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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM DREW HODGES, Defendant and Appellant.	A131542 (Sonoma County Super. Ct. No. SCR558444)

Defendant and appellant William Drew Hodges appeals from the judgment entered after a jury found him guilty of robbery (Penal Code[1] section 211), assault with a deadly weapon (§ 245, subd. (a)(1)) and felony petty theft with a prior (§ 666). As explained below, because the trial court's response to a jury question was misleading and it failed to provide a pinpoint instruction requested by defendant, we shall reverse the judgment and remand for further proceedings.

PROCEDURAL BACKGROUND

The Sonoma County District Attorney filed a felony complaint against defendant in March 2009. In June 2009, defendant, assisted by counsel and pursuant to a plea agreement, entered guilty pleas to assault by means of force likely to result in grievous bodily injury and petty theft with a prior. Before imposition of sentence, however, the trial court granted the prosecution leave to amend the complaint to allege several newly-discovered priors from out of state and permitted defendant to withdraw his plea.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts B, C and D.

1 Further statutory references are to the Penal Code unless otherwise specified.

A second amended complaint was filed in September 2009. Subsequently, the public defender's office determined defendant was not eligible for legal services. Defendant appeared with retained counsel at setting hearings held in December 2009 and January-February 2010. On March 9, 2010, the date set for the preliminary hearing, defendant appeared with retained counsel and pleaded no contest to charges of robbery, assault with a deadly weapon and petty theft with a prior, pursuant to a negotiated disposition. In August 2010, the trial court again permitted defendant to withdraw his guilty plea, this time because his retained counsel misinformed him about the maximum term he would receive under the negotiated disposition. Thereafter, retained counsel indicated he intended to withdraw from the case due to defendant's inability to pay and the trial court appointed the public defender and set trial for October 7, 2010.

On September 2, the public defender informed the court defendant was ineligible for legal services. On September 8, defendant signed a *Faretta*[2] waiver form stating he wanted to represent himself and give up his right to be represented by a lawyer. The *Faretta* waiver signed by defendant was also signed by the court just below a section of the form stating that based on the court's observation of and discussion with defendant, the court found defendant voluntarily, and with full understanding of the disadvantages of self-representation, chose to represent himself. Defendant represented himself at the preliminary hearing held on October 19 and was held to answer on all charges.

On November 2, 2010, the Sonoma County District Attorney filed an information charging defendant with robbery (§ 211) (count 1), assault with a deadly weapon, to wit, a car (§245, subd. (a)(1)) (count 2) and petty theft with a prior (§ 666) (count 3). The information also alleged defendant suffered three prior strike convictions for robberies committed during an incident in New Mexico in February 1997. On Friday December 17, the date set for trial, defendant appeared with attorney Erick Guzman.

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[2] *Faretta v. California* (1975) 422 U.S. 806, 835-836 [holding that a criminal defendant has a right, under the Sixth Amendment to the federal Constitution, to conduct his or her own defense, provided that he or she knowingly and intelligently waives his or her Sixth Amendment right to the assistance of counsel].)

Guzman informed the court he wished to represent defendant pro bono, stated he had just received discovery, and requested a continuance. The trial court denied counsel's request for a continuance and stated the court would address motions in limine the following Monday, December 20.

On December 22, counsel delivered opening statements and presentation of evidence commenced. The jury returned guilty verdicts on all charges on December 27. In a subsequent bifurcated proceeding and bench trial, the court found true the prior felony allegations. At a sentencing hearing held on March 8, 2011, the trial court struck two of the three prior felony convictions for sentencing purposes, and imposed a state prison sentence of 11 years. Defendant filed a timely notice of appeal on March 22, 2011.

FACTS

At trial, the prosecution presented testimony from two percipient witnesses, loss prevention officer Jason Anderson (named in the information as the victim of the robbery and assault) and his colleague, fellow loss prevention officer Valentin Ramirez. Defendant did not testify at trial.

Valentin Ramirez testified that in March 2009 he was employed as a loss prevention officer by Monument Security, assigned to the Safeway store in Petaluma as a plain-clothes security officer. On March 12, Ramirez was on duty with Jason Anderson, who was also assigned by Monument to work at the Petaluma Safeway Store. While on duty together, they customarily called each other for assistance by cell phone. At approximately 8:30 p.m. on March 12, Ramirez noticed defendant enter the store without a basket or cart. Ramirez followed defendant on foot through the store. In the soft drinks aisle, Ramirez observed defendant take out a clear plastic Safeway bag and place several items into the bag, including sodas, batteries and some bananas. Ramirez called Anderson for assistance and then stationed himself at the front of the store. Ramirez observed defendant approach the front of the store, look around, and then walk out of the store carrying the items he previously placed in the bag. Defendant did not stop at any point of sale (register) prior to leaving the store.

Ramirez followed defendant out of the store into the parking lot. Ramirez informed Anderson defendant had left the store with the goods and asked for assistance. When Ramirez caught up to defendant, defendant was sitting behind the wheel of his car, a two-door Ford Thunderbird, with the driver's door open. Ramirez identified himself as store security and asked if defendant had a receipt for the goods. Defendant claimed he lost the receipt, so Ramirez asked defendant to accompany him back into the store in order to verify the purchase. Defendant offered to give the goods back to Ramirez but Ramirez refused; he explained to defendant he could not just take the items back and defendant would have to return to the store. Defendant then started his car engine. Ramirez, surmising defendant was not going to accompany him back to the store, walked to the rear of defendant's vehicle to phone 911 and report defendant's license plate number. Anderson approached defendant's vehicle and the driver's door was open. Anderson told defendant he had to return to the store. As defendant got out of the car Ramirez observed "[defendant] looked like he was handing the items back to my partner. . . . And he just pushed the items towards Anderson, like shoved them, and went [back] inside his car and tried to reverse out." Ramirez also testified defendant tossed the items at Anderson, "like it was a distraction," and the items hit Anderson in the chest.

Anderson fell back into a parked van when the items tossed at him by defendant hit him in chest. Anderson recovered and reached inside of defendant's car to turn the engine off, however defendant put the car in reverse causing the car to move backward while Anderson was reaching for the keys. Defendant's car continued to move in reverse, dragging Anderson along. At some point, defendant hit the brakes and Anderson "popped out" of the vehicle. Ramirez yelled at Anderson to let defendant go because the police were on their way. Just then, defendant's car began to move in reverse again and Anderson was struck by the open driver's door. The force of the contact with the door propelled Anderson up and over the driver's door and he landed on the ground. Defendant then backed out of the parking stall and drove away quickly. Ramirez identified defendant from a photo lineup.

Jason Anderson largely corroborated the testimony given by Ramirez. Anderson testified that when he asked defendant to come back to the store, defendant asked Anderson "to cut me some slack, man." When Anderson told defendant company policy required that he return to the store, defendant said, "Okay," and stepped out of the car. After defendant got out of the car, he threw the six-pack of bottles at Anderson's face, striking him in the right eye. After the bottles hit Anderson in the face, defendant pushed Anderson on the right shoulder with both hands causing Anderson to fall against a parked van and onto the ground, where he landed on his shoulder. Anderson further testified that after the incident involving defendant, he experienced pain in both shoulders, his right thumb, his back and his right toe, and subsequently received treatment at the VA hospital, including surgery for a fractured toe.

DISCUSSION

A. The Court's Response to a Jury Question Was Misleading

Defendant contends the trial court's response to a jury question was constitutional error under the federal Constitution because it presented an invalid theory of guilt and relieved the prosecution of its burden of proof. As explained below, we conclude trial court's response to the jury question was an abuse of discretion under section 1138.

1. Background

Before the case was submitted to the jury, defendant asked the trial court to give the following instruction: "If Defendant truly abandoned the victim's property before using force, then, of course, he could be guilty of theft, but not of [] robbery. *People v. Pham* (1993) 15 Cal.App.4th 61, 68." During the course of settling instructions, the trial court denied defendant's requested instruction, and the following colloquy ensued: "[Defense counsel]: Your Honor, if I could just make one quick point about the instruction I proposed?

The Court: Yes.

[Defense counsel]: I believe [] Ramirez testified that [defendant] shoved the merchandise back, and that was before everything with the car. So if the jury believed that, then that could be viewed as an abandonment of the stolen property.

[¶] . . . [¶]

The Court: He shoved the items, and he hit Mr. Anderson in the chest. . . . Mr. Anderson indicated the bottles. And I don't believe that constitutes true abandonment. I believe that converts the property to basically a weapon. [¶] . . . [¶] . . . Your objection is noted. . . ."

Subsequently, the trial court gave the CALCRIM 1600 robbery instruction, as follows: "The defendant is charged in Count I with robbery.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant took property that was not his own;
2. The property was taken from another person's possession and immediate presence;
3. The property was taken against that person's will;
4. The defendant used force or fear to take the property or to prevent the person from resisting;

AND

5. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently.

The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery.

If you find the defendant guilty of robbery, it is robbery of the second degree.

A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.

The property taken can be of any value, however slight.

A person does not have to actually hold or touch something to possess it. It is enough if the person has the right to control it, either personally or through another person.

A store employee who is on duty has possession of the store owner's property."

After jury deliberations began, the trial court received two handwritten notes from the jury containing questions about the jury instructions. The question from the jury at issue here stated: " Robbery (Penal Code 211) Point 4 states 'The defendant used force or fear to take the property or to prevent the person from resisting.' [¶] As stated, the defendant would be guilty here only if force or fear was used during the commission of the theft. [¶] However, the force/fear was subsequent to the act, in the parking lot, after the defendant had surrendered the goods (throwing them at Mr. Anderson). [¶] Does the timing/sequence of events—theft, then force/fear bear on the applicability of this clause—would point 4 apply here?" The court proposed the following response to the jury question: "With regard to Count 1, Penal Code 211, the theft is deemed to be continuing until the defendant has reached a point in which he is no longer being confronted by the security guards. Thus, item 4 of the instruction 1600 applies to the confrontation in the parking lot." Defense counsel objected to the court's proposed instruction on the grounds that "[t]he theft ceased after he no longer had the intent to maintain, to keep the property." The court overruled counsel's objection and answered the question in the form proposed by the court. Shortly thereafter, the jury returned its verdicts.

2. Applicable Standards of Review

"When a jury asks a question after retiring for deliberation, '[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.' (Citation.)"[3] (*People v. Eid* (2010) 187 Cal.App.4th 859, 881-882 (*Eid*).) "This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's

[3] Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

request for information. . . . But a court must do more than figuratively throw up its hands and tell the jury it cannot help. . . . It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) "We review for an abuse of discretion any error under section 1138. (Citation.)" (*Eid, supra,* 187 Cal.App.4th at p. 882.)

Section 1138 error due to the trial court's failure to adequately answer the jury's question is subject to the prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, i.e., "whether the error resulted in a reasonable probability of a less favorable outcome. (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) In this context, ' "reasonable probability' " means ' "merely a *reasonable chance*, more than an *abstract possibility*," ' of an effect of this kind. (*People v. Blakeley* (2000) 23 Cal.4th 82, 99.)" (*Eid, supra,* 187 Cal.App.4th at p. 882.) Also, a failure to instruct on all elements of an offense is a constitutional error "subject to harmless error analysis under both the California and United States Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 475 (*Flood*).) Under the federal Constitution, the standard is whether the instructional error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (See *Flood, supra,* 18 Cal.4th at p. 504.)

3. The Elements of Robbery

Before we evaluate the propriety of the court's response to the jury question at issue, a brief review of the elements of the crime of robbery is appropriate. Robbery is "a species of aggravated larceny." (*People v. Gomez* (2008) 43 Cal.4th 249, 254 (*Gomez*).) Theft by larceny involves "the taking of another's property, with the intent to steal and carry it away." (*Gomez, supra,* 43 Cal.4th at pp. 254-255.) The "taking" of property has two components, "caption" (achieving possession of the property) and "asportation" (carrying the property away), where "the slightest movement" may constitute asportation and "the theft continues until the perpetrator has reached a place of temporary safety with the property. [Citation.]" (*Id.* at p. 255.) "To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his

presence. [¶] In robbery, the elements of larceny are intertwined with the aggravating elements to make up the more serious offense." (*Gomez, supra,* 43 Cal.4th at p. 254.) Nevertheless, there is no single "temporal point at which the elements must come together" in order to constitute the offense of robbery: Rather, "robbery, like larceny, is a continuing offense," and whereas "[a]ll the elements must be satisfied before the crime is completed[,]" . . . no artificial parsing is required as to the precise moment or order in which the elements are satisfied." (*Gomez, supra,* 43 Cal.4th at p. 254.)

Courts have considered, under different factual scenarios, the interaction of the taking element of larceny, "caption," with the aggravating factors that constitute robbery—the use of force or fear and the taking from the victim's presence. For example, in *Gomez, supra,* defendant broke into a restaurant and took cash from an ATM machine in the lobby. The restaurant manager arrived and saw defendant slip out a side door and walk away from the restaurant. The manager followed in his truck and defendant shot at the truck to scare the manager off. (See *Gomez, supra,* 43 Cal.4th at p. 253.) Although the victim was not present at the taking, the Supreme Court upheld defendant's robbery conviction on the grounds that robbery occurs "whether a perpetrator relies on force or fear to gain possession *or to maintain possession* against a victim who encounters him for the first time as he carries away the loot." (*Gomez, supra,* 43 Cal.4th at p. 265, italics added.)

Likewise, in relation to the element of the use of force or fear, a robbery occurs where a perpetrator achieves possession of the property in the victim's immediate presence *without* the use of force or fear, then uses force or fear during asportation in order to retain possession of the property. (See *People v. Anderson* (1966) 64 Cal.2d. 633, 638 [defendant guilty of robbery where he "use[d] force or fear in removing . . . the property from the owner's immediate presence"].) Addressing the use of force or fear during asportation, several appellate courts have affirmed robbery convictions on the grounds that what began with larceny ripened into robbery due to defendant's use of force or fear to maintain possession of the property.

For example, in *People v. Estes* (1983) 147 Cal.App.3d 23 (*Estes*), defendant entered a Sears store, picked up a coat and vest and walked out without paying for them. A security guard followed defendant outside the store and attempted to detain him after defendant refused to return to the store. Defendant pulled out a knife, swung it at the guard and threatened to kill him. Defendant was convicted of robbery and appealed on the grounds "his assaultive behavior was not contemporaneous with the taking of the merchandise from the store." (*Estes, supra,* 147 Cal.App.3d at p. 28.) The appellate court noted that because "[t]he crime of robbery is a continuing offense, . . . [i]t is sufficient to support the conviction that appellant used force to prevent the guard from retaking the property and to facilitate his escape. . . . 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.* [italics added]; see also *People v. Pham, supra,* 15 Cal.App.4th at p. 67 [robbery conviction affirmed where defendant "forcibly asported . . . the victims' property when he physically resisted their attempts to regain it"]; *People v Torres* (1996) 43 Cal.App.4th 1073, 1077-1079 [robbery conviction affirmed where defendant swung at victim with a screwdriver to keep him at bay, got out of the victim's car holding the victim's stereo, told victim "it is over with," and put the stereo back on victim's passenger seat and left]; *People v. Flynn* (2000) 77 Cal.App.4th 766, 772 [holding that "willful use of fear to *retain property* immediately after it has been taken from the owner constitutes robbery"] [italics added].)

4. The Court's Misleading Response

Having concluded our review of the elements of robbery, in particular, how the use of force or fear during asportation elevates larceny to robbery, we now address the propriety of the court's response to the jury question at issue. In its question to the court, the jury included prefatory statements that defendant used force or fear after he "surrendered the goods (throwing them at Mr. Anderson)" and that "defendant would be guilty here only if force or fear was used during the commission of the theft." These prefatory statements demonstrate the jury sought legal guidance on whether defendant

could be convicted of robbery if they determined he "surrendered" the goods prior to the use of force. Thus the jury's inquiry required guidance on two distinct and different elements of robbery: (1) taking, which not only includes achieving possession but carrying property away, or asportation, and, (2) the point at which the defendant must employ force or fear in connection to the taking to complete the crime of robbery. That this is so is reflected in the jury's request for guidance from the court on the "timing/sequence of events—theft, then force/fear" in determining whether defendant committed robbery. In this regard, and as noted in our review of the elements of robbery, it is well-established that a defendant, who takes property from the immediate presence of the owner without use of force or fear, but uses force or fear to retain possession of the property when the owner attempts to retrieve it, is guilty of robbery. (See e.g., *Estes, supra,* 147 Cal.App.3d at p. 28 [any force applied against the victim *in furtherance of the robbery* [] can properly be used to sustain the conviction"]; *People v. Pham, supra,* 15 Cal.App.4th at p. 67 [robbery conviction affirmed where defendant "forcibly asported . . . the victims' property when he physically resisted their attempts to regain it"]; *People v. Flynn, supra,* 77 Cal.App.4th at p. 772 [holding that "willful use of fear to *retain property* immediately after it has been taken from the owner constitutes robbery"] [italics added].)

However, in framing its response to the jury, the trial court failed to address the jury's inquiry regarding the legal impact of defendant's surrender of the goods and the relationship of that conduct to the required use of force. Rather, the trial court instructed the jury: (1) the "*theft* is deemed to be continuing until the defendant has reached a point in which he is no longer being confronted by the security guards," [italics added] (2) therefore, "item 4 of the instruction [] applies to the confrontation in the parking lot." The trial court's response was misleading.

The court's instruction that "the *theft* is deemed to be continuing until the defendant has reached a point in which he is no longer being confronted by the security guards" is based on the "escape rule," which "defines the *duration* of the underlying felony, *in the context of certain ancillary consequences of the felony* [citation], by

deeming the felony to continue until the felon has reached a place of temporary safety. (Citation)." (*People v. Cavitt* (2004) 33 Cal.4th 187, 208 [italics added]; see also CALCRIM 3261 [providing that for purposes proving an allegation, such as defendant personally used a firearm, the crime of robbery "continues until the perpetrator(s) (has/have) actually reached a temporary place of safety"]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165 [distinguishing between the initial *commission* of robbery at "a fixed point in time" once all the elements are satisfied and "the *duration* of the commission of a robbery for purposes of assessing aider and abettor liability," (*id.* at p. 1164, italics added) and stating that "[a]lthough for purposes of establishing guilt, the asportation requirement is initially *satisfied* by evidence of slight movement [citation], asportation is not confined to a fixed point in time [and] continues thereafter as long as the loot is being carried away to a place of temporary safety, [t]herefore . . . a getaway driver must form the intent to facilitate or encourage commission of the robbery prior to or during the carrying away of the loot to a place of temporary safety" (*Id.* at p. 1165)].)[4] However, the jury's question did not pertain to the duration of the theft in relation to ancillary consequences. Rather, the jury sought guidance on whether the timing of defendant's surrender of the property was relevant to the element of force or fear in establishing robbery.

The court's response, fashioned in part on the above cited "escape rule," not only failed to address the crux of the jury's inquiry but the court also informed the jury "item 4 of the instruction [regarding use of force] applies to the confrontation in the parking lot." This court's instruction was misleading because it allowed the jury to conclude defendant was guilty of robbery without regard to whether defendant intended to permanently

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[4] Consider the following hypothetical: A person leaves a store without paying for goods, drops the goods when confronted by a security guard, and flees; the guard gives chase and at some point during the pursuit, the person uses force to resist the pursuing guard's attempt to detain him. Under this hypothetical, the escape rule, concerning the *duration* of the offense, is not in play because no robbery was *committed*, there being no evidence that the person intended to deprive the owner of the property at the time force was used.

deprive the owner of the property at the time the force or resistance occurred. Otherwise stated, this aspect of the court's instruction conflated elements 4 and 5 of the robbery instruction and permitted the jury to find defendant guilty of robbery based on defendant's confrontation with security guards, without also finding (under element 5) that defendant used force with the intent to retain the property or prevent its recovery by the lawful owner. Finally, the court's instruction, "Item 4 . . . applies to the confrontation in the parking lot," improperly resolved the factual conflict inherent in the jury's inquiry regarding the impact of defendant's surrender of the goods prior to the use of force.[5] Therefore, we conclude that the court's response to the jury's inquiry amounted to an abuse of discretion under section 1138.

B. The Court Erred in Failing to Include the Pinpoint Instruction Requested by Defendant

The issue of whether defendant's use of force in the parking lot elevated a larceny into a robbery is also central to defendant's related contention that the trial court erred in failing to grant his request for a pinpoint instruction stating, "[I]f Defendant truly abandoned the victim's property before using force, then, of course, he could be guilty of theft, but not of [] robbery." The trial court rejected defendant's requested pinpoint instruction on the grounds Anderson testified defendant hit him with the six-pack and defendant's use of the six-pack as a weapon did not constitute "true abandonment."

However, it is well settled the trial court has the duty not only to instruct the jury on the general principles of law relevant to the case (*People v. Breverman* (1998) 19 Cal.4th 142, 154), but also, upon request, to give pinpoint instructions that are pertinent

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[5] Under the case law discussed *ante*, because defendant did not use force in taking the property, in order to convict him of robbery the prosecution had to prove, and the jury had to find, defendant used force to maintain possession of the property against the lawful efforts of the owner to regain it. (See, e.g., *Estes, supra,* 147 Cal.App.3d at p. 28 [robbery conviction upheld where defendant "used force to prevent the guard from retaking the property and to facilitate his escape"]; *People v. Pham, supra,* 15 Cal.App.4th at p. 67 [robbery conviction affirmed where defendant "forcibly asported . . . the victims' property when he physically resisted their attempts to regain it"].)

to the theory of the defense, (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142; *People v. Adrian* (1982) 135 Cal.App.3d 335, 337-339 [upon request, a defendant is entitled to an instruction relating particular facts to any legal issue or which pinpoints the crux of his case]). Nevertheless, the error in refusing such a pinpoint instruction is harmless if the essence of the refused instruction is adequately conveyed by other instructions. (See *People v. Adrian*, supra, 135 Cal.App.3d at pp. 341-342.)

Here, the instruction requested by defendant was correct in its general legal framework because, as discussed above, to convict defendant of robbery on the evidence presented by the prosecution, the jury had to find defendant used force with the intent to maintain possession of the property or resist the owner's attempt to retrieve it. The jury's inquiry did in fact raise issues regarding defendant's intent in using force during the confrontation in the parking lot, and the evidence regarding proof on these matters was susceptible to competing interpretations. Thus the trial court, at defendant's request, was obliged to tailor defendant's proposed instruction to give the jury some guidance on how the use of force during asportation can elevate theft to robbery. (Cf. *People v. Falsetta* (1999) 21 Cal.4th 903, 924 ["trial court erred in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"].) Instead, the trial court erroneously rejected defendant's proposed instruction on the basis of an improper factual determination by crediting the testimony of Anderson over that of his colleague Ramirez and concluding defendant used the six-pack as a weapon against Anderson.

C. The Trial Court's Instructional Errors Were Prejudicial

In summation, the prosecutor argued the evidence showed defendant took property from the store with the intent to steal it, thus he committed petty theft. The prosecutor added that "when he uses force or fear in an attempt to flee with the property, that makes it a robbery." Immediately thereafter, the prosecutor explicitly acknowledged, "And so it's up to you, ladies and gentlemen, to decide whether or not he was intending to get away with the property when he threw those bottles at Mr. Anderson and when he got back into his car and eventually hit Mr. Anderson with his car." The prosecutor's

comment goes directly to element 5 of the robbery instruction given here—"when the defendant used force or fear to take the property, he intended to deprive the owner of it permanently." However, in response to the jury question whether it could convict defendant if he "surrendered" the goods before using force, the trial court gave a blanket instruction suggesting that the theft was in progress while defendant was "confronted by the security guards" and "item 4 [use of force] of the instruction 1600 applies to the confrontation in the parking lot." In doing so, the court, not the jury, determined that defendant used force with the intent to retain possession of the property. Furthermore, because the evidence here is susceptible to a contrary finding, as evidenced by the jury's prefatory comments to its question (see *ante*), we cannot say the error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), or there is no reasonable probability the verdict would have been different in the absence of the error, (*People v. Watson* (1956) 46 Cal.2d 818, 836).

Similarly, defendant's requested pinpoint instruction, relating to whether defendant's use of force in the parking lot elevated his theft into robbery, went to crux of defendant's theory of the case. And, as subsequently demonstrated by the jury question at issue, the essence of the refused instruction was not adequately conveyed by other instructions in this case. (*People v. Adrian, supra,* 135 Cal.App.3d at pp. 341-342.) Thus, the trial court's failure to give defendant's requested pinpoint instruction was prejudicial also. (*Ibid.*)

In sum, on account of the prejudicial instructional errors discussed above, defendant's robbery conviction must be reversed.

D. Remaining Issues

We shall also address those remaining issues raised by defendant that are not moot in light of our reversal of his robbery conviction.

1. Faretta Claim

Defendant contends his waiver of the right to counsel under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)[6] was invalid because the trial court did not ensure the waiver was made freely and voluntarily by fully explaining the drawbacks of self-representation.[7] However, we need not address the effectiveness of defendant's *Faretta* waiver, because, under the circumstances presented here, any defect in the court's acceptance of defendant's *Faretta* waiver was nonprejudicial.

In general, *Faretta* error is prejudicial per se. (See *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [erroneous *denial* of a *Faretta* motion is reversible per se]; accord *People v. Dent* (2003) 30 Cal.4th 213, 222; see also *U.S. v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167 [*grant* of *Faretta* motion is per se prejudicial error absent valid *Faretta* waiver]). However, automatic reversal is not the appropriate standard under the circumstances of this case.

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[6] As well as guaranteeing a criminal defendant the right to counsel, the Sixth Amendment affords the defendant the right to self-representation. (*Faretta, supra,* 422 U.S. at p. 820.) Before a defendant waives his right to counsel and asserts the right to self-representation, "the trial court 'must insure that he understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the "dangers and disadvantages of self-representation." ' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 545.) However, "[n]o particular form of words . . . is required in admonishing a defendant who seeks to forgo the right to counsel and engage in self-representation. ' "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." ' [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 140.)

[7] Defendant also suggests he was "coerced" into self-representation because the trial court accepted the public defender's representation that defendant was not eligible for legal services; according to defendant, the trial court should have rejected the public defender's representation, appointed counsel, and recouped costs later pursuant to section 987.8 if it was later determined he had the ability to pay. However, defendant did not voice any objection below to the determination that he was ineligible for legal services, and even if we could reach the issue the record contains no evidence on the matter. Nor does the record support a finding of "coercion"; indeed, when defendant was informed he was ineligible for legal services, he stated, "I guess I'm going to be representing myself," and requested his preliminary hearing be set out beyond the statutory time period.

Here, after the public defender declared defendant ineligible for legal services and the trial court accepted defendant's *Faretta* waiver, defendant appeared in pro per at the preliminary hearing and was held to answer on the charges in the amended complaint. Thereafter, defendant obtained counsel before trial commenced and was ably represented by counsel throughout the trial proceedings. Accordingly, this case does not involve a "total deprivation of the right to counsel at trial," which is a structural defect in the trial requiring reversal (*Arizona v. Fulminante* (1991) 499 U.S. 279, 308-310), and any error in granting defendant his *Faretta* rights was undeniably cured by defendant's retention of new counsel on the eve of trial. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 910 (*Dunkle*) (disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22); see also *Cordova v. Baca* (9th Cir. 2003) 346 F.3d 924, 926-928 [holding defendant retained the right to counsel following his invalid *Faretta* waiver, therefore it was structural error to try defendant without assistance of counsel, but acknowledging harmless error analysis is appropriate "where defendant was denied counsel during a less central portion of the proceedings"].) The California Supreme Court's decision in *Dunkle* supports our resolution of this issue. In *Dunkle*, the trial court erroneously denied defendant's *Faretta* motion, but after the error was discovered prior to voir dire, he was asked if he wanted to represent himself and replied that he wanted the lawyer to take responsibility for the case. (*Id.* at p. 908.) Our Supreme Court held that the defendant's statements after the discovery of the error "cured the error in denying defendant his *Faretta* rights." (*Id.* at p. 910.) Thus, the Supreme Court deemed "the *Faretta* error [] nonprejudicial," stating that "a defendant who, following an erroneous denial of his assertion of Faretta rights, validly waives the right to self-representation and proceeds to trial represented by counsel" is not entitled to relief on appeal. (*Ibid.*; see also *McKaskle v. Wiggins, supra*, 465 U.S. at p. 182-183 [where trial court appointed standby counsel for self-represented defendant, and defendant acquiesced in standby counsel's participation at various points during the trial, defendant could not complain on appeal that he was denied his right to represent himself at those points]; see also *Cordova v. Baca, supra*, 346 F.3d at pp. 926-928 [acknowledging harmless error analysis appropriate

"where defendant was denied counsel during a less central portion of the proceedings" than trial].) Similarly, in this case any *Faretta* error was necessarily nonprejudicial and harmless beyond a reasonable doubt (*Chapman, supra,* 386 U.S. at p. 24), because defendant waived his right to self-representation and proceeded to trial represented by counsel.

2. Denial of Request for Continuance

Defendant contends the trial court abused its discretion by denying his request for a continuance and thereby violated his right to due process and to effective assistance of counsel. We disagree.

A continuance may be granted only upon a showing of good cause. (§ 1050, subd. (e).) Whether good cause exists rests within the sound discretion of the trial court. (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) A trial court may not exercise its discretion over continuances so as to deprive the defendant of fundamental rights, such as the right to prepare a defense. (*People v. Snow* (2003) 30 Cal.4th 43, 70.) Upon review, defendant bears the burden of establishing that denial of a continuance constituted an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) "In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request." (*People v. Frye* (1998) 18 Cal.4th 894, 1013 [disapproved on other grounds by *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22]; see also *People v. Blake* (1980) 105 Cal.App.3d 619, 624 [right to continuance is not absolute and " 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.' [Citation.]") Defendant must demonstrate abuse of discretion *and* prejudice before we reverse a conviction on the basis of the trial court's denial of a motion for a continuance. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1126.)

Here, even if defendant could show the court abused its discretion in denying his request for a continuance, defendant has not shown he was prejudiced thereby.[8] (See *People v. Barnett, supra*, 17 Cal.4th at p. 1126 [defendant must demonstrate abuse of discretion *and* prejudice to warrant reversal for denial of continuance].) In this regard, defendant merely speculates that given more time to investigate, he might have uncovered other impeachment evidence throwing "additional doubt on the victim's [Anderson's] story and his credibility." However, Anderson was thoroughly impeached at trial based on his pending criminal prosecution. In this regard, the court informed the jury Anderson was under charges for making criminal threats and was testifying under an agreement with the district attorney for use immunity, and on cross-examination, defense counsel elicited that [Anderson] allegedly threatened to kill his landlord over a dispute about the landlord charging repairs against [Anderson's] rental deposit. Furthermore, the value of any other impeachment evidence was undermined by the fact that Ramirez corroborated Anderson's story in all respects, except the immaterial one of whether defendant lobbed the loot at Anderson's chest or threw it in his face.[9]

In sum, defendant has failed to show an abuse of discretion in the trial court's denial of his request for a continuance, nor has he succeeded in demonstrating prejudice. (See *People v. Barnett, supra*, 17 Cal.4th at p. 1126.) Furthermore, based on the

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[8] To the extent defendant relies on *People v. Maddox* (1967) 67 Cal.2d 647 (*Maddox*), to suggest the court's purported error in denying him a continuance was reversible per se, we conclude *Maddox* is distinguishable. There, a defendant disagreed from the outset with his court-appointed attorney's defense strategy, completely preventing them from working together to prepare a defense. The *Maddox* court found defendant was not meaningfully represented until the trial court granted self-representation, at which time preparation of the defense effectively began. (*Id.* at p. 654.) However, the trial court, after granting defendant the right of self-representation, refused to allow defendant the statutory minimum number of days to which he was entitled to prepare for trial. (*Id.* at pp. 652-653.) On appeal, the *Maddox* court held the statutory violation was reversible per se. (*Id.* at p. 655.) No such statutory violation occurred here, however, and thus *Maddox* does not apply.

[9] Defendant's additional assertion of prejudice on the grounds trial counsel might have presented a stronger defense to the robbery charge if granted a continuance has been mooted by our reversal of that conviction.

circumstances of the case and the reasons presented for the continuance, the trial court's denial of defendant's request for a continuance cannot be viewed as so arbitrary that it constituted a denial of his fundamental rights to due process or effective assistance of counsel. (*People v. Frye, supra,* 18 Cal.4th at p. 1013.) Accordingly, defendant's attack on the judgment on this ground must fail.

DISPOSITION

Defendant's robbery conviction is reversed. The judgment is vacated and matter is remanded for further proceedings consistent with this opinion.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.

People v. William Drew Hodges, A131542

Trial Court:	Superior Court, Sonoma County
Trial Judge:	Hon. Julie Conger, Judge
Counsel for Appellant:	Thea Greenhaigh, by Appointment of the Court of Appeal, First District Appellate Project Independent Case System
Counsel for Respondent:	Kamala D. Harris Attorney General of California, Dane R. Gillette Chief Assistant Attorney General, Gerald A. Engler Senior Assistant Attorney General, Laurence K. Sullivan Supervising Deputy Attorney General, Rene A. Chacon Supervising Deputy Attorney General

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