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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JEFFERY DEANDRE DAVIS, Defendant and Appellant.	B270884 (Los Angeles County Super. Ct. No. YA092173)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Lori A. Quick, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephen D. Matthews,

Supervising Deputy Attorney General, and J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

BACKGROUND

A. *The Robbery*

On March 19, 2015, about 9:00 a.m., Jeffery Deandre Davis (Davis) entered the JS Liquor Store at 1005 West Century Boulevard in Los Angeles and stole a bag of chips. Davis was well-known to the store's owner, Kevin Choi. Davis had frequented the store for years and shoplifted from the establishment many times.[1] Wayne Berry, a store employee, also knew Davis. Berry had worked at the store for six years before Choi bought it. Berry first noticed Davis back in 2009, when Davis stole beer from the store.[2] At all times in question, Davis had been and remained banned from the store due to his conduct.

On March 20, 2015, at 7:40 a.m., Davis entered the store and once again stole a bag of chips. Berry chased after Davis until Davis reached the other side of Century Boulevard. Berry then returned to the store. About 11:25 a.m. that same day, Davis entered the store yet again,

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[1] Choi did not call the police after these incidents because the items were not worth much.

[2] Berry did not call the police after this particular incident because he did not think the police would bother responding to a simple theft call.

grabbed some items off a shelf, and ran out of the store.[3] Davis ran across Century Boulevard; Choi and Berry gave chase. Choi caught up with Davis in the middle of the street, and grabbed the collar of Davis's jacket. Davis dropped some of the items he had stolen from the store, slipped out of his jacket, and continued to run. As he struggled out of his jacket, Davis swung at Choi, scratching Choi's neck.

Choi continued to chase after Davis. Once Davis reached the other side of the street, he dropped the rest of the merchandise he had stolen and turned to face Choi. Davis pulled out a knife and pointed the blade at Choi. He was about five feet away from Choi at the time, and told Choi, " 'I'll be here every day, and if you guys try to stop me, I'll kill all of you guys.' " Berry was about 13 feet away at the time and believed Davis might stab him and Choi. Choi feared for his life and went back to the store. He also feared that Davis would return and hurt him. Law enforcement officers located and arrested Davis later that day.

B. *Trial Proceedings*

In an amended information, the People charged Davis with robbery (Pen. Code,[4] § 211; count 1), criminal threats (§ 422; count 2), and exhibiting a deadly weapon (§ 417,

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[3] Surveillance cameras captured all three incidents on March 19th to March 20th and the video was played at Davis's trial.

[4] All further statutory references are to the Penal Code unless otherwise indicated.

subd. (a)(1); count 3).[5] As to counts 1 and 2, the People alleged that Davis personally used a dangerous weapon (§12022, subd.(b)(1)). The People also alleged that Davis had suffered a prior serious or violent felony conviction (§ 667, subds. (b)-(i), § 1170.12, as well as three prior convictions for which he served time in prison (§ 667.5, subd.(b)).

The jury returned a guilty verdict on count 1, but found Davis not guilty on count 2. The jury also found that Davis personally used a deadly weapon. After a separate bench trial, the court also found the prior conviction and prison tern allegations to be true. The court sentenced Davis to a total of 13 years in state prison.

DISCUSSION

I. Ineffective Assistance of Counsel Claim

Without objection from Davis's attorney, the prosecution moved to admit evidence of Davis's two prior thefts from the store (on March 19, 2015, at 9:00 a.m. and March 20, 2015, at 7:40 a.m.) to prove identity, intent, common plan or scheme.[6] The court granted the motion,

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[5] The prosecution subsequently dismissed count 3. The court denied the prosecution's motion to add an assault with a deadly weapon charge instead.

[6] California Evidence Code section 1101, subdivision (b) allows for "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .)." However, while "[t]he categories listed in section 1101, subdivision (b), are examples of facts that

finding that, "I think it's admissible. If nothing else, [to prove] intent. The People have to prove that the defendant intended to personally deprive . . . the owner of his property. The fact that the defendant stole twice previously from the store, to me, is indicative that he intended again to steal and permanently deprive the victim of his ownership of the property that was taken. Consequently, the conduct occurring earlier on March 20th and the conduct occurring on March 19th can properly be brought before the jury." The court subsequently instructed the jury that the two prior incidents could be used for identity, intent and motive, plan or scheme.

According to appellant Davis, there was no question that he was the person who entered the store, took items from the shelf, and was chased across the street by Choi and Berry. He was well known to them and did not deny being that person. Thus, the prior thefts were entirely irrelevant to the issue of identity. Because he did not contest identity, Davis argues, counsel provided ineffective assistance by failing to object to the admission of the two prior thefts. Davis further maintains that the uncharged crimes were inadmissible as evidence of intent, motive or a common plan or scheme. Lastly, Davis contends that this evidence was highly prejudicial. Indeed, Davis contends, there is a reasonable probability that had the jury not heard of the

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legitimately may be proved by other-crimes evidence . . . the list is not exclusive." (*People v. Catlin* (2001) 26 Cal.4th 81, 146.)

prior incidents, it would have convicted him only of petty theft, rather than robbery. Consequently, Davis concludes, the prejudicial effect of the evidence far outweighed any probative value it might have had.

A. *Standard of Review*

To demonstrate that his attorney provided ineffective assistance of counsel, Davis must show that his attorney's performance was deficient and that this deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) To establish deficient performance, Davis must show that counsel's "performance fell below an objective standard of reasonableness under prevailing professional norms." (*In re Cudjo* (1999) 20 Cal.4th 673, 687.) However, " ' " '[r]eviewing courts defer to counsel's reasonable tactical decisions' " ' " when examining an ineffective assistance of counsel claim, and there is a " ' " ' "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ' " ' " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 86.)

" ' "[W]e have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' . . . 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' " ' " (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 86.) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will

not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) "Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

With respect to prejudice, " '[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.) " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*Id.* at p. 218.)

An appellate court "need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697.) Therefore, if a defendant does not show that he or she was prejudiced by the purported deficient performance of counsel, the claim can be rejected without deciding whether counsel's performance was actually deficient under the *Strickland* standard.

B. *Merits*

i. Counsel's Performance

Davis contends that trial counsel's failure to object to the admission of his prior thefts (committed on March 19, 2015, at 9:00 a.m. and March 20, 2015, at 7:40 a.m.) constituted ineffective assistance of counsel under *Strickland*. In order to satisfy *Strickland*'s first prong, Davis must show that his attorney's performance was deficient. (*Strickland*, *supra*, 466 U.S. at p. 687.) In other words, Davis "must show that counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Price* (1991) 1 Cal.4th 324, 386; *Fosselman*, *supra*, 33 Cal.3d at p. 584.) To that end, our Supreme Court has held that "[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*Price*, at p. 387.)

Here, a reasonably competent attorney might well have determined that objecting to the admission of this evidence would have been futile. Even if counsel had successfully moved to exclude the two prior thefts, the jury still would have learned about Davis's lengthy history of shoplifting from the store. Choi testified that Davis had stolen items from the store many times in the past. Berry testified that Davis first came to his attention in 2009, when Davis stole beer from the store—six years before the theft at issue in this case. Both Choi and Berry testified that Davis's continual misconduct had led to his banishment from the

store. This testimony was part and parcel of their identification of Davis.

The evidence was also admissible to show motive. Davis contends that his previous thefts from the store did not provide a cause or a reason for him to commit the charged offense. However, the fact that Davis had successfully stolen from the store provided him with a motive to try it yet again. Indeed, neither Choi nor Berry had called the police to report Davis's conduct even though he had been stealing from the store for at least six years. Thus, Davis's prior thefts—up to and including the successful thefts on March 19th and earlier in the day on March 20th—gave him ample reason to return to the store once again.[7]

Although Davis maintains he conceded stealing from the store—thus rendering irrelevant evidence of the two prior thefts—Davis quotes his counsel's *closing* argument as proof of this concession.[8] Furthermore, every element of a charged offense is at issue during trial. (*Catlin, supra,* 26

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[7] Davis's banishment from the store provided further motive. Once prohibited from entering the store, Davis could have repeatedly returned out of anger, as well as a misguided sense of revenge, or to simply test the store's commitment to his expulsion.

[8] In his closing argument, counsel told the jury: "I'm going to be asking you to convict him of what he really did, which is petty theft. He obviously repeatedly stole from the JS Liquor market."

Cal.4th at p. 146 ["Defendant's not guilty plea put in issue all the elements of the charged offenses"]; see *People v. Rowland* (1992) 4 Cal.4th 238, 260 ["[A] fact—like defendant's intent—generally becomes 'disputed' when it is raised by a plea of not guilty or a denial of an allegation"].)

The prosecution's burden of proof is not ameliorated by a defendant's concession at trial. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69 ["[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense"].) Given that "a broader range of evidence may be presented to show motive, intent and identity where the prior misconduct and charged offense involves the identical perpetrator and victim," *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1613, counsel was not ineffective by failing to object to its admission.

ii. Prejudice

Even if counsel's performance was deficient, his failure to object to the admission of the prior thefts did not prejudice the defense. (See *Strickland*, *supra*, 466 U.S. at p. 687.) Even if the court had excluded these two particular thefts, the jury still viewed surveillance video of Davis shoplifting merchandise and heard testimony that Davis had stolen items from the store many times over the course of several years. In light of this overwhelming evidence, "there is no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (See *Ledesma*, *supra*, 43 Cal.3d at pp. 217–218.)

Furthermore, Davis's thefts on March 19th and March 20th were minor offenses compared to his conduct later that same day, which included swinging at Choi and scratching his neck, as well as pulling a knife on Choi and threatening to kill him. The two prior thefts are not the sort of crimes that would lead a jury to view Davis as deserving of punishment regardless of his guilt for the charged offenses. (See *People v. Kipp* (1998) 18 Cal.4th 349, 372.) Thus, Davis cannot satisfy *Strickland*'s second prong. (See *Strickland*, *supra*, 466 U.S. at p. 695.) And the entire claim must fail. (*Id.* at p. 697 [if defendant cannot show counsel's actions were prejudicial, court may reject the claim without determining whether counsel's performance was deficient].)

II. Insufficiency of the Evidence Claim

Davis contends that the evidence was insufficient to support his robbery conviction because he did not use force when Choi tried to get the stolen items back and because he dropped the remaining items before pulling a knife on Choi. Davis further contends that the evidence was insufficient to support the jury's finding that he personally used a deadly weapon because he did not use a weapon during the robbery.

A. *Standard of Review*

A judgment of conviction must be reversed if the record does not contain substantial evidence to support it. (*People v. Towler* (1982) 31 Cal.3d 105, 117–118; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) *People v. Cuevas* (1995) 12 Cal.4th 252 described the substantial evidence standard of review set forth in *Johnson*: "Under this standard, the court

'must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' " (*Id.* at pp. 260–261.)

The substantial evidence standard of review involves two steps. "First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that our 'power' begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. . . .' [Citation.] '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value. . . .' [Citation.] The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632–1633, fns. omitted.)

"[T]he power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874, italics omitted.)

B. *Merits*

A 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.) "It consists of larceny plus two aggravating circumstances: (1) when the property is taken from the person or presence of another, and (2) when the taking is accomplished by the use of force or threatened force." (*People v. Marquez* (2000) 78 Cal.App.4th 1302, 1308.)

"The taking element of robbery itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165.) "Circumstances otherwise constituting a mere theft will establish a robbery where the perpetrator peacefully acquires the victim's property, but

then uses force to retain or escape with it." (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 222.)

Notably, "[t]he 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." (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.) Thus, it "is sufficient to support the conviction [if Davis] used force to prevent [Choi] from retaking the property and to facilitate his escape. (*Ibid*.) The crime is not divisible into a series of separate acts. A "[d]efendant's guilt is not to be weighed at each step of the robbery as it unfolds. (*Ibid*.) "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". (*Ibid*.)

Here, Davis took items from the store and then tried to escape by running across Century Boulevard. Choi caught up with Davis and tried to stop him by grabbing Davis's jacket collar. Davis dropped some of the items and slipped out of his jacket. Davis also swung at Choi, scratching Choi's neck in the process. Clearly, Davis had not yet reached a place of relative safety. He also used force to resist Choi's attempt to retake the stolen property. Thus, sufficient evidence supported Davis's robbery conviction.

(See *People v. Estes*, *supra*, 147 Cal.App.3d at p. 28; see also *People v. Pham* (1993) 15 Cal.App.4th 61, 67 [conviction upheld where defendant "forcibly asported . . . the victims' property when he physically resisted their attempts to regain it"]; *People v. Flynn* (2000) 77 Cal.App.4th 766, 772 ["[T]he willful use of fear to *retain property* immediately after it has been taken from the owner constitutes robbery"], italics added); *People v. Torres* (1996) 43 Cal.App.4th 1073, 1077–1079, disapproved on another ground in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3.[9])

After escaping from Choi, Davis ran to the other side of the street, turned to face Choi, and dropped the remaining items he had stolen. Davis then pulled out a knife and pointed the blade at Choi, threatening to "kill all of you guys." He was just five feet away from Choi at the time. Choi, in fear for his life, stopped chasing Davis and returned

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[9] In *People v. Torres*, *supra*, 43 Cal.App.4th 1073, the victims found the defendant in their car, unplugging the stereo. While still in the car, the defendant swung a screwdriver at one of the victims. He got out of the car, holding the stereo, but put it back in the car before fleeing. On appeal, the defendant contended "the stereo was initially obtained without threat or any use of force and was then abandoned by defendant without any attempt to retain it through threat or use of force." (*Id.* at p. 1078.) The court rejected the insufficiency of the evidence claim, finding that when he swung at the victim with a screwdriver, he had "used force or fear to prevent [the victim] from regaining the car stereo." (*Id.* at p. 1079.)

to the store. Although Davis had dropped the rest of the stolen property, there is no requirement that the robber have manual possession of the property. (*People v. Quinn* (1947) 77 Cal.App.2d 734, 736–737 [asportation was satisfied when robber ordered victim at gunpoint to throw down his wallet, although robber allowed victim to leave with wallet after victim showed robber it contained no money]; see *People v. Martinez* (1969) 274 Cal.App.2d 170, 174.) In short, the robber's escape with the loot is not necessary to commit the crime. (See *People v. Clark* (1945) 70 Cal.App.2d 132, 133 [stating general rule].)

We decline to parse the robbery into discrete incidents. (*People v. Estes*, *supra*, 147 Cal.App.3d at p. 28; *People v. Gomez* (2008) 43 Cal.4th 249, 254 ["[N]o artificial parsing is required as to the precise moment or order in which the elements of robbery are satisfied"].) When viewed as a continuing offense, Davis's conviction was unequivocally supported by sufficient evidence. Each time Davis used force against Choi, he had yet to reach a place of relative safety and therefore the robbery was still in progress. Davis's failure to ultimately escape with the stolen items does not negate his commission of the crime. A robber must form the intent to steal "before or during rather than after the application of force" and must apply the force for the purpose of accomplishing the taking. (*People v. Bolden* (2002) 29 Cal.4th 515, 556.) However, "[i]f the aggravating factors are in play at any time during the period from caption through asportation, the defendant has engaged in conduct that

elevates the crime from simple larceny to robbery." (*Gomez,* at p. 258.) The facts of Davis's case plainly satisfy these requirements.

For the same reason, sufficient evidence also supported the jury's finding that Davis personally used a deadly weapon. Under section 12022, subdivision (b)(1), a consecutive one-year sentence is imposed if a defendant personally used a deadly or dangerous weapon in the commission of a felony or attempted felony. Because Davis used a knife during his commission of the robbery, the jury's true finding must be upheld.

Nevertheless, Davis contends that the court should not have imposed personal use enhancement because he did not use the knife until after he had dropped the remaining stolen items. Thus, Davis argues, his display of the knife could not have aided in accomplishing any of the essential elements of robbery. However, it is undisputed that his use of the knife prevented Choi from continuing his pursuit. Given that Davis had not yet won his way to a place of temporary safety at the time—indeed, he displayed the knife in order to facilitate his escape and reach such a place—Davis necessarily used the weapon during the commission of the robbery and the enhancement was properly imposed. (See *People v. Fierro* (1991) 1 Cal.4th 173, 225–227 [defendant "personally used" gun during commission of robbery because using gun prevented victim from pursuing defendant].)

III. Jury Instruction Claim

Lastly, Davis contends that the jury should have received a unanimity instruction because two distinct robberies took place—the first when he took a swing at Choi in the middle of the street, and the second when he pulled a knife on Choi after reaching the other side of the street.

A. *Applicable Law*

"[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Where no election is made, the court has a duty to instruct sua sponte on the unanimity requirement. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

"The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed [him] guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' " (*People v. Russo* (2001) 25 Cal.4th 1124, 1134–1135.)

When deciding whether to give the instruction, "the trial court must ask whether (1) there is a risk the jury may

divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo*, *supra*, 25 Cal.4th at p. 1135.)

A unanimity instruction is not required if "the defendant offered the same defense to both acts constituting the charged crime, so no juror could have believed defendant committed one act but disbelieved that he committed the other, or because 'there was no evidence . . . from which the jury could have found defendant was guilty of' the crime based on one act but not the other." (*People v. Davis* (2005) 36 Cal.4th 510, 562; see *People v. Stankewitz* (1990) 51 Cal.3d 72, 100 [no unanimity instruction required "when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them"].)

B. *Merits*

The evidence here established that Davis committed one robbery, stealing a single group of items from the store while twice using force during his commission of the crime. But Davis's use of force did not convert the robbery into two separate crimes; rather, it provided the jury with multiple theories or acts from which it could form the basis of a guilty verdict. (*People v. Russo*, *supra*, 25 Cal.4th at pp. 1134–1135.)

Furthermore, Davis's displays of force took place during a single pursuit, unseparated by any appreciable amount of time. Because Davis engaged in one continuous course of conduct, a unanimity instruction was not required. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Crandell* (1988) 46 Cal.3d 833, 875.)

Finally, Davis offered the same defense to both acts constituting the charged crime. The defense argued that Davis abandoned the stolen items and thus lacked the required intent to permanently deprive Choi of his property. Furthermore, rather than distinguishing between Davis's two displays of force, the defense attacked the credibility of Choi and Berry, arguing that they testified against Davis because he was a nuisance and they wanted him out of the neighborhood. In short, the defendant offered the same defense to each of the acts and there was no reasonable basis for the jury to distinguish between them. Thus, once again, a unanimity instruction was not required.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.