and the defendant must apply the force or fear for the purpose of accomplishing the taking. (*Anderson*, at p. 994; *People v. Bolden* (2002) 29 Cal.4th 515, 555-556.)

" 'A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim's presence. [Citations.]' [Citation.] That is, '[a] robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property. . . . [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.' [Citation.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 686-687; *People v. Williams* (2013) 57 Cal.4th 776, 787; *People v. Hodges* (2013) 213 Cal.App.4th 531, 540 (*Hodges*); *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28 (*Estes*).) Such use of force or fear to maintain possession of the victim's property is sometimes referred to as an "*Estes* robbery." (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 223.) However, a defendant who uses force only *after* he or she has abandoned the victim's property may be guilty of theft, but not of robbery. (*People v. Pham* (1993) 15 Cal.App.4th 61, 68 ["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."]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1165 & fn. 8; *Hodges*, at p. 543.)

Thus, to prove robbery in light of the evidence here, the People were required to show Edwards took the liquor bottles and used force or fear against Obeid in order to carry them away. There was sufficient evidence on these points. Jones testified that he observed Edwards remove the security caps from liquor bottles and place the bottles in his pants. The videotape shown to the jury showed Edwards placing the bottles in his pants, and indeed, Edwards admitted doing so. Edwards also admitted he intended to steal the bottles; he attempted to remove the caps to avoid triggering the security system and positioned himself in the liquor aisle in what he hoped was a "blind spot," where he could not be observed by store personnel. Moments after placing the bottles in his pants, Edwards left the store, travelling down one aisle and then heading down the facial care aisle toward the door. Obeid testified he could see Edwards the entire time Edwards walked down the facial care aisle, and Edwards did not remove the bottles from his pants. Jones testified that he kept Edwards in sight from the point at which Edwards attempted to remove the security caps until Edwards left the store, although Jones could not see Edwards's hands the entire time. Jones did not see Edwards stop, slow, or turn toward the shelves as he made his way out of the store. After Edwards left, Jones retraced Edwards's steps but did not find the bottles left along his path. When Obeid tried to stop him, Edwards did not explain that he had put the bottles back, but instead pushed Obeid out of the way. From this conduct, the jury could infer Edwards still had

the bottles in his pants and did not want Obeid to discover them. When apprehended by police minutes later, Edwards lied and said he had not been at the CVS store that day, conduct the jury could infer demonstrated consciousness of guilt. From the foregoing evidence, the jury could reasonably find Edwards left the store with the bottles in his pants, without paying for them, and shoved Obeid while in possession of the bottles in an attempt to carry them away. The evidence was therefore sufficient to prove robbery.

Edwards nonetheless argues the evidence was insufficient. He points out that he testified he changed his mind and replaced the bottles before he reached the exit; neither Jones nor Obeid could see his hands as he walked down the center aisle, and his progress down that aisle was not captured on the video; Jones and Obeid admittedly did not know whether he had the bottles when he left the store; Obeid did not see any bulges in his pockets or pants as he left; neither Jones nor Obeid saw him discard bottles as he walked away; the police officers did not find the bottles in his possession when he was apprehended and he did not smell of alcohol; and Jones did not testify that he retraced Edwards's steps in the store until Edwards's retrial.

Edwards's arguments amount to a request that this court reweigh the evidence and substitute our judgment for the jury's. This we cannot do. The evidence regarding Edwards's possession of the bottles when he exited CVS was conflicting. But the fact the evidence might have been reconciled with a contrary finding does not warrant a reversal. "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see, e.g., *People v. Harris* (2013) 57 Cal.4th 804, 849-850.) We resolve

neither credibility issues nor evidentiary conflicts. (*People v. Friend* (2009) 47 Cal.4th 1, 41; *People v. Cortes* (1999) 71 Cal.App.4th 62, 81 [where an appellant "merely reargues the evidence in a way more appropriate for trial than for appeal," we are bound by the trier of fact's determination].) Here, of course, the jury was free to reject Edwards's testimony that he abandoned the bottles in the store. Although it is the trier of fact's duty to acquit if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the trier of fact, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. (*Harris*, at pp. 849-850; *People v. Iboa* (2012) 207 Cal.App.4th 111, 117.) For the reasons we have discussed, there was no evidentiary deficit.

2. *Purported instructional errors*

Edwards contends the trial court prejudicially erred by instructing on the "escape rule," which in his view was irrelevant and misleading, and by refusing to give a proposed pinpoint instruction. We conclude that even if the trial court erred, any error was harmless.

a. *Instructions given and requested*

The trial court instructed on robbery with CALCRIM No. 1600, the applicable pattern instruction. It provided: "The defendant is charged in Count 1 with robbery. [¶] To prove that the defendant is guilty of this crime, 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 it permanently. [¶] 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. [¶] If you find the defendant guilty of robbery, it is robbery of the second degree. [¶] A person takes something when he gains possession of it and moves it some distance. The distance moved may be short. [¶] The property taken can be of any value, however slight. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person. [¶] A store employee who is on duty has possession of the store owner's property. [¶] Property is within a person's immediate presence if it is sufficiently within his physical control that he could keep possession of it if not prevented by force or fear."

The court also instructed with CALCRIM No. 1800, regarding the lesser included offense of petty theft. That instruction stated that to prove petty theft, the People had to prove (1) Edwards took possession of property owned by someone else; (2) without the owner's consent; (3) when he took the property, he intended to deprive the owner of it permanently; and (4) he moved the property, even a small distance, and kept it for any period of time, however brief.[3]

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[3] The trial court read the petty theft instruction, CALCRIM No. 1800, to the jury, but in the clerk's transcript it is not included with the written instructions provided to the jury.

Over a defense objection, the court instructed with CALCRIM No. 3261, regarding the "escape rule," as follows: "The crime of robbery continues until the perpetrator has actually reached a place of temporary safety. [¶] The perpetrator has reached a place of temporary safety if: [¶] He has successfully escaped from the scene; [¶] He is not or is no longer being chased; [¶] He has unchallenged possession of the property; and [¶] He is no longer in continuous physical control of the person who is the target of the robbery."[4]

Based on *Hodges, supra,* 213 Cal.App.4th 531, discussed in more detail *post,* defense counsel requested the following pinpoint instruction: "If the Defendant did not initially use force to take the property, the People must prove, beyond a reasonable doubt, that the defendant used force to maintain possession of the property against the lawful efforts of the owner to regain it. If the People have not proven that the Defendant maintained possession of the property when force was used, he can only be guilty of theft or attempted theft, not robbery." Counsel asserted the instruction was necessary to clarify the elements of robbery and "highlight the legal significance of this factual question" of whether Edwards possessed the bottles when he used force. Counsel expressed concern that under CALCRIM Nos. 1800 and 1600, the jury could conclude Edwards committed attempted theft when he put the bottles in his pants with the intent to steal, and then find "any type of force that was used at the door was part of a robbery," even if Edwards had abandoned the bottles in

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[4] The trial court omitted the first sentence of the pattern instruction, which pertains to proof of an ancillary allegation, such as use of a firearm, during commission of the robbery.

the store. Alternatively, counsel requested an instruction stating that if Edwards did "not have the property when he [left] that store, there is no crime."

The prosecutor objected that *Hodges* was factually inapposite, and argued that the proposed instruction would confuse the jury and was repetitive of CALCRIM Nos. 1600 and 1800. Both the prosecutor and the trial court opined that there could be no theft unless Edwards actually left the store with the bottles. The court declined to give either of the proposed instructions, finding the relevant legal principles were adequately set forth in CALCRIM No. 1600.

b. *Legal principles and standard of review*

A trial court must instruct on the principles of law relevant to the issues raised by the evidence, and has the correlative duty to refrain from instructing on legal principles that have no application to the facts of the case. (*People v. Debose* (2014) 59 Cal.4th 177, 205-206; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129; *People v. Armstead* (2002) 102 Cal.App.4th 784, 792.)

We review a claim of instructional error de novo. (*People v. Martinez* (2017) 10 Cal.App.5th 686, 708; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) Our charge is to determine whether the trial court fully and fairly instructed on the applicable law. (*People v. Mason* (2013) 218 Cal.App.4th 818, 825.) The correctness of the instructions is to be determined from the entire charge and the record, not from a consideration of parts of an instruction or from a particular instruction alone. (*People v. Young*, *supra*, 34 Cal.4th at p. 1202.) Where reasonably possible, we interpret the instructions to support the judgment rather than defeat it. (*Martinez*, at p. 708; *Ramos*, at p. 1088.)

Where the claim is that an instruction is ambiguous, we inquire whether there is a reasonable likelihood the jury misunderstood and misapplied it. (*People v. Cross* (2008) 45 Cal.4th 58, 67-68; *People v. Smithey* (1999) 20 Cal.4th 936, 963.) We consider the arguments of counsel in assessing the probable impact of the instructions on the jury. (*People v. Young*, *supra*, 34 Cal.4th at p. 1202; *People v. Martinez*, *supra*, 10 Cal.App.5th at p. 708.) The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 328.)

c. *Instruction on the escape rule*

"Under the escape rule, as applied in the context of the felony-murder doctrine and certain other ancillary consequences of robbery, 'robbery is said to continue through the escape to a place of temporary safety, whether or not the asportation of the loot coincides with the escape . . . .' " (*People v. Gomez*, *supra*, 43 Cal.4th at p. 256, fn. 5; *People v. Cooper*, *supra*, 53 Cal.3d at p. 1166.) The escape rule originated in the felony-murder context, but has "been extended to other contexts requiring proof that an act occurred in the commission of a crime – such as inflicting great bodily injury in the course of commission of a crime [citation], kidnapping for purposes of robbery [citation], and use of a firearm in the commission of a robbery [citation]." (*People v. Wilkins* (2013) 56 Cal.4th 333, 341.) In such felony-murder and other cases, the "purpose of the escape rule is to measure the *duration* of a robbery, in order to determine whether a killing or some other act has occurred in the perpetration or commission of the robbery." (*People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1007.) A narrower principle applies in the

Estes robbery context; there, the robbery continues only as long as the thief has possession of the loot. (See *Cooper*, at p. 1165 & fn. 8 [citing *Estes* with approval; holding that for purposes of aider and abettor liability, a robbery continues only so long as the "loot is being carried away to a place of temporary safety"]; see 2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 96(4), pp. 134-135.)

Edwards contends the escape rule instruction "only applies to ancillary consequences of robbery and does not assist a jury in determining whether a robbery has occurred." Because in his case there was no ancillary fact for the prosecution to prove and the duration of the robbery was of no import, he urges, the instruction was irrelevant and misleading.

The People urge that CALCRIM No. 3261 correctly stated the law and was relevant because the evidence showed Edwards used force while attempting to escape. They point out that while the escape rule most often applies when an ancillary consequence is at issue, Edwards cites no authority expressly limiting it to such instances. In their view, language similar to that used in the challenged instruction has been applied to determine whether a robbery occurred. (See *Estes*, *supra*, 147 Cal.App.3d at pp. 27-28; *People v. Flynn* (2000) 77 Cal.App.4th 766, 772.) Further, the Bench Notes for CALCRIM No. 1600 reference *Estes* and CALCRIM No. 3261 and advise, "If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point." (Bench Notes to CALCRIM No. 1600 (2017 ed.).) The Bench Notes for CALCRIM No. 3261 state that it should be given "whenever the evidence raises an issue over the duration of the felony and another instruction given to the jury has required

some act 'during the commission or attempted commission' of the felony." (Bench Notes to CALCRIM No. 3261 (2017 ed.).) The People assert that the duration of the crime was at issue here because "there was a temporal disconnect" between the taking and the use of force.

We are not convinced by Edwards's argument that the challenged instruction is proper only when the ancillary consequences of a robbery are at issue. The principle and language of the escape rule have been applied to the determination of whether an *Estes* or other robbery occurred. In *Estes,* for example, the defendant took unpaid merchandise from a Sears store and, when confronted by a security guard outside the store, swung a knife at him. In rejecting the defendant's contention that there was no robbery because his assaultive behavior was not contemporaneous with the taking, the court explained: "The crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety. It is sufficient to support the conviction that appellant used force to prevent the guard from retaking the property and to facilitate his escape. The crime is not divisible into a series of separate acts. Defendant's guilt is not to be weighed at each step of the robbery as it unfolds. The events constituting the crime of robbery, although they may extend over large distances and take some time to complete, are linked by a single-mindedness of purpose. [Citation.] Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction." (*Estes*, *supra*, 147 Cal.App.3d at p. 28.)

In *People v. Flynn*, the defendant grabbed the victim's purse. Even though the manner in which the bag was snatched may not have constituted force, the court upheld the robbery conviction "on the theory the perpetrator used fear to accomplish retention of the property after it was taken." (*People v. Flynn*, *supra*, 77 Cal.App.4th at p. 769.) *Flynn* reasoned that a "theft or robbery remains in progress until the perpetrator has reached a place of temporary safety." (*Id.* at p. 772.) It therefore followed that the willful use of fear to retain the property immediately after the taking constituted robbery. (*Ibid.*)

In *People v. Gomez*, the victim arrived on the scene after the defendant committed the initial taking. The victim followed the defendant as he fled, and the defendant shot at the victim. (*People v. Gomez*, *supra*, 43 Cal.4th at p. 253.) In rejecting the defendant's claim that the evidence was insufficient to prove robbery because the victim was not present during the initial taking, *Gomez* explained: "In robbery, the elements of larceny are intertwined with the aggravating elements to make up the more serious offense. The issue here is the temporal point at which the elements must come together. The answer lies in the fact that robbery, like larceny, is a continuing offense." (*Id.* at p. 254.) Although "the slightest movement may constitute asportation [citation], the theft continues until the perpetrator has reached a place of temporary safety with the property [citation]." (*Id.* at p. 255; contrast *People v. Williams*, *supra*, 57 Cal.4th at p. 787 [crime of theft by false pretenses ends the moment title to the property is acquired and thus cannot become robbery by the defendant's later use of force or fear].)

The foregoing authorities suggest the escape rule principle —that a robbery continues until the perpetrator has reached a

place of temporary safety with the loot – may be relevant to analysis of an *Estes* robbery, whether or not ancillary consequences are at issue. Here, the duration of the robbery was a relevant consideration for the jury. It was undisputed Edwards did not use force during caption, that is, the initial taking, but there was evidence he used force against Obeid during asportation, that is, when exiting the store with the bottles. The instruction was therefore relevant to the jury's consideration of the issues and clarified that robbery could be established even if the taking and the force were not simultaneous.

But even assuming arguendo that CALCRIM No. 3261 was given in error, we discern no prejudice. Where a trial court gives a legally correct, but inapplicable, instruction, the error " 'is usually harmless, having little or no effect "other than to add to the bulk of the charge." ' [Citation.]" (*People v. Lee* (1990) 219 Cal.App.3d 829, 841.) Use of an inapplicable, or "abstract," instruction is generally " ' "only a technical error which does not constitute grounds for reversal." ' [Citation.]" (*People v. Cross*, *supra*, 45 Cal.4th at p. 67; *People v. Rowland* (1992) 4 Cal.4th 238, 282.) "There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant's prejudice." (*People v. Rollo* (1977) 20 Cal.3d 109, 123.) We review such an error under the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, that is, whether it is reasonably probable defendant would have achieved a more favorable result in the absence of the error. (*People v. Guiton*, *supra*, 4 Cal.4th at pp. 1129-1130; *People v. Debose*, *supra*, 59 Cal.4th at pp. 205-206.) Reasonable probability in this context does not mean more likely than not, but merely a reasonable chance, greater than an

abstract possibility. (*People v. Wilkins*, *supra*, 56 Cal.4th at p. 351.) "In determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*Guiton*, at p. 1130.)

Edwards contends use of the escape rule instruction "gave the jury a path to convict without finding beyond a reasonable doubt that appellant possessed the liquor bottles when he shoved Obeid." "By telling the jury that the duration of the crime mattered, the jury was led to believe that the undisputed facts – the initial taking, the initial intent to permanently deprive CVS of the liquor bottles, and the shoves at the exit – were sufficient for guilt since they all occurred before appellant reached a place of temporary safety." In essence, he argues that CALCRIM No. 3261 implied that as long as force or fear was used at any point during the incident, a robbery occurred.

We do not think there was a substantial risk the jury could have been mislead in light of the other instructions given and the arguments of counsel. First, CALCRIM No. 1600 explained that to establish Edwards's guilt, the People had to prove that "[w]hen the defendant used force or fear to take the property, he intended to deprive the owner of it permanently." If Edwards had already changed his mind about committing the theft, removed the bottles from his pants, and left them somewhere in the store, he could not simultaneously have intended to permanently deprive CVS of the merchandise when he exited and shoved Obeid. Thus, if the jury believed Edwards's account, it could not have concluded the required element was met; the two findings were mutually exclusive.

Second, nothing in the language of CALCRIM No. 3261 authorized the jury to ignore the question of whether Edwards had the bottles when he shoved Obeid. The instruction's language did not suggest such a construction, and we do not believe reasonable jurors would have interpreted it in this fashion. Edwards complains that the jury would not have understood how to square CALCRIM No. 3261 with CALCRIM No. 1600, but we see no obvious conflict or reason to believe jurors would have chosen to ignore the elements of robbery clearly listed in CALCRIM No. 1600. To the contrary, we presume jurors are intelligent persons, able to understand and correlate the court's instructions and apply them to the facts of the case. (*People v. Carey* (2007) 41 Cal.4th 109, 130; *People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378.)

Third, the language of CALCRIM No. 3261 itself ensured the jury could not have concluded the robbery was ongoing after Edwards abandoned the bottles. CALCRIM No. 3261 stated that a perpetrator reaches a place of temporary safety when he "has unchallenged possession of the property." If Edwards no longer had the bottles in his pants, but had left them inside the store, he did not have "unchallenged possession" of them.

Finally, if the jury had harbored any doubts about the significance of Edwards's possession of the bottles at the time he used force, they necessarily were dispelled by the parties' arguments. Both the prosecutor and defense counsel treated the question of whether Edwards had the bottles in his pants when he exited as a key issue in the case. The prosecutor argued that unless Edwards exited with the bottles, he had committed no crime. The prosecutor urged: "It's not just that he put the bottle in his pants. I mean it's certainly not recommended, but you

could stick a bottle down your pants, walk up to a register, pull it out and pay for it. Not a crime. [¶] The problem is that he's exiting the store with those bottles on him and not paying for them, and in doing that, what happens? There is an individual inside that store who is responsible for that property, Mr. Obeid, who tries to resist—who tries to prevent the defendant from taking those two bottles without paying for them. [¶] And the defendant's response is to use force to push Mr. Obeid out of the way."

Defense counsel argued, "[i]f . . . there is no taking out of that store, then there's no crime that has been committed here. [¶] So one of the things the prosecution has to prove beyond a reasonable doubt . . . is that there was property that was taken out of the store and that there was force used at that time that he had the property. If not . . . you would have to find him not guilty." Continuing, defense counsel stated, "He chose not to take those items. At that point in time, he got rid of those items. Getting rid of those items, there is no crime. The fact that he put them in his pocket and took them out of his pocket before he went out of that store, there is no crime." Defense counsel stressed that the force had to occur while Edwards had the bottles: "A person would have to use force in order to keep the property, in order to maintain the property, in order for it to be a robbery. We don't have that here. There's absolutely no proof that he had . . . the bottles at that point in time." "If you can't decide what happened or whether he took the items or . . . left them on the middle aisle, then Mr. Edwards is not guilty."[5]

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[5] As we discuss *post*, some cases have held, contrary to the understanding of the parties and the trial court, that a theft can

Nothing in the parties' arguments remotely suggested Edwards was guilty of robbery if he left the store without the bottles or was not in possession of the bottles when he shoved Obeid. In short, given the instructions and the parties' arguments, there is no likelihood the jury would have been mislead as Edwards suggests.

Hodges, cited by Edwards, does not compel a contrary conclusion. There, the defendant left a grocery store with unpaid merchandise in a bag. A security guard followed him to his car and asked him to return to the store. The defendant offered to give the goods back, but the guard refused. A second security guard approached and the defendant threw the goods at him. The defendant then began to drive off, hitting one of the guards in the process. (*Hodges*, *supra*, 213 Cal.App.4th at pp. 535-536.) During deliberations the jury sought guidance on whether the timing of defendant's surrender of the stolen merchandise vis-à-vis the use of force or fear was relevant to the establishment of robbery. The jury query observed that based on the instructions given, the defendant would be guilty of robbery only if force or fear was used during commission of the theft. "However, the force/fear was subsequent to the act, in the parking lot, after the defendant had surrendered the goods (throwing them at [the security guard]). [¶] Does the timing/sequence of events – theft, then force/fear bear on the applicability of this clause – would point 4 [the defendant used force or fear to take the property or to

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occur even if a defendant does not actually remove items from a store, as long as he or she detaches the property from the store shelves and moves it with the intent to deprive the owner of it permanently. However, any error in the parties' arguments here worked in Edwards's favor.

prevent the person from resisting] apply here?" (*Id.* at p. 538.) In response, the trial court, over a defense objection, informed the jury: " 'the theft is deemed to be continuing until the defendant has reached a point in which he is no longer being confronted by the security guards. Thus, item 4 of the instruction [CALCRIM No.] 1600 applies to the confrontation in the parking lot.' " (*Ibid.*)

Hodges concluded the court's response was prejudicial error. (*Hodges*, *supra*, 213 Cal.App.4th at p. 543.) The court "failed to address the jury's inquiry regarding the legal impact of defendant's surrender of the goods and the relationship of that conduct to the required use of force." (*Id.* at p. 542.) The court's response that the theft continued until the defendant reached a point in which he was no longer being confronted by security guards was based on the escape rule. But the escape rule was irrelevant in *Hodges* because the jury's question pertained not to the duration of the theft in relation to ancillary consequences, but asked whether the timing of defendant's surrender of the property was relevant to the force or fear element, a point the court's response failed to address. (*Id.* at pp. 542-543.) The court's answer was also misleading; by informing the jury that the fourth element (requiring the use of force or fear in taking the property or preventing resistance) applied to the parking lot confrontation, the court "allowed the jury to conclude defendant was guilty of robbery without regard to whether defendant intended to permanently deprive the owner of property at the time the force or resistance occurred." (*Id.* at p. 543.) And, the court's advice that the fourth element applied to the parking lot confrontation "improperly resolved the factual conflict inherent in the jury's inquiry regarding the impact of defendant's surrender of the goods prior to the use of force." (*Ibid.*)

In its analysis, *Hodges* offered the following hypothetical: "A person leaves a store without paying for goods, drops the goods when confronted by a security guard, and flees; the guard gives chase and at some point during the pursuit, the person uses force to resist the pursuing guard's attempt to detain him. Under this hypothetical, the escape rule, concerning the *duration* of the offense, is not in play because no robbery was *committed*, there being no evidence that the person intended to deprive the owner of the property at the time force was used." (*Hodges*, *supra*, 213 Cal.App.4th at p. 543, fn. 4.)

In our view, *Hodges* does not hold that the escape rule principle is necessarily irrelevant in an *Estes* robbery. The *Hodges* jury had concluded Hodges had abandoned the property before using force, and sought specific guidance on whether he could be convicted of robbery nonetheless. The jury here did not pose a similar query, and there was evidence Edwards used force while in possession of the property. Nor does the *Hodges* hypothetical demonstrate the escape rule is inapplicable when the ancillary consequences of robbery are not at issue, as Edwards suggests. The *Hodges* hypothetical assumed the stolen property was abandoned before the defendant used force. That fact cannot be presumed here. Although that was Edwards's theory, the evidence on the point was conflicting. If the People's evidence was credited, there was no abandonment and the *Hodges* hypothetical is inapplicable. Because there was evidence showing a robbery *was* committed, the escape rule was in play.

Moreover, the instructions given by the trial court in the instant matter did not suffer from the flaws present in *Hodges*. The *Hodges* trial court erred by improperly resolving the factual conflict inherent in the jury's query. (*Hodges*, *supra*, 213

Cal.App.4th at p. 543.) No similar error occurred here. The *Hodges* response was also defective because it allowed the jury to find Hodges guilty of robbery without regard to whether he had the requisite intent when he used force. (*Ibid*.) Here, CALCRIM No. 1600 correctly instructed on robbery and, unlike in *Hodges*, the court did not undercut that instruction by giving an incomplete response.

d. *Rejection of the pinpoint instruction*

Edwards argues the trial court erred by declining to give his requested pinpoint instruction. He contends it was not argumentative, correctly stated the law, pointed the jury to the relevant legal facts, and explained their legal import. Echoing his arguments regarding use of CALCRIM No. 3261, Edwards contends the pinpoint instruction was necessary because the instructions given did not adequately explain "what happens if the property is abandoned before the use of force." Further, he posits that the trial court's failure to give the requested pinpoint instruction violated his due process right to present a defense.

Upon request, a trial court is required to give a pinpoint instruction, that is, an instruction that relates particular facts to a legal issue in the case or pinpoints the crux of a defendant's case. (*People v. Wilkins*, *supra*, 56 Cal.4th at pp. 347, 348-349 ["When a legally correct instruction is requested . . . it should be given 'if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration.' "]; *People v. Clark* (2011) 52 Cal.4th 856, 975; *People v. Canizalez* (2011) 197 Cal.App.4th 832, 856-857 [a defendant " 'is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt' "].) A trial court may refuse a pinpoint instruction if it is argumentative, unsupported by

substantial evidence, potentially confusing, or duplicative. (*Clark*, at p. 975; *People v. Bivert* (2011) 52 Cal.4th 96, 120.)

The point made by the requested pinpoint instruction—that unless Edwards had possession of the property when force was used—was adequately conveyed by CALCRIM Nos. 1600 and 3261. CALCRIM No. 1600 expressly stated that to prove robbery, the People had to show that "[w]hen the defendant used force or fear to take the property, he intended to deprive the owner of it permanently." As we have explained, the jury could not have concluded Edwards intended to deprive CVS of the liquor bottles if he had already abandoned them. CALCRIM No. 3261 stated that a perpetrator reaches a place of temporary safety when he "has unchallenged possession of the property." Under the plain language of that instruction, if Edwards left the bottles inside the store, he no longer had "unchallenged possession" of them, and the jury could not have concluded the robbery was ongoing after the abandonment. Thus, the instructions given adequately informed the jury of the relevant principles. (See *People v. Canizalez*, *supra*, 197 Cal.App.4th at p. 857 [pinpoint instruction unnecessary when other instructions adequately informed the jury of the point]; *People v. Bolden*, *supra*, 29 Cal.4th at p. 559 [trial court is required to give pinpoint instruction "only when the point of the instruction would not be readily apparent to the jury from the remaining instructions"].)

Arguably, the requested instruction would have made the point more clearly. But even assuming it should have been given, there was no prejudice. The erroneous failure to give a proposed pinpoint instruction generally requires reversal only if it is reasonably probable that the jury would have come to a different conclusion had the instruction been given. (*People v. Earp* (1999)

20 Cal.4th 826, 887; *People v. Hughes* (2002) 27 Cal.4th 287, 363; *People v. Larsen* (2012) 205 Cal.App.4th 810, 830; *People v. Canizalez*, *supra*, 197 Cal.App.4th at p. 858.)[6]

As with his argument regarding CALCRIM No. 3261, Edwards contends that "[b]ecause the jurors could have found appellant guilty under the instructions as given without also finding that he maintained possession of the bottles when he shoved Obeid," he was prejudiced by the omitted pinpoint instruction. His argument runs as follows. Neither the robbery nor the petty theft instruction (CALCRIM Nos. 1600 and 1800) expressly told the jury that he had to possess the property when he used force. A theft may occur even when the defendant does not remove merchandise from the store. (See *People v. Shannon* (1998) 66 Cal.App.4th 649, 654 ["[O]ne need not remove property from the store to be convicted of theft of the property from the store. [Citations.] One need only take possession of the property, detaching it from the store shelves or other location, and move it slightly with the intent to deprive the owner of it permanently."];

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[6] Edwards argues that the beyond-a-reasonable-doubt harmless error standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, applies because the trial court's instructions "infected the entire trial, removed an element from the jury's consideration, and prevented the defendant from putting on a meaningful defense." (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 662-663 [instruction that omits an element of the offense is evaluated under *Chapman*].) We disagree. As we explain, the instructions given did not mislead the jury, remove an element from its consideration, or deprive Edwards of a defense. Accordingly, the *Watson* standard applies. (*People v. Earp*, *supra*, 20 Cal.4th at pp. 886-887; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

People v. Tijerina (1969) 1 Cal.3d 41, 47; *People v. Khoury* (1980) 108 Cal.App.3d Supp. 1, 4-5.) Therefore, the jury could have found a taking based on Edwards's uncontested movement of the bottles in the store and, relying on the fact he used force to leave the store, find him guilty of robbery even if he had abandoned the bottles before exiting and shoving Obeid.

For essentially the same reasons we found no prejudice in regard to the court's instruction with CALCRIM No. 3261, we conclude no prejudice arose from the court's refusal of the pinpoint instruction. CALCRIM No. 1600 correctly and adequately set forth the elements of robbery. (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774; see *People v. Anderson*, *supra*, 51 Cal.4th at pp. 998-999.) Element 6 of the instruction covered the principles relevant to an *Estes* robbery, that is, that the force and intent to take the property must be coterminous. As we have explained, the jury could not have convicted Edwards of robbery if it concluded he did not have the bottles when he left the store. Thus, even if the jury concluded he committed theft by putting the bottles in his pants – an unlikely circumstance, considering the parties' arguments – it could not have gone on to convict him of robbery if it believed he had already relinquished the bottles before using force. Especially in light of the parties' arguments, the proposed instruction was unlikely to have made a difference to the jury's analysis. We think it clear under any standard that no better result for Edwards would have resulted had the pinpoint instruction been given.

Nor did the trial court's rejection of the pinpoint instruction deprive Edwards of a defense, as he suggests. As noted, CALCRIM No. 1600 set forth the elements of the crime, and

Edwards was free to—and did—present his defense. Nothing in the instructions given precluded him from presenting evidence that he had abandoned the bottles or arguing that he could not be convicted of robbery because there was insufficient evidence he had the bottles when he left the store. To the contrary, his defense on these points was robust.

3. *Cumulative error*

Edwards contends that the cumulative effect of the purported instructional errors deprived him of due process. He urges that the "irrelevant and misleading escape rule instruction," coupled with the erroneous omission of the requested pinpoint instruction, was prejudicial, even if neither was prejudicial on its own. He avers that the failure to give the pinpoint instruction amplified the error in giving the escape rule instruction. But his arguments regarding both purported errors rest essentially on the same analysis and, as we have explained, in light of the instructions given and the parties' arguments, there is no showing of prejudice. As we have found any assumed errors to be nonprejudicial, we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

4. *Correction of the abstract of judgment*

At sentencing, the trial court awarded Edwards 335 days of custody credit, comprised of 292 actual days and 43 days of "good time/work time" credit. The abstract of judgment, while stating the correct total, indicates 293 days of actual credit and 42 days of conduct credit. The parties request that we order this clerical error corrected.

Where an abstract of judgment differs from the court's oral pronouncement, the abstract does not control. We deem any discrepancy to be the result of clerical error, which may be corrected on appeal. (*People v. Jones* (2012) 54 Cal.4th 1, 89; *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.) Accordingly, we order the abstract of judgment corrected.

DISPOSITION

The clerk of the superior court is directed to modify the abstract of judgment dated May 24, 2016, to reflect that Edwards is entitled to 292 days of actual custody credit and 43 days of conduct credit. The clerk is directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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