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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN DOE, Defendant and Appellant.	)	2d Crim. B123456 (Sup.Ct.No. KA123456)

APPEAL FROM THE JUDGMENT OF

THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE DANIEL S. LOPEZ, JUDGE

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of conviction after jury trial, and is authorized by Penal Code section 1237.

STATEMENT OF THE CASE

An Information charged appellant in count 1 with petty theft with a prior conviction (Pen. Code § 666) and in count 2 with second-degree commercial burglary (Pen. Code § 459).[1] The Information also alleged a prior conviction within the meaning of sections 1170.12(a)-(d)/667(b)-(i) and 667.5(b). (CT 23-25.)[2]

Upon jury trial, appellant was convicted of count 1; the jury deadlocked on count 2 which was then dismissed (CT 92-95). The court, after jury waiver, found the prior conviction allegations to be true (CT 106).

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1 All further statutory references are to the Penal Code.

2 "CT" and "RT" refer respectively to the Clerk's and Reporter's Transcripts of proceedings conducted in this case.

At probation and sentencing proceedings conducted on November 15, 1995, the court sentenced appellant to five years imprisonment, consisting of the two-year mid term on count 1, doubled per sections 1170.12(a)-(d)/667(b)-(i), plus one year for the section 667.5(b) enhancement. Appellant was awarded 238 days credit for presentence custody. (CT 127-129).

On the day of sentencing, appellant filed a Notice of Appeal (CT 130).

STATEMENT OF FACTS

Prosecution Case

On the afternoon of June 10, 1995, La Verne K-Mart security guard Charles Gottschalk saw appellant select five boxed cameras from the camera aisle and take them to the candy aisle. There, appellant took a non-K-Mart bag from his pocket, placed the cameras in it, and walked towards the exit, bypassing the cash registers. (RT 80-83, 92.) Gottschalk confronted appellant at the exit doors, just as appellant was about to step out of the store (CT 87). Appellant probably had one leg out the door (CT 109).

Gottschalk, who was in plain clothes, identified himself as a security guard. Appellant then dropped the bag containing the cameras at the threshold where the two men were standing. Gottschalk, placing a hand on appellant's shoulder, said that appellant forgot to pay. Appellant told Gottschalk to let go of him. Gottschalk then urged appellant to go back inside and talk about it, and attempted to place a two-arm hold on him. Appellant resisted the hold and eventually extricated himself. (RT 87-88, 98, 110.)

Gottschalk followed appellant to a car where he again tried to restrain him; eventually, appellant was able to enter the car, which contained a female passenger, and drive off. Gottschalk got the license number and phoned the police. (RT 88-90.)

Portions of Gottschalk's encounter with appellant were witnessed by a student selling candy near the doors (RT 63-80), and an Assistant Manager of the store (RT 143-154). The student saw appellant drop a bag inside the store's double exit doors, and Gottschalk put a

hold on appellant who then struggled to get free (RT 67-68, 73, 76); he heard Gottschalk say appellant would probably to go jail for this and appellant reply he didn't take anything (RT 67).

The Assistant Manager saw Gottschalk talking to appellant at the door, but saw nothing in appellant's hands. Later, after appellant had left the store, she saw a transparent plastic bag at the doors which contained five cameras but no receipt. The bag was not from K-Mart, and the store does not carry loose candy for customers to bag. (RT 143-154.)

Shortly after appellant left K-Mart, a police officer saw him driving his car about two and a half miles from the store, and stopped and handcuffed him and his female passenger (RT 116-122). Gottschalk was brought to the scene, where he identified appellant (RT 90, 122-123). The officer then told appellant that he was being arrested for theft and battery on a "private person's arrest" (RT 123). Appellant responded that he didn't take anything, he'd entered the store planning to take something but dropped the property before exiting because he noticed he was being followed, and that he was the one who'd been battered (RT 124).

Later, at the police station, appellant said to the same officer that he might as well change his story. He then said he needed additional money to fix his brakes and had decided to get some by stealing something from K-Mart to sell. He entered the store with intent to steal, put some property in a bag which he found inside, but dropped the bag about 15 feet from the door when he saw someone following him. (RT 125-127.) Neither of appellant's two statements were tape recorded or written down and shown to him (RT 140-142).

The value of the five cameras was $114.81 (RT 93). Appellant had money on him when arrested (RT 135-136).

Defense Case

Appellant testified that he entered the K-Mart with the intent only to buy batteries for his girlfriend, but upon seeing the boxed cameras in the camera area, started thinking of stealing them. He took a bag from the counter and put the cameras in it with that thought in mind, but changed his mind and put the bag down after he'd carried it no more than a couple of

feet. He never went into the candy aisle. He started to leave the store without buying batteries because he noticed a man following him. The man, who never identified himself as a security guard or store employee, accosted him at the exit, putting his arms around appellant's neck and asking if appellant wanted to go to jail. (RT 158-170, 174, 179.)

Appellant further testified that he did not tell the police that he'd entered with intent to steal. In his first statement, he said he entered with the intent to buy something and that he was the one who was battered rather than the one who'd perpetrated battery. In his second statement, he said that he'd entered with intent to buy batteries; he mentioned to the officer that his brakes needed fixing, but not that he entered with intent to steal. (RT 172-173.)

Appellant had $20 or $25 on him when he entered the store (RT 159-160). The bag produced in court (i.e., the one identified by the prosecution witnesses) was one which appellant had never seen before trial; it was not the one which appellant had taken from the counter and placed the cameras inside (RT 160-163).

ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT ON ATTEMPTED THEFT AS A LESSER INCLUDED OFFENSE

In this case, the prosecution and defense presented two different, and irreconcilable, versions of what happened at K-Mart. The prosecution evidence, if believed, established appellant's commission of a completed theft. However, the defense evidence, if believed, established appellant's commission of only an attempted theft. In the face of this conflict, the trial court's failure to give the jury the option of convicting appellant of attempted theft was reversible error, entitling appellant to a new trial.

A. General Principles Regarding the Duty to Instruct

A trial court must instruct *sua sponte* on lesser included offenses, including attempt to commit the charged crime, whenever there is evidence that would support a finding that the defendant committed the lesser offense or attempt but not the charged offense. (*People* v. *Webster* (1991) 54 Cal.3d 411, 443; *People* v. *Hood* (1969) 1 Cal.3d 444; *People* v. *Crary* (1968) 265 Cal.App.2d 534, 540.) In determining whether the evidence meets this test, the Court of Appeal may not weigh the credibility of witnesses or attempt to determine which version of the evidence is more likely true, for these are questions within the exclusive province of the jury. (*People* v. *Wickersham* (1982) 32 Cal.3d 307, 324-325; *People* v. *Flannel* (1979) 25 Cal.3d 668, 684 [superceded by statute on other grounds]; *People* v. *Turner* (1983) 145 Cal.App.3d 658.) An attempt to commit the charged offense is always necessarily included within that offense, unless the charged offense itself is an attempt. (*People* v. *Vanderbilt* (1926) 199 Cal. 461; see also, Pen. Code § 1159.)

The obligation to so instruct is based on the due process principle that that jury must be instructed on every material question raised by the evidence. (*People* v. *St. Martin* (1970) 1 Cal.3d 524.) Thus, an erroneous failure to instruct on a lesser offense or attempt is

reversible *per se* unless the record reveals that the question posed by the omitted instruction was resolved by the jury under other, properly given, instructions. (*People* v. *Sedeno* (1974) 10 Cal.3d 703.)

B. The Prosecution Evidence Showed a Completed Theft

According to the prosecution evidence, appellant took several cameras from the camera aisle, put them in a bag and, without paying for them, moved them past the checkstand to the threshold of the exit door (RT 80-92). This established a "taking" and asportation sufficient to establish completed theft notwithstanding that appellant had not left the store, because "[t]he carrying of the [cameras] through the checkstand constituted an asportation of the goods, as the act effectively removed them from the store's possession and control, even if only for a moment." (*People* v. *Thompson* (1958) 158 Cal.App.2d 320, 323; accord, *People* v. *Tijerina* (1969) 1 Cal.3d 41 [held, completed taking and asportation established by defendant's taking coat from rack in store and moving it to a place in the store restricted to emergency use by employees].)

C. The Defense Evidence Showed only an Attempt

In contrast to the prosecution evidence, the defense evidence was that appellant placed the cameras in a bag from the camera counter and then moved the cameras no more than several feet within the camera aisle before he abandoned both them and his intent to steal them; he did not remove them to anyplace where either he, or anyone other than a bona-fide purchaser, had no right to take them (RT 158-170). Thus this version of the evidence, unlike the situation in *Thompson* and *Tijerina*, showed no movement of the property inconsistent with the store's continued possession of it.

In order to establish a completed theft, "it must be shown that the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment." (*People* v. *Meyer* (1888) 75 Cal. 383, 384-385.) In both *Thompson* and *Tijerina*, the defendants' movements of the property "severed" that property from the store's possession or custody and therefore satisfied the *Meyer* test, by removing the property to a

location where only a bona-fide purchaser had a right to take it (*Thompson*) or to where *no* bona-fide customer had a right to take it (*Tijerina*). By the same token, the movement of goods no more than a few feet within an area in which non-purchasers are permitted to carry about saleable items is fully consistent with the store's continued possession and custody of those items and hence, insufficient under *Meyer* to constitute the "taking" necessary to establish completed theft. Thus, under the principles of *Meyer*, *Thompson* and *Tijerina*, the defense evidence in this case showed no more than an attempted theft.

Appellant is aware of *People* v. *Khoury* (1980) 108 Cal.App.3d Supp. 1, a case in which two judges of the appellate department of the Superior Court held, over their colleague's strong dissent, that *any* movement of property within a store can establish completed theft as long as accompanied by intent to steal. Even were *Khoury*'s majority opinion correctly reasoned, however, this court is under no obligation to follow the holding of a lower tribunal, especially where its value is undermined by its ascendency over a "spirited dissent" by the narrowest of margins (*Payne* v. *Tennessee* (1991) 501 U.S. 808, 828).

In any event, the reasoning used by the *Khoury* majority is patently insufficient to support its holding. The question posed to the *Khoury* court was whether a completed theft was shown by the movement of goods up to, but not past, a store checkstand. The majority hardly paused at all to reach an affirmative answer. It simply cited *Thompson*, *Tijerina*, *Meyer* and *People* v. *Brown* (1963) 214 Cal.App.2d 128 as "mak[ing] it clear that the property does not have to be actually removed from the premises of the owner," and there stopped, as if that principle answered the question. (*People* v. *Khoury*, *supra*, 108 Cal.3d Supp. at pp. 4-5.) Plainly, it does not.

The *Khoury* majority is wrong because, *granted* that there are circumstances in which a theft can be completed without removing property from the store premises, the question remains what those circumstances are. As *Thompson*, *Tijerina*, *Meyer* and *Brown* make clear, a completed theft requires removal from the store's possession or custody. Such removal was

accomplished in three of the four cases cited by the *Khoury* majority: in *Thompson* and *Tijerina* by removing the property to a place where a non-purchaser had no right to take it, and in *Brown* by taking the property not only past the checkstand but entirely out of the store. In the fourth case, *Meyer*, the California Supreme Court held that the asportation for several feet of a coat which was still chained to a sidewalk dummy did *not* accomplish a completed theft, because the chain's presence prevented the requisite severance from the store's possession. Thus these cases, far from establishing that movement of property within the display area constitutes completed taking, serve only to *distinguish* a completed theft from the situation in *Khoury* (and more so, that shown by the defense evidence here), where the defendant's movement of the property was within an area fully consistent with the store's continued possession and control.

The dissent in *Khoury* was correct. Khoury's movement of goods up to the checkstand failed to show sufficient taking and asportation to constitute a completed theft because the goods were never removed from the store's possession and control (*People* v. *Khoury*, *supra*, 108 Cal.App.3d Supp. at p. 6). Similarly here, and for the same reasons, the defense evidence showed no more than an attempted theft.

D. Reversal or Reduction is Required

The court's failure to give the jury the option of convicting appellant of attempted theft requires reversal of appellant's conviction or its reduction to attempted theft. In the face of evidence showing that, by appellant's own admission, he was guilty of attempted theft, the only options given the jury were conviction of completed theft and acquittal. The jury was unable to reach a verdict on the count 2 burglary charge, apparently due to disagreement whether appellant had intent to steal when he entered the store. Thus, in the face of undisputed evidence that, at the very least, appellant committed the crime of attempted theft, the instructional error created the unsavory choice between his outright acquittal and his conviction of a crime greater than could have been found from the evidence. That truncation of choice was a denial of due process. Since the jurors were never permitted to decide whether appellant's conduct fell in the middle

ground between completed theft and wholly noncriminal conduct, he is entitled either to a new trial or to reduction of his conviction to attempted theft. (*People* v. *Sedeno*, *supra*, 10 Cal.3d at p. 703; Pen. Code § 1260.)

II

THE JUDGMENT SHOULD BE VACATED AND THE CASE REMANDED TO PERMIT THE TRIAL COURT TO RESENTENCE APPELLANT WITH AN ACCURATE UNDERSTANDING OF ITS POWERS UNDER PENAL CODE SECTION 1385

In *People* v. *Superior Court (Romero)* (1996) 13 Cal.4th 497, the California Supreme Court held that a trial court retains discretion under section 1385, either on the court's own motion or on that of the prosecuting attorney, to dismiss allegations of prior "strikes" within the meaning of sections 1170.12, subdivisions (a)-(d) and 667, subdivisions (b)-(i). *Romero* held that a defendant is entitled to a new sentencing hearing to allow the trial court to consider striking his prior "strike" convictions except in those cases where "the record shows that the sentencing court was aware that it possessed the discretion to strike prior felony conviction allegations . . . and did not strike the allegations, or if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*People* v. *Superior Court (Romero)*, *supra*, 13 Cal.4th 497, 530, fn. 13.) This decision is fully retroactive. (*Id*.)

In *People* v. *Sotomayor* (1996) Cal.App.4th [96 Daily Journal D.A.R. 8459], this court held that the proper procedure for addressing this issue when, as here, the cause is still pending in the appellate courts, is to ask the Court of Appeal to remand the matter back to the Superior Court in light of *Romero*. (*Id*. at p. 8457; accord, *People* v. *Metcalf* (1996) Cal.App.4th [96 Daily Journal D.A.R. 8106] and *People* v. *Rodriguez* (1996) Cal.App.4th [96 Daily Journal D.A.R. 8497].)

In the present case, at the beginning of trial appellant filed a motion with the trial court requesting that it dismiss the prior strike allegation in the interests of justice pursuant to Penal Code section 1385. The court denied the motion with no comment (RT 12). Because, at the time the motion was heard, the Courts of Appeal were in disarray over whether trial courts had discretion to dismiss "strikes" at *any* stage of proceedings (e.g., *People* v. *Dominguez* (1995) 38 Cal.App.4th 410 [no] vs. *People* v. *Williams* (1995) 37 Cal.App.4th 1737 [review granted

November 16, 1995]), and because the trial court did not indicate what side it took in this dispute, the record fails to affirmatively show that the court "was aware it possessed the discretion to strike prior felony conviction allegations" (*Romero*, *supra*, at p. 530, fn. 13).

Nor does the record show "that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegation" (*Ibid.*). The court's refusal to reduce appellant's conviction to a misdemeanor under section 17(b) (RT 265-268) signifies only that the court felt that his offense and record merited something more than 365 days in county jail; since a state prison sentence of up to four years could have been achieved even were the strike dismissed,[3] the court's denial of appellant's 17(b) motion is fully consistent with a willingness to exercise discretion to dismiss the strike.

Finally, such dismissal would not be an abuse of discretion in this case. The present crime was of minimal severity; it was neither serious nor violent, it would not even have qualified as a felony had appellant not suffered a prior conviction, and notwithstanding the prior conviction his current offense has still been classified by the Legislature as something less than an inherent felony (see section 17(b)). Nor was appellant's record aggravated in the context of defendants who are subject to the "strikes" laws in the first place. He had only a single prior prison term and his "strike" conviction was for attempted second-degree robbery, an offense meriting, at most, a three-year sentence (Pen. Code § 213).

Since the record below fails to affirmatively show either that the trial court "was aware of its discretion to strike prior felony conviction allegations" or that "it would not in any event have exercised its discretion to strike," this case should be remanded to the trial court for resentencing pursuant to *People* v. *Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530, fn. 13 and *People* v. *Sotomayor*, *supra*, 96 Daily Journal D.A.R. 8459.

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3 In the absence of the strike allegation, appellant would have been subject to a sentence of two years four months, three years, or four years (the low, middle and upper term for a section 666 conviction, enhanced in each instance by one year for the 667.5(b) allegation).

CONCLUSION

For the reasons set forth in Argument I, the conviction in count 1 should be reversed and remanded for new trial; for those set forth in Argument II, the case should be remanded for a new sentencing hearing.

DATED: August 12, 1996

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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_____
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WORD COUNT CERTIFICATION
People v. *John Doe*

I certify that this document was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 3382 words.

_____
NANCY GAYNOR

PROOF OF SERVICE

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On *, I served the within

APPELLANT'S OPENING BRIEF

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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