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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.

WILLIE MARSHALL FANT,

Defendant and Appellant.

E053385

(Super.Ct.No. RIF10004827)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge.  
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.  
VI, § 6 of the Cal. Const.) Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, and Gil Gonzalez and Garrett  
Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant and appellant Willie Marshall Fant walked out of a Home Depot store with merchandise without paying for it. When he was confronted just outside the store by a Home Depot employee, he fought the employee and another who came to the aid of the first. He injured both employees, then fled in a waiting car. During the fight, the stolen merchandise fell to the ground and was left there. Defendant was later apprehended.

Defendant was charged with and convicted by a jury of two counts of robbery (counts 1-2; Pen. Code, § 211) and one count of attempted mayhem (count 3; Pen. Code, §§ 664, 203). Thereafter, defendant admitted allegations of one prior prison term (Pen. Code, § 667.5, subd. (b)) and one prior strike conviction (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). He was sentenced to a total term of eight years in prison and ordered to pay a restitution fine (Pen. Code, § 1202.4), a parole revocation fine (Pen. Code, § 1202.45), a criminal conviction assessment fee (Gov. Code, § 70373), and a court security fee (Pen. Code, § 1465.8).

On appeal, defendant contends the court erred in failing to instruct the jury *sua sponte* as to lesser included offenses of theft and attempted robbery. He also contends the abstract of judgment is incorrect because it indicates that the court security fee is \$120 when the court orally imposed the amount of \$100.

We reject these arguments and affirm the judgment.

## II. SUMMARY OF FACTS

On May 3, 2010, Michelle Galloway drove defendant to a Home Depot store in Moreno Valley. Galloway stayed in the car while defendant went into the store.

Daniel Ormonde, an asset protection specialist for Home Depot, saw defendant enter the electrical department of the store. Defendant picked up six GFCI switches. He then walked to the kitchen and bath department near the back of the store. Ormonde saw defendant conceal the switches in his waistband under his shirt. Ormonde called Joshua Quiroga, another asset protection specialist, and told him what he had seen and said the suspect was heading toward the front of the store.

Defendant walked out of the store without paying for the switches. Quiroga followed him outside. When defendant was about five feet outside the store, Quiroga approached him and said, "Home Depot asset protection." Defendant immediately hit Quiroga on the left jaw. Quiroga grabbed defendant and the two fell to the ground. Ormonde went to help Quiroga. Ormonde got on top of defendant and held him down. Defendant bit Ormonde's thigh, causing a bruise.

With both Quiroga and Ormonde on top of defendant, he appeared to tire or calm down. Quiroga told defendant to roll over so he could handcuff him. As Quiroga reached for his handcuffs, defendant began fighting again. He threw Quiroga off him and struck Ormonde in the head with one of the GFCI switches, causing Ormonde to bleed profusely. Defendant then tried to choke Ormonde, but Quiroga pulled defendant away. Quiroga told Ormonde to go inside the store to get medical attention.

Quiroga and defendant continued to struggle. As they were lying on the ground, defendant placed his thumbs into Quiroga's eyeballs, causing him to bleed under his eyes and disrupt his vision.

Quiroga stood up and defendant got into a fighting stance. Quiroga told him "it was over," and defendant walked away. The entire fight lasted approximately 30 seconds.

Defendant got into Galloway's car. Galloway noticed defendant was breathing heavily and had blood on his shirt or pants. Defendant told Galloway that someone had jumped him. Galloway then drove away with defendant.

During the fight, the GFCI switches defendant had taken outside the store fell out of his jacket and were subsequently retrieved by Quiroga. The approximate value of the merchandise was \$150.

A witness to the incident wrote down the license plate number of Galloway's car. That information led the police to Galloway, which eventually led to the apprehension of defendant.

The defense offered no evidence at trial. The focus of defense counsel's argument to the jury was that the prosecution had failed to prove beyond a reasonable doubt that defendant was the person who committed the crimes.

### III. DISCUSSION

#### A. *Lesser Included Offenses*

During a discussion of jury instructions, defense counsel informed the court that, for strategic reasons, it was not requesting instructions on any lesser offenses. On appeal, defendant contends the trial court should have instructed the jury sua sponte as to the lesser crimes of theft and attempted robbery. We disagree.

In a criminal trial, “the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’ [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given.” (*People v. Sedeno* (1974) 10 Cal.3d 703, 715-716, fn. omitted, overruled on other points in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10 & *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.)

The duty to instruct as to lesser included offenses exists only when there is substantial evidence to support the instruction on the lesser offense. (*People v. Cole*

(2004) 33 Cal.4th 1158, 1215.) Substantial evidence in this context is not *any* evidence, no matter how weak, but rather evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed.

(*People v. Cruz* (2008) 44 Cal.4th 636, 664.) Thus, there is no duty to instruct on the lesser included offense “when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime (for example, when the only issue at trial is the defendant’s identity as the perpetrator).” (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; see also *People v. Kelly* (1990) 51 Cal.3d 931, 959 [court need not instruct the jury as to a lesser included offense “if the evidence was such that the defendant, if guilty at all, was guilty of the greater offense”].)

Here, there is no question that theft and attempted robbery are lesser included offenses of robbery. (See *People v. DePriest* (2007) 42 Cal.4th 1, 50 [theft is a lesser included offense of robbery]; *People v. Crary* (1968) 265 Cal.App.2d 534, 540 [attempted robbery is a lesser included offense of robbery].)

Defendant argues he was entitled to an instruction as to theft because there was substantial evidence that he had left the store with the stolen merchandise without using force or fear (i.e., before being confronted by Quiroga). “This conduct alone,” he asserts, “could have supported a conviction for simple theft.” However, this is only part of the analysis. As set forth above, even if there is evidence to support the uncharged, lesser offense of theft, the court is required to instruct as to that offense only if there is evidence

that he committed the lesser offense, *but not the greater offense*. (*People v. Kelly, supra*, 51 Cal.3d at p. 959.)

The greater offense in this case is robbery. 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.” (Pen. Code, § 211.) In essence, robbery adds the element of force or fear to the crime of theft. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) The use of force or fear required for robbery may occur either at the time the property is taken, ““while carrying away the loot”” (*People v. Pham* (1993) 15 Cal.App.4th 61, 65), or “in resisting attempts to regain the property” (*People v. Estes* (1983) 147 Cal.App.3d 23, 27 (*Estes*)).

The nature of robbery in a factual setting somewhat similar to this case was discussed in *Estes, supra*, 147 Cal.App.3d 23. In that case, a security guard for a Sears store observed the defendant taking property from the store without paying for it. (*Id.* at p. 26.) The security guard followed the defendant outside the store. (*Ibid.*) When they were both about five feet away from the store, the security guard indentified himself and confronted the defendant about the stolen items. (*Ibid.*) When the security guard attempted to detain the defendant, the defendant pulled out a knife, swung it at the security guard, and threatened to kill him. (*Ibid.*) He was subsequently convicted of robbery. (*Id.* at pp. 25-26.)

On appeal, the defendant in *Estes* argued that he did not commit robbery because his assaultive behavior was not contemporaneous with the taking of the merchandise

from the store. (*Estes, supra*, 147 Cal.App.3d at p. 28.) He was, he argued, at most guilty of petty theft and a subsequent assault. (*Ibid.*) The Court of Appeal disagreed, and 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 [defendant] 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.” (*Ibid.*)<sup>1</sup>

Here, defendant does not point to any evidence that the perpetrator of the theft did not also commit robbery against Quiroga and Ormonde. Indeed, there was uncontradicted evidence that the perpetrator used physical force in his attempt to escape and carry away the stolen merchandise. It does not matter that he dropped the stolen merchandise during the fight and left it behind. (See *People v. Pham, supra*, 15

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<sup>1</sup> The defendant in *Estes* was also convicted of theft. The court reversed the conviction of theft because the robbery conviction was upheld. (*Estes, supra*, 147 Cal.App.3d at pp. 28-29.) “A defendant,” the court explained, “cannot be convicted both of the greater offense and the lesser included offense. [Citations.] Where there is sufficient evidence to sustain the conviction of the greater offense, the conviction of the lesser offense must be reversed.” (*Id.* at p. 28.)

Cal.App.4th at p. 65 [the crime of robbery “does not require that the loot be carried away *after* the use of force or fear”].) Defendant’s theory at trial was not that he did not use force or fear in taking the property, but that he was not the perpetrator of any crime.

*People v. Trimble* (1993) 16 Cal.App.4th 1255 is instructive. In that case, the defendant was charged with burglary of a trailer coach. (*Id.* at p. 1257.) On appeal, he argued that the court should have instructed the jury as to the lesser offense of automobile tampering. (*Id.* at p. 1260.) The court set forth the applicable rule: “It is well settled that ‘the trial court need not, even if requested, instruct the jury on the existence and definition of a lesser and included offense if the evidence was such that the defendant, if guilty at all, was guilty of the greater offense.’ [Citation.] Where a defendant ‘denies any complicity in the crime charged, and thus lays no foundation for any verdict intermediate between “not guilty” and “guilty as charged” . . . [¶] . . . it is error to so instruct [on the lesser offense] because to do so would violate the fundamental rule that instructions must be pertinent to the evidence in the case at bar.’ [Citation.]” (*Ibid.*)

The *Trimble* court rejected the defendant’s argument because his defense at trial “was that he committed no offense whatsoever. . . . Nothing in the evidence suggested that [defendant] may have merely tampered with the trailer coach rather than burglarizing it. If [defendant] was guilty of anything, he was guilty of burglary . . . .” (*People v. Trimble, supra*, 16 Cal.App.4th at p. 1260.)

Here, as in *Trimble*, defendant’s defense at trial was that he committed no offense whatsoever. Analogously, there is nothing in the evidence to suggest that defendant

merely committed theft of the GFCI switches, but not the robbery against Quiroga and Ormonde. Therefore, there was no duty to instruct the jury as to theft.

With respect to the lesser included offense of attempted robbery, defendant also contends that, “[a]rguably, any intended robbery was not completed” because the stolen GFCI switches “fell out of [defendant’s] pocket and were retrieved by Quiroga.” He offers no authority for this proposition. The law is contrary. As stated in *Pham*, “[i]t is enough that defendant forcibly prevented the victims from recovering their property, even for a short time. The *commission* of a robbery does not require the robber to escape with the loot to a place of temporary safety.” (*People v. Pham, supra*, 15 Cal.App.4th at p. 68.)

In sum, there is no evidence in the record that suggests that the perpetrator of the alleged crimes committed the theft of the GFCI switches, but not the robbery. Nor is there any evidence that he merely *attempted*, but failed, to commit robbery. Thus, “there is no evidence that the offense was less than that charged.” (*People v. Sedeno, supra*, 10 Cal.3d at p. 715.) Accordingly, there was no duty to instruct the jury as to the lesser offenses of theft or attempted robbery.

#### B. *Court Security Fee*

Penal Code section 1465.8, subdivision (a)(1), provides that “an assessment of forty dollars (\$40) shall be imposed on every conviction for a criminal offense, including a traffic offense,” except for certain parking offenses or local ordinances. Because defendant was convicted of three crimes, the mandatory court security fee is \$120.

According to the reporter’s transcript of the sentencing hearing, the court orally imposed a \$100 court security fee. The minute order regarding the hearing and the abstract of judgment, however, state that the court security fee is \$120. Defendant contends we should direct the court to prepare a “corrected” abstract of judgment and reduce the fee to \$100 to reflect the court’s oral pronouncement of the fee. We reject this argument.

Generally, as defendant points out, when there is a discrepancy between a court’s oral pronouncement of sentence and the court’s minute order or the abstract of judgment, the oral pronouncement will control. (See, e.g., *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) However, the trial court “‘has a duty to determine and impose the punishment prescribed by law. [Citations.]’” (*People v. Woods* (2010) 191 Cal.App.4th 269, 273.) If the sentence imposed by the court is unauthorized, it “is subject to judicial correction whenever the error comes to the attention of the reviewing court.” (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) It follows that, notwithstanding the general rule concerning discrepancies between an oral pronouncement and a minute order or abstract of judgment, an oral pronouncement of an unauthorized sentence does not control over a correct, mandatory sentence reflected in the minute order and abstract of judgment.

The amount of the security fee mandated by Penal Code section 1465.8 is not subject to the trial court’s discretion; it is \$40 per conviction. (Pen. Code, § 1465.8, subd. (a)(1); *People v. Woods, supra*, 191 Cal.App.4th at p. 273.) Here, if the court did not

announce the correct amount of the fee at the sentencing hearing,<sup>2</sup> the amount was corrected in the court's minute order and abstract of judgment. There is nothing further to be done.

#### IV. DISPOSITION

The judgment is affirmed.

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KING  
J.

We concur:

HOLLENHORST  
Acting P.J.

McKINSTER  
J.

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<sup>2</sup> The transcription of \$100 may have been a typographical error.