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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY JOHNSON, Defendant and Appellant.	E051793 (Super.Ct.No. FSB902776) OPINION

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Timothy Johnson, of robbery (Pen. Code, § 211)[1] during which he used a knife (§ 12022, subd. (b)(1)), and assault with a deadly weapon (§ 245, subd. (a)(1)). The jury also found true allegations that defendant had suffered three strike priors (§ 667, subds. (b)-(i)) and three serious priors (§ 667, subd. (a)(1)). Defendant was sentenced to prison to a term of 25 years to life plus 16 years and appeals claiming insufficient evidence supports both of his convictions, the jury was misinstructed, his trial counsel was incompetent, his one year enhancement attached to the robbery should be stayed under section 654, the trial court abused its discretion in ruling on his *Pitchess*[2] motion and this court should independently review the documents examined by the trial court to determine if the trial court abused its discretion in ruling that they were not discoverable by the defense. We agree with defendant that the enhancement should be stayed under section 654. By agreement of the parties, we review the document examined by the trial court and determine that it did not abuse its discretion in ruling that they were not discoverable by the defense. Otherwise, we reject his contentions and affirm, while directing the trial court to stay the enhancement.

FACTS

A Walmart plain clothes male asset protection associate (hereinafter "male security") testified that on July 3, 2009 at 6:00 p.m., he saw defendant at the front of the

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

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

store.[3] Defendant wore very baggy clothes and his outer shirt was not tucked in.[4] Defendant had a shopping cart, as did his girlfriend, who had a child with her. Defendant went to the men's department, where he selected several baseball jerseys from a rack.[5] Male security observed him from about 15 yards away. Most of the jerseys on the rack had security sensors on them, but the ones defendant selected did not. Defendant hung the jerseys, which were still on their hangars, onto the basket portion of his cart. Defendant met up with his girlfriend in the women's department and they went to the toy department. The girlfriend stayed in the toy department, while defendant went to the sporting goods department, went down a couple of aisles, then put about four packages of darts into the seat portion of his cart. Defendant went two aisles over from where he got the darts to the back wall of the sporting goods department where, while facing male security, he removed the hangars from all the jerseys but one, putting the hangers in the basket portion of the cart, stacked the jerseys on top of each other in the seat portion of the cart, folded the stack in half and rolled it into a roll which measured 6 inches in diameter and about 12 inches long. He pulled up his undershirt and placed the roll in his pants, under the waistline. There was no camera in the aisle where defendant did this.

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[3] Male security testified that the woman who appeared with defendant while he was in the men's department in the video (defendant's girlfriend) was the woman defendant "had come in the store with" implying that he had seen defendant enter the store. On cross-examination, defense counsel said that male security had testified that he "watched [defendant] every minute that [defendant] was in the store."

[4] He wore a long-sleeved undershirt under the outer shirt.

[5] Defendant had a Fuze drink in his cart at the time.

Defendant rejoined his girlfriend in the toy department, where she removed the hangars from his cart and put them on a shelf. Defendant went to the hardware department while his girlfriend headed toward the garden department. While male security observed defendant, defendant occasionally drank from a bottle of Fuze, which he kept in the seat portion of his cart. The store sold bottles of Fuze. Defendant did not remove the jerseys from his pants while male security observed him. Male security called his female counterpart, who was also watching defendant, and told her that he was going outside the store and he asked her to continue to watch defendant. He then walked to the front entry of the store and asked a uniformed store stocker to accompany him to the parking lot to witness him intercepting defendant as the latter left the store, which is company policy. Defendant came out of the store through the garden department door. Male security yelled, "Hey" and was about to identify himself when defendant pulled an eight-inch long knife out of his pocket. He held the knife in his right hand, which was extended out with the palm facing up, pointed at male security's lower chest and upper abdomen and the "Fuze" drink in his left hand. Male security took a step back and yelled "Knife." He was in fear for his life. An off-duty police officer, who happened to be shopping at the store, approached defendant, male security and the store stocker. Defendant began to move towards the freeway, which abutted the store parking lot. Defendant turned and began to run, throwing the Fuze bottle in the direction of the three. The off-duty officer, with a gun in his hand, began to pursue defendant, yelling, "Colton Police. Colton Police." Defendant ran to the fence that separated the parking lot from the freeway and appeared to throw the knife, then jumped over the fence. Defendant ran across the southbound

lanes of the freeway, which contained a lot of cars, some of which had to swerve and/or brake to avoid hitting defendant. Male security saw a pack of darts that were in the middle of the freeway get run over. The knife could not be found.

Male security's female counterpart (hereinafter, "female security") testified that from a couple of feet away from defendant, she saw him select seven to nine jerseys in the men's department and put them, still on the hangars, on his cart. Defendant wore baggy clothes and his shirt covered his waistline. He met up with his girlfriend, who had her own cart, in the women's department, and they went to the toy department. Defendant went to the sporting goods department where he removed the hangars from all but one of the jerseys, putting the hangars in the basket portion of his cart, and rolled up the jerseys and shoved them down his pants under his waistband. Female security observed this from five yards away from defendant while he had his back to her. She could tell he rolled up the jerseys on the seat portion of the cart based on the movement of his arms, shoulders and elbows from her "side angle" view of him. She could also see his left hand. Defendant then took two packages of darts. He met his girlfriend in the toy department. The girlfriend went to the garden department, paid for merchandise and sat in a chair with the child and a puppy. Defendant went towards the hardware department where he placed the jersey that remained on the hangar on the aisle by some merchandise. He went to the furniture department, where he abandoned the cart, then went out the garden department door to the parking lot, without stopping at any of the registers there. The receipt generated for the girlfriend's purchase of items in her cart did not list jerseys, darts or a Fuze drink.

The store stocker testified that he was wearing a shirt with the store name on it and a badge on July 3, 2009. When defendant came out of the store, male security said to him, "Walmart security." Defendant pulled out a knife while the stocker was five to six feet from him. Defendant moved the knife from right to left and the stocker jumped back. At one point, the knife was pointed at the stocker and at male security. The off-duty officer pulled out a gun and identified himself as a police officer. He pointed his gun at defendant and told defendant to drop the knife. Defendant threw the Fuze bottle towards the officer, then took off running towards the freeway. The officer chased defendant to the fence. Defendant jumped over the fence and ran across the freeway.

The off-duty officer testified that defendant walked out the garden department door and was approached by male security, who identified himself as Walmart security. The store stocker was with male security. Defendant and male security faced each other at three to six feet apart and the officer was three to six feet from them. Defendant pulled a knife from his right front pants pocket with his right hand and pointed it at male security. Defendant held the Fuze bottle in this left hand. Defendant told male security to get back in a nervous, angry and excited tone. Male security yelled, "Knife" and jumped back. The officer drew his gun, identified himself as a police officer and told defendant in a loud tone to drop the knife. Defendant looked at the officer and looked him in the eye. Defendant walked back a couple of steps, turned and ran. As he ran, the officer repeated that he was a police officer and he demanded that defendant drop the knife, but defendant continued to run towards the fence and the officer ran after him. The officer identified himself and ordered defendant to stop and drop the knife at least three

times as he chased defendant to the fence, but defendant did not comply. As defendant ran, he threw the Fuze bottle in the direction of the officer and male security. The officer told defendant he was going to shoot him if he did not drop the knife. Defendant replied that the officer should do it. As defendant approached the fence, he threw the knife towards the bushes near the fence and jumped the fence. The officer holstered his gun and tried unsuccessfully to grab defendant off the fence. Defendant ran across all lanes in both directions of the freeway, in heavy traffic, then through a parking lot on the other side of the freeway and disappeared.

Another Colton police officer testified that on July 5, 2009, he went in uniform and in a marked patrol car to defendant's girlfriend's home to look for defendant. The girlfriend ran inside when the officer identified himself and tried to contact her. The girlfriend said she did not know if defendant was inside. The officer, a partner and a canine went into the home after telling the girlfriend to make sure no one was inside because the dog was being used to search. The officer and his partner announced their presence inside the house at least five times. The dog alerted to the cabinet under the kitchen sink. The cabinet door was opened and defendant could be seen inside. Defendant was ordered twice to show his hands and come out. Defendant had a shiny object wrapped in a bandana in his hand. He was ordered three more times to come out, but did not, so he was removed. When he came out, he had no weapon in his hand.

Defendant's girlfriend testified for the defense that at some point while in the store she and defendant met up while both had items in their carts. She told defendant that she was not going to pay for some of the items, including jerseys that were in his cart because

they were too expensive. She claimed that she put the hangars from the jerseys on a store shelf because as she looked at the price tags for the jerseys, the latter came off the hangars and defendant wanted her to put the jerseys back on the hangars but she didn't want to.

A video of clips recorded by the store's surveillance cameras shows, in the first clip,[6] defendant walking down the aisle that separates the men's department from the women's department with his girlfriend pushing a cart in which the child is located.[7] Defendant is wearing a very long and very loose outer shirt. He is holding a canned beverage but does not initially have a cart. However, one is positioned near the first rack of clothes he looks at and as he picks out jerseys, he places them into this cart. Clip three shows defendant engaged in this activity from another point of view. One of the jerseys he selects is navy and white, which is the same colors as the jersey he later left in the cart. It is noteworthy that, at one point, he looks down the inside of one of the shirts he has

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[6] Fortunately for this court, the trial court pointed out that the first twenty minutes of this clip contained no information relevant to this case. We were not so fortunate as to the remaining eight clips, several of which are one hour long. Had counsel or the trial court stated on the record at what point in those clips relevant evidence appeared, it would have saved hours of this court's time reviewing the clips. Most criminal trials are appealed to this court. Why the parties at trial do not anticipate this inevitability and take care to create a record that does not require us to spend hours of time in fruitless endeavors is beyond us.

[7] In his opening brief and in his letter requesting early transmission of exhibits to this court, appellate counsel for defendant refers to this exhibit as Exhibit 11. In fact, Exhibit 11, which was sent to this court pursuant to appellate counsel's request, was not admitted into evidence. Appellate counsel should have requested early transmission of Exhibit *12*, which contains the footage he describes in his opening brief and which was admitted into evidence. Appellate counsel's carelessness in this regard delayed this appeal and frustrated this court.

selected. It is also noteworthy that he does not appear to look at the sizes of the shirts as he selects them and puts them into his cart. In the second clip, wherein defendant is seen about 13 minutes after putting the jerseys in his cart, defendant is in an aisle in the sporting goods/camping gear section of the store, looking at fishing equipment. The canned beverage and some other item appear in the seat portion of his cart and the jerseys in the basket portion. Defendant leaves the aisle, but returns to it, takes two items small enough to be held in one hand off the shelf and placing them in the seat portion of his cart.[8] In the fourth clip, defendant and his girlfriend are seen a few minutes after his last appearance in the third clip in an aisle of the store where toys and pool equipment are located. The girlfriend takes empty hangars from defendant's cart and places them on a shelf, while a navy and white jersey remains in the cart.[9] Two minutes later, a female store employee walks by, notices the hangars and removes them. In the seventh clip, defendant is seen about 14 minutes after the last-mentioned clip coming down what male security testified is a main aisle between the hardware and furniture/domestics departments and defendant is headed to the former. Defendant is seen pushing his cart. In the fifth clip, defendant is seen about three minutes after the last-mentioned clip coming from inside the store into the garden department. He no longer has his cart.

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[8] Male security testified these were the boxes of darts.

[9] In his statement of facts, defendant correctly points out that he does not appear to be walking awkwardly "as if he had a number of jerseys stuffed down his pants." However, defendant looses site of the fact that male security testified that the roll defendant had just beneath his waist was only 12 inches long and 6 inches in diameter.

Defendant's outer shirt hangs in something of an "A" shape down his body.[10] The eighth clip is a view of the entrance/exit doorway to the store that is in the garden department. It looks down at the doorway from the wall next to the outside so that defendant is seen from the front. Defendant's outside shirt is unbuttoned below his waist and it pulls in front, as though he has extra girth below his waist. The sixth clip shows defendant coming out of the above-mentioned doorway from overhead and behind him. He appears to have an item in one or both of his hands. Once he is outside, at least one person approaches him. The off-duty police officer then comes up behind him as he abruptly changes direction when he gets near closer to the afore-mentioned person and another and he runs off. In the ninth clip, defendant is seen being chased by the off-duty police officer who aims his gun at defendant, and by two others. The bottled beverage is in defendant's left hand and he throws it in the direction of his pursuers. Defendant is seen going over the fence and beginning to run across the southbound lanes of the freeway, but a palm tree situated at the fence blocks the view beyond that point.

1. *Insufficient Evidence of Robbery*

Defendant contends there was insufficient evidence that he had items taken from Walmart in his possession when he pulled the knife. Defendant asserts that he could have

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[10] In his statement of facts, defendant repeats that this clip does not show defendant walking awkwardly, again, "as if he had a number of jerseys stuffed down his pants." However, it does show that defendant's shirt hangs in an "A", which, if he was a woman, or was uncharacteristically hippy, would not necessarily suggest that he had a 12 inch by 6 inch roll under his waistband. However, the way the shirt hangs suggests that he does, given that he is a man and there is no indication in the record that his hips are particularly wide.

abandoned the jerseys he rolled up and stuffed down his pants before he left the store. He points out that male security did not observe him the entire time he was in the store. He also asserts that female security did not testify that she observed him the entire time he was in the store. If, by this, defendant means that she did not testify that she observed him continuously from the time both she and male security observed defendant stuff the jerseys down his pants, he is incorrect. Male security testified that he instructed female security to continue to watch defendant while he went out the front door. Female security testified to defendant's movements throughout the store until he went out the garden department door in to the parking lot. She did not testify that she ever lost sight of defendant after seeing him place the roll of jerseys down his pants.[11] Therefore, the jury could reasonably conclude that she did not. The fact that she did not see defendant put the darts he had taken on his person does not, as defendant asserts, prove that she did not observe him the entire time after he put the jerseys down his pants. First, male security testified that defendant took the darts *before* he put the jerseys down his pants. Therefore, it is possible that he secreted a box of the darts on his person before female

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[11] Male security testified that he stop observing defendant and left that area of the store to go out the front door as defendant was heading to the hardware department and female security was still on the end cap where she had been observing defendant. Female security testified as follows about defendant's movements at this point and beyond,

"Q [THE PROSECUTOR]: Did you watch where the defendant was headed . . . ?

"A [THE WITNESS]: He proceeded towards the hardware department where he placed one of the . . . jerseys on the aisle . . . . [¶] . . . [¶]

"Q [THE PROSECUTOR]: Where did he go after that?

"A [THE WITNESS]: He proceeded towards the furniture department where he dumped the cart, and he went out through the garden transitional [(meaning where the cash registers are in the garden department near the door)]."

security saw him put the jerseys under his waist. Second, female security testified that she observed defendant after he placed the jerseys inside his pants only from the side and the back. Defendant could have easily slipped a box of the darts into a pocket of his baggy clothing or elsewhere on his person without her observing it. Male security testified to seeing the box of darts on the freeway just after defendant ran across it. This was sufficient to support the jury's implied finding that defendant had the darts on his person when he pulled the knife.[12]

Defendant also asserts that the video does not show defendant running "like a man impaired by a large roll of jerseys in his pants." Male security testified to the dimensions of the roll defendant created from the jerseys. Defendant's clothes were baggy and his outer shirt very long and very large. Having viewed the clips shown to the jury, we were able to detect girth in the area beneath defendant's waist that could easily be caused by this roll.[13] The fact that defendant was able to scale the fence and run across both directions of the freeway showed that he was able to overcome a great deal in order to get away. The jury could reasonably conclude that defendant had the jersey roll on his person when he pulled the knife.

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[12] The facts pointed out by defendant that male security did not mention the darts until trial and the receipt Walmart prepared to show the value of the items stolen did not include the darts were explained at trial. The jury was free to reasonably accept both explanations. The fact that neither the officer nor the store stocker testified that they saw the darts falling out on the freeway does not undermine the jury's implied finding that male security was believable when he said he saw them on the freeway.

[13] See footnote 10, *ante*, page 11 and text surrounding it.

Defendant asserts there was insufficient evidence he stole the Fuze drink because it was not on the stolen property receipt male security prepared. However, male security was never asked why this was the case and the fact that the drink had a value of less than $1.50 may be the reason. Defendant asserts that he had the drink when he came to male security's attention. He cites no portion of the record in support of this assertion. In his statement of facts, he incorrectly states that he did not come to male security's attention until he was in the men's department near the jerseys. This is belied by the record.[14] Defendant's assertion to the contrary, male security *never* testified at what point in observing defendant he first noticed the drink. Even if he had, such an innocuous item can be easily overlooked by security personnel attempting to catch someone shoplifting. Defendant's present assertion that it was just as likely that he came into the store with the drink flies in the face of his girlfriend's uncontested testimony that just before she and defendant entered the store, they got into an altercation with men in the parking lot over a near fender-bender, which included name-calling and hand gestures. She described the incident as "scary." Most people who suffer such an experience would not have the presence of mind to remember to bring their drink into the store with them.

Defendant offers no persuasive reason for finding that his conviction of robbery is not supported by substantial evidence.

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[14] See footnote three, *ante*, page three.

2. *Jury Instruction on Robbery*

a. *Retention Theory of Robbery*

The jury was instructed as to robbery, in pertinent part, that the defendant must have taken property that was not his own and " . . . used force or fear to take the property or to prevent . . . [¶] . . . [a store employee who is on duty from resisting and w]hen the defendant used force or fear to take the property, he intended to deprive [the store employee] of it permanently or to remove it from [that person's] possession . . . ."

Defendant here asserts that because the facts established and the People's theory of the case was that defendant did not take, but *retained*, the stolen property by force or fear, the jury should have been instructed, sua sponte, that at the time he used force or fear, he was in possession of stolen property which he sought to retain. However, the above quoted instruction requires that defendant steal the property in the first place. It then requires that defendant use force or fear to prevent the store employee from resisting, while having the intent to permanently deprive the store employee of the stolen property or to remove it from the store employee's possession. The clear implication of this language is that defendant must use force or fear to prevent the store employee from resisting his retention of the stolen property. This, of course, implies that defendant must have possession of the stolen property—you cannot retain what you do not have. This adequately conveys the requirement that defendant be in possession of the stolen property at the time he used force or fear.

b. *Unanimity*

Defendant claims that the trial court had a sua sponte duty to give the jury an instruction that it had to agree on which item or items defendant stole in order to convict him of robbery. However, the unanimity instruction is not required when the People elect which acts constitute the offense. (See *People v. Jennings* (2010) 50 Cal.4th 616, 679, 680.) Here, the People elected to base the robbery on defendant's retention of all the items—the jerseys, the darts and the drink.[15] Therefore, there was no basis for the giving of a unanimity instruction.

We also agree with the People that where several items are taken over a period of time such that the takings form one continuous transaction, the unanimity instruction is not required. (*People v. Harris* (1994) 9 Cal.4th 407, 431, 432 (*Harris*); *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) Defendant asserts that the continuous transaction exception to the unanimity requirement does not apply here because although defense counsel argued the same defense to the taking of all the items, i.e., that *none* were taken,

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[15] The prosecutor said, during opening argument, "[Male security] testified, and so did [female security], about the Fuze bottle, about the jerseys, about the darts. *That would be property that was taken.*" During closing argument, the prosecutor responded to defense counsel's argument that there was no theft of anything, thusly, "The first crime [charged] is a robbery, and that is the theft. Whether it be jerseys, how many, doesn't matter. How many packs of darts? Doesn't matter. If it was just a Fuze bottle, it doesn't matter. There's no set amount for a robbery. That is just a theft where someone uses force or fear to get away." We do not construe the prosecutor's statement during closing as a revocation of her assertion during opening argument that defendant was guilty of robbery because he stole the jerseys, the darts *and* the drink. Rather, her second set of remarks was addressed to the fact that it didn't matter how many jerseys defendant stole, how many boxes of darts and whether the Fuze drink was inexpensive because the total value of the items was not determinative of whether a robbery occurred.

conceivably, some of the jurors may have believed that the jerseys never made it out of the store, but defendant took the drink and/or the darts, that the darts never made it out of the store but the drink and/or the jerseys did, or that defendant had brought the drink in the store with him, but stole the darts and/or the jerseys.

However, in *Harris*, the California Supreme Court said, of the necessity for the unanimity instruction when several items are taken over a period of time but only one count of robbery is charged, "Even assuming a defendant, by and through the argument of counsel to the jury, suggests differing defenses to each of the alleged acts, still it must be determined whether there is any 'reasonable basis' for the jury to distinguish between them in determining whether the 'continuous conduct' rule applies. [(*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)] [¶] Here, there was an ongoing forcible restraint of the victim throughout his two-day ordeal . . . . In particular, he was being held captive along with his stolen car throughout the period during which the office and home takings were accomplished. [Citation.] The takings were successive and compounding in nature; none of the items of personal property taken from [the victim's] home and office were 'carried away to a place of temporary safety' until well after completion of the looting of those premises. [Citation.] We may *therefore* question whether *any* 'reasonable basis' was available to *legally* distinguish between the four 'taking theories' for purposes of establishing the single count of robbery charged. The successive takings arguably reflected a 'continuing course of conduct,' the central objective of which was to rob [the victim] of all of his property wherever it might be located . . . ." (*Harris*, *supra*, 9 Cal.4th at p. 431, fn. 14, first italics added, other italics original.) Thus, under *Harris*, the

determinative facts are not whether it was conceivable that some jurors convicted defendant of robbery only for this theft of the jerseys and not the other two items (although this was contrary to the prosecutor's election). Rather, what is determinative are the facts that *none* of the items taken from Walmart were carried away to a place of temporary safety until the completion of the crime and the central objective was to rob Walmart of all the items, in whatever department they were located.

People v. Haynes (1998) 61 Cal.App.4th 1282 clarifies *Harris* and solidifies our view that it is applicable to this case. In *Haynes*, the defendant argued on appeal, just as defendant here does, that there was "room for doubt whether defendant [committed the act that constituted aiding and abetting the taking of the first set of cash from the victim], whether he actually aided the robbery by doing so . . . or whether he knew at that point that a robbery was in progress. In other words, he relies on there having been somewhat differing available defenses to the acts on which jurors could have relied, and he maintains that jurors who relied on one act would not necessarily have found all of his acts to be culpable. [¶] . . . [¶] The case here is clearer [than in *Harris*]. The two [takings] were just minutes and blocks apart and involved the same property [(i.e., the victim's money)]. The acts were successive, compounding, part of a single objective of getting all the victim's cash, charged as a single robbery and . . . none of the loot was carried away to a place of temporary safety until all of it was obtained." (*Id*. at pp. 1295-1296.)

People v. Davis (2005) 36 Cal.4th 510, which defendant cites in support of his argument, is distinguishable because, unlike *Davis*, there was no evidence here of

distinctive takings, the prosecutor did not argue that any one of the three items take could support the robbery charge and defendant did not offer different defenses to the different takings.

3. *Ineffective Assistance of Counsel*

Having concluded that the facts of this case do not justify the giving of either of the instructions defendant here contends should have been given, as discussed above, we necessarily reject defendant's fall-back assertion that his trial counsel was incompetent for failing to request them.

4. *Insufficient Evidence of Assault with a Deadly Weapon*

As already stated, male security testified that when he accosted defendant, the latter pulled out an eight inch knife, which he held in his right hand extended out with the palm facing up, pointed at male security's lower chest and upper abdomen, causing male security to take a step back, yell, "Knife" and be in fear for his life. The store stocker was "next to" male security at the time. As already stated, the store stocker testified that defendant pulled the knife while defendant was five to six feet from the stocker and moved the knife from right to left, causing the stocker to jump back. At one point, the knife was pointed at both male security and the stocker. As already stated, the off-duty police officer testified that male security, with the stocker with him, approached defendant and the latter pulled out the knife while he was three to six feet from male security and pointed it at male security. Defendant told male security to get back in a nervous, angry and excited tone. Male security yelled, "Knife" and jumped back.

Defendant contends that this evidence cannot support the jury's finding of assault with a deadly weapon because the video clip shows that the encounter between defendant and male security (and the stocker) did not show defendant's hands and happened too quickly for the things they testified to have occurred. The clip of this portion of the videos shows feet and shadows, but not hands. However, it is corroborative of the movements of defendant, male security and the stocker consistent with the above summarized accounts. It doesn't take long to pull out a knife, threaten someone with it and have them yell and jump back in reaction. We are not persuaded that the video renders the testimony of these three witnesses inherently incredible or the fact that it did not show defendant's hands renders their testimony unworthy of belief. Defendant cites no authority holding that he had to have approached male security, rather than male security and the stocker approaching him, in order for his actions to constitute an assault. He cites no authority that he must have slashed or stabbed at male security with the knife in order to be guilty. The stocker testified that defendant moved the knife from side to side, and we have already concluded that his testimony was not inherently unbelievable. Finally, defendant cites no authority holding that when a defendant pulls a knife and points it at someone while ordering the person in an angry tone to get back, or holds a knife in an extended hand with his palm facing up, pointed at a person's chest and abdomen, that an assault has not taken place.

5. *Enhancement for Use of a Knife*

The sentencing court imposed a one year enhancement for defendant's use of a knife during the robbery and a term for the aggravated assault to run concurrently with

the sentence for the robbery and its enhancement. Defendant contends that section 654 requires that the enhancement be stayed under the authority of *People v. Wynn* (2010) 184 Cal.App.4th 1210 [Fourth Dist., Div. One]. The People counter that section 654 does not apply to enhancements, and, therefore, *Wynn* was wrongly decided. After the briefing in this case was completed, the California Supreme Court held in *People v. Ahmed* (2011) 53 Cal.4th 156, 164, that it did, a position this court took many years ago in *People v Moringlane* (1982) 127 Cal.App.3d 811, 818. *Ahmed* involved multiple enhancements attached to one offense—for using a firearm and inflicting serious bodily injury. The Supreme Court in *Ahmed* concluded, "[W]hen applied to multiple enhancements, for a single crime, section 654 bars multiple punishment for the same *aspect* of a criminal act." (*Ahmed*, *supra*, 53 Cal.4th at p. 165.) Neither party has submitted letter briefs discussing the holding in *Ahmed*. We find nothing in it that is inconsistent with *Wynn*. We further conclude that the Supreme Court's emphasis on the aspect of the criminal act, although not specifically in the context of the instant issue, suggests that we focus on the fact that defendant is being punished for the aspect of using a knife by receiving a concurrent sentence for assault with a deadly weapon, which was committed to effectuate the robbery, therefore, section 654 prohibits him from being additionally punished for using the knife as an enhancement to the robbery. Therefore, we will order the one year term for the knife use enhancement stayed under section 654.

6. *Pitchess Motion*

a. *Limitation on in Camera Review*

Before trial began, defendant brought a *Pitchess* motion to have the off-duty police officer's personnel file examined by the trial court in camera for evidence of, as is pertinent to this discussion, false reports and excessive force. In support of his motion, he submitted a declaration by his trial counsel, based on information and belief, that defendant took nothing from the Walmart, that he threw nothing at anyone, that he did not have a knife and that the officer used a gun. He asserted that the officer falsified his report to justify the unlawful detention and use of excessive force, adding, "Specifically, [d]efendant alleges that [the o]fficer . . . falsely alleges the use of the knife, its description[,] where it was on the defendant's person and [defendant] having thrown it. Other than these specific portions of the officer's report, defendant did not deny that the officer repeatedly told him to drop the knife or the officer would shoot him and the last time the officer said this, defendant replied, "Do it then." Defendant pointed out that the knife was never found. In a supplemental police report attached to the motion, the officer reported that he was familiar with defendant, who was a documented North Side Colton criminal street gang member and defendant knew the officer. The officer said that defendant pointed a knife at male security and told him to get back after the latter approached defendant and identified himself as security and ordered defendant to stop upon exiting the store. The officer further reported that, fearing for the safety of male security and the store stocker, he drew his gun, pointed it at defendant, identified himself as a police officer and ordered defendant to drop the knife. Defendant looked at the

officer, pointed his knife at him and backed up. The officer advanced on defendant, telling him to drop the knife and get on the ground or he would shoot him. Defendant continued to walk backwards, brandishing the knife, then threw the beverage at the officer, with male security and the store stocker standing behind him, and began to run towards the freeway. The officer chased defendant, continuing to identify himself and ordering defendant to drop the knife or the officer would shoot him. Defendant said, "Do it then" and continued to run. Defendant threw the knife toward some bushes as he approached the fence and the officer attempted unsuccessfully to grab him as he mounted the fence. The trial court granted defendant's request to examine the officer's file for evidence of false reports, but denied the request to examine it for evidence of excessive force, concluding that defendant had made an insufficient showing regarding the latter. Defendant here contends that the trial court abused its discretion in denying his request to examine the file for evidence of the officer's use of excessive force. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221 (*Jackson*).)

"Good cause for discovery [of an officer's personnel file] exists when the defendant shows . . . '"materiality' to the subject matter of the pending litigation . . . ."' [Citation.] A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016, *Warrick*).) "[A] showing of good cause requires a defendant . . . to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach

the officer's version of events." (*Id*. at p. 1021.) "[T]he trial court looks to whether the defendant has established the materiality of the requested information . . . through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial?" (*Id*. at pp. 1026-1027.) " . . . [W]hen considered together with the police reports . . . [defense] counsel's averments [must] establish a plausible factual foundation for an allegation [of police misconduct]." (*Id* at p. 1020.) "The trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence is persuasive . . . . [¶] . . . [¶] . . . [A] plausible scenario of officer misconduct is one that might or could have occurred." (*Id*. at pp. 1020, 1026.)

We agree with the trial court's ruling that because a sufficiency showing had not been made as to excessive force defendant failed to establish a plausible factual foundation for an allegation that the officer used such force in that defendant did not specifically deny that the officer repeatedly told him to drop the knife or he would shoot him or that defendant finally replied to these warnings with "Do it then" as he continued to run from the officer. Nor did defendant deny that he was a documented member of a criminal street gang. Absent such denials, defendant's version of events in his declaration does not establish a plausible factual foundation, as an officer who *believes* a known gang member has a knife and is refusing to drop it upon repeated commands, as

evidenced by the giving of those commands and defendant's express refusal to comply with them, does not use excessive force in drawing a gun on that person and chasing him. While we realize that this applies equally to the trial court's implied finding that such a foundation existed as to false reports, we are not being called upon here to assess that finding. Rather, we are to determine whether the trial court abused its discretion in denying defendant's request to examine the officer's personnel file for evidence of excessive force and we conclude that defendant failed to meet his burden in this regard.

We also pause to note the circuitous nature of the issue before the trial court. Defendant's real mission was to uncover incidents of falsehood by the officer because if the officer was lying about defendant having the knife, then the officer's use of his gun constituted excessive force. Prior incidents of excessive force in the officer's personnel file were not material to the issue whether he was lying in this particular case unless those incidents were accompanied by the officer lying about what motivated him to use the force that he did. That leaves us back at the trial court's ruling, allowing the examination of the file for evidence of falsehood. Under these circumstances, the trial court did not abuse its discretion in denying defendant's request.

Defendant candidly admits that the officer's possible use of excessive force would not constitute a defense to either of the charged offenses. However, he maintains, as he did at the time of the motion, that such evidence was relevant to the officer's credibility. Indeed, non-felony conduct involving moral turpitude is admissible to impeach a witness. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) However, neither below, nor here, does defendant cite authority holding that the use of excessive force by a police officer

constitutes moral turpitude. Moreover, we highly doubt that any defendant who avers that an officer is lying about any matter automatically is entitled to have a trial court peruse the officer's personnel file for evidence of the use of excessive force on the theory that an officer who has a habit of using excessive force would also lie to cover it up and those lies would not be documented in the officer's personnel file, but allegations of excessive force would.

b. *Examination of Officer's Personnel File*

Pursuant to the agreement of the parties, this court has performed an in camera independent review of the documents viewed by the trial court for evidence of false reports by the off duty officer and we conclude that the trial court did not abuse its discretion in determining that none of those documents are discoverable. (*Jackson*, *supra*, 13 Cal.4th at pp. 1220-1221.)

DISPOSITION

The trial court is directed to order the one year term for the knife use on the robbery stayed pursuant to section 654. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

KING
J.

CODRINGTON
J.