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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. RYAN ESTEBAN CONCEPCION, Defendant and Appellant.	E036353 (Super.Ct.No. SWF004991) OPINION

APPEAL from the Superior Court of Riverside County. Suzanne Knauf, Judge. (Retired Judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Terrence Verson Scott, under appointment by the Court of Appeal, and Andrew E. Rubin for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and James D. Dutton, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In this case, we hold that the defendant's involuntary absence from the courtroom during the prosecution's presentation of all the evidence offered to support certain criminal charges was structural error, and the defendant's convictions must therefore be reversed.

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Defendant Ryan Esteban Concepcion was charged with five offenses and related enhancements arising from events that took place on two different dates.

A. July 10, 2003, Events

In early July 2003, defendant visited the home of an acquaintance, Crystal Hall, to look at a gun that her grandmother wished to sell. Defendant, an ex-felon, brought along a friend who had an interest in buying the gun. The Halls showed defendant and his friend the gun. When the Halls were not looking, defendant and his friend left, taking the gun with them. The gun was a collector's item worth about $1,200.

On the basis of those events, defendant was charged in counts 4 and 5 with grand theft (Pen. Code,[1] § 487, subd. (d)) and residential burglary (§ 459). The jury found him guilty of the grand theft, but not guilty of the burglary.

B. July 30, 2003, Events

On July 30, 2003, Hector Lopez and his family were standing outside their home near where his automobile was parked. Defendant, a stranger to the Lopezes,

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

approached, armed with a handgun, and said he needed a ride. When Lopez refused, defendant demanded his car keys. Lopez removed the car key from his keychain and gave it to defendant. Defendant said he would leave the car at an AM/PM market the next day, and he drove away in Lopez's car.

A short time later, a uniformed police officer driving a marked patrol car noticed defendant driving the car without its headlights on. A car chase ensued, which ended when defendant drove the car into a telephone pole. The police found a semiautomatic handgun in the car.

On the basis of these events, defendant was charged in counts 1 through 3 with carjacking (§ 215, subd. (a)), felony flight from a pursuing peace officer (Veh. Code, § 2800.2), and the possession of a firearm by a felon (§ 12021). The jury found him guilty of all three counts and found true the enhancement allegation with respect to count 1 that defendant personally used a firearm (§ 12022.53, subd. (b)).

C. Sentencing

In bifurcated proceedings, the trial court found true allegations that defendant had incurred a prior serious felony conviction for purposes of the five-year enhancement of section 667, subdivision (a), and a prior strike for purposes of section 667, subdivisions (c) and (e)(1), and section 1170.12, subdivision (c)(1).

The trial court sentenced defendant under the two-strike provisions to a 10-year term for the carjacking, a consecutive 10-year term for the firearm enhancement, a consecutive 16-month term for each of counts 2 and 4, a concurrent 16-month term for

count 3, and a consecutive five-year term for the section 667, subdivision (a), enhancement, for a total term of 27 years 8 months.

D. The Trial

Jury selection took place on February 11, 2004; defendant was present in court. When the court convened on February 17 for the first day of trial, defendant was absent from the courtroom. Defense counsel reported hearing rumors that defendant and others had escaped from the jail. Defense counsel moved for a continuance or, in the alternative, a mistrial. Defense counsel stated his concern that the jurors would be prejudiced against defendant if they heard of the escape.

The court held a hearing to determine whether defendant was voluntarily absent and learned from a sheriff's deputy that defendant was missing from the jail, and his absence was related to an escape.

The court also conducted individual voir dire of the jurors and admonished them not to guess or speculate as to the reason defendant was not present. The court also admonished the jurors as a group. The court decided to proceed with the trial in defendant's absence under section 1043. The court found that defendant was voluntarily absent from the trial.

After the court gave preinstructions to the jury, the court learned that defendant was back in custody, in Perris. An officer had informed the court that defendant could not be transported back to court until the next day. The court nonetheless continued with the trial. The prosecutor and defense counsel made their opening statements, and the

prosecutor presented the testimony of three witnesses to prove the crimes charged in counts 1 through 3.

Defendant was back in court for trial the following day. The court allowed evidence of the circumstances of his escape from jail.

III. DISCUSSION

A criminal defendant has a statutory and constitutional right to be present during such phases of trial as are important to his or her defense unless he or she is voluntarily absent. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; §§ 977, subds. (b)(1) & (2); 1043, subds. (a) & (b); *People v. Freeman* (1994) 8 Cal.4th 450, 511; *People v. Chavez* (1980) 26 Cal.3d 334, 357-358 ["California courts throughout our history have taken note of the 'most substantial' nature of the defendant's right to confront witnesses, designating it a 'right of the highest importance.'"].) Although defendant was voluntarily absent from trial following his escape from custody, and the trial court so found, *his absence ceased to be voluntary once he was returned to custody*. When defendant was re-apprehended and taken into custody in Perris, he was again subject to the control of the state. After his re-arrest, therefore, his absence from his trial was involuntary, regardless of the initial voluntariness of his failure to appear in court. We conclude that he therefore had a right to be present at trial, and it was error for the trial court to proceed in his absence.[2]

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[2] We reject the People's contention that the failure of defendant's counsel to renew his request for a continuance, or otherwise object to continuing the trial in his client's absence after learning that his client was back in custody, constitutes a waiver of

[footnote continued on next page]

Defendant argues that the error was either structural, and hence reversible per se, or, if subject to a harmless error analysis, was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18).[3] As we discuss below, we conclude that the error was structural, and defendant's convictions must therefore be reversed.

A structural error is a "'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" (*People v. Gray* (2005) 37 Cal.4th 168, 233.) In *Johnson v. United States* (1997) 520 U.S. 461, 468-469, the

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[footnote continued from previous page]
the issue. True, once defendant was returned to custody, circumstances had changed. He had been apprehended, his whereabouts were known, and his availability for trial was certain. Thus, defense counsel's request for a continuance under those circumstances would not have been simply a renewed objection to continuing the trial in defendant's absence; rather, it would have been a request for a continuance with knowledge of a date certain when defendant would be present.

Although such an omission might constitute a waiver under some circumstances (see *People v. Mayfield* (1997) 14 Cal.4th 668, 798), this is not one of them. A criminal defendant's fundamental right to be present at trial and to confront adverse witnesses is a personal right that must be expressly waived and thus cannot be relinquished by the action or inaction of counsel. (See, e.g., *People v. Collins* (2001) 26 Cal.4th 297, 308.) Thus, it cannot be said that defendant waived his right to be present at his trial.

However, if either defense counsel or the prosecution had brought to the court's attention that defendant's absence was no longer voluntary, the court might have averted the error by continuing the case until defendant could be transported and present. If either recognized the potential for constitutional error, they did not speak up. Their silence and failure to bring it to the court's attention may have contributed to the court's error.

3 The People give short shrift to the central issue in this case – the standard by which we evaluate the error based on defendant's involuntary absence from trial. Their entire argument is as follows: "Here, the jury's verdicts of guilt were supported by overwhelming evidence. If there was any error, denial of the right to be present is a trial error, as opposed to a structural error, and is subject to a harmless error analysis. (*Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141-1144.) Hence, based on the overwhelming evidence of guilt and the totality of the circumstances, any error was harmless."

Supreme Court stated that it so far has found structural error in only six circumstances: *Gideon v. Wainwright* (1963) 372 U.S. 335 [a total deprivation of the right to counsel]; *Tumey v. Ohio* (1927) 273 U.S. 510 [lack of an impartial trial judge]; *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of grand jurors of the defendant's race]; *McKaskle v. Wiggins*, (1984) 465 U.S. 168 [the right to self-representation at trial]; *Waller v. Georgia* (1984) 467 U.S. 39 [deprivation of the right to a public trial]; *Sullivan v. Louisiana* (1993) 508 U.S. 275 [erroneous instruction to the jury on proof beyond a reasonable doubt]. Although not acknowledged by the court in *Johnson v. United States, supra*, 520 U.S. 461, the court also found the equivalent of structural error in *Riggins v. Nevada* (1992) 504 U.S. 127. In that case, the court held that the trial court had erred in ordering that antipsychotic drugs be administered to the defendant during his trial, and over his objection, without making findings that there were no less intrusive alternatives, that the medication was medically appropriate, and that it was essential for the sake of defendant's safety or the safety of others. In assessing the effect of the error, the court stated, "Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative." (Id. at p. 137.)

The common element of all these cases is the courts' recognition that the consequences of the deprivation of certain constitutional rights were "necessarily unquantifiable and indeterminate." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.) Similarly, in *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-311, the seminal case in which the court announced the dichotomy between structural errors requiring

reversal and mere trial errors, which could be subject to harmless error review, the court focused on whether it was possible to determine accurately the impact of the error on the outcome of the proceeding.

When a defendant is absent during the taking of testimony against him, we cannot know what he would have said or done. We cannot determine how the demeanor and testimony of witnesses might have changed had the defendant been present and able to participate fully in the process. The error did not involve a de minimis absence; rather, the defendant was absent during all the testimony offered to convict him of counts 1 through 3. Such error was structural.

We have found no California case (and the parties have cited none) addressing whether error under circumstances similar to those presented in this case is structural or subject to harmless error analysis.

A number of courts throughout the country have found a defendant's absence from portions of the criminal proceedings to be structural error. In *State v. Calderon* (2000) 270 Kan. 241 [13 P.3d 871], for example, the Supreme Court of Kansas held that the absence of the defendant's interpreter during closing arguments in a murder prosecution violated the defendant's right to be present at his trial and was structural error. (*Id.* at p. 253.) The court explained, "The right to be present at one's criminal trial is a fundamental right. To be 'present' requires that a defendant be more than just physically present. It assumes that a defendant will be informed about the proceedings so he or she can assist in the defense. A defendant's right to be present includes a right to have trial

proceedings translated into a language that he or she understands so that he or she can participate effectively in his or her own defense.

"The United States Supreme Court has stated that it is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. *Riggins v. Nevada,* 504 U.S. 127, 142, 118 L.Ed.2d 479, 112 S.Ct. 1810 (1992). At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. [Citation.]

"Here, the trial court denied Calderon a meaningful presence during closing argument, an error which implicates the basic consideration of fairness. Under these circumstances, this court is not permitted to determine that it was harmless beyond a reasonable doubt even though the error might have had little, if any, likelihood of having changed the result of the trial." (*State v. Calderon, supra,* 270 Kan. 241 at p. 253.) (See also *State v. Bird* (2002) 308 Mont. 75 [43 P.3d 266, 273] [defendant's exclusion from in-chambers voir dire of jurors was structural error]; *State v. Padilla* (N.M.App. 2000) 129 N.M. 625 [11 P.3d 589, 594] [same]; *State v. Garcia-Contreras* (1998) 191 Ariz. 144 [953 P.2d 536, 540] [defendant's involuntary absence from jury selection was structural error]; *State v. Lopez* (2004) 271 Conn. 724 [859 A.2d 898, 906] [defendant's absence from an in-chambers inquiry regarding a possible conflict of interest on the part of

defense counsel was structural error]; *State v. Brown* (2003) 362 N.J. Super. 180 [827 A.2d 346, 352 [defendant's absence during the readback of testimony to the jury, unsupervised by the judge, was structural error].)

We recognize that other courts have held that error pertaining to a defendant's absence from certain stages of the criminal proceedings – even stages deemed "critical" – was subject to a harmless error analysis. (See *Rushen v. Spain* (1983) 464 U.S. 114, 117-119 [trial judge's ex parte communication with a juror]; *People v. Davis* (2005) 36 Cal.4th 510, 532[4] [defendant's absence from a pretrial hearing to determine the admissibility of a jailhouse tape]; *Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1171-1172 [defendant's exclusion from a chambers conference during trial]; *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472 [defendant's absence during the rereading of trial testimony to the jury]; *Rice v. Wood, supra,* 77 F.3d at p. 1144 [defendant's absence when the jury returned its verdict].)

We agree that those cases were correctly decided on the basis of the facts before those courts. Those cases, however, dealt with the defendant's absence during limited portions of the proceedings, and under many circumstances, the defendant's absence

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[4] The court in *People v. Davis* stated, "Under the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23 [17 L.Ed.2d 705, 87 S.Ct. 824]."(*People v. Davis, supra,* 36 Cal.4th at p. 532.) The facts of *People v. Davis* were notably different from those of the present case, and therefore we do not deem the court's dictum controlling with respect to error in the defendant's involuntary exclusion from the entire presentation of evidence relating to certain criminal counts.

from criminal proceedings may be subject to harmless error review. Those cases, however, did not address the defendant's absence during the prosecution's presentation of all the evidence to support certain criminal counts. Thus, the errors before those courts applying harmless error analysis were qualitatively different from that in the present case, and on that basis, we find them distinguishable.[5]

Moreover, even those courts applying harmless error analysis have often recognized that the denial of a defendant's right to be present at trial is not *always* subject

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[5] In one case, the court held that the defendant's absence during the taking of testimony was subject to harmless error analysis. (*United States v. Toliver* (2d Cir. 1976) 541 F.2d 958.) In that case, over defense counsel's objection, testimony of two witnesses was taken when one of several defendants was absent from the courtroom due to illness. In analyzing the impact of the error, the court noted that one of the two witnesses had "merely laid the necessary foundation for introduction into evidence of photographs . . . he simply stated that the photographs to be offered by the government were taken from rolls of film which his firm had obtained from the service." (*Id.* at p. 965.) Moreover, the same witness had provided similar testimony in the previous trial of the defendant, and the transcript of that previous testimony had been provided to defense counsel during discovery. (*Ibid.*) The other witness testified that "the handwriting on various forms and checks matched that of the exemplars taken from [the defendant]," and his testimony "was a key link in the proof against her." (*Id.* at p. 966.) However, that witness was later recalled and cross-examined in the defendant's presence. (*Ibid.*) The court concluded, "During the cross-examination of a witness . . . a defendant does not exercise any absolute prerogative comparable to a peremptory challenge [of a prospective juror]. He may assist his counsel in preparing the cross-examination and suggest areas to be explored or avoided, but the extent to which his absence may impair his ability to do so is capable of appraisal by a reviewing court." (*Id.* at p. 965.) Finally, the court reasoned that the "psychological function" served by a defendant's presence could be accomplished by the presence of the codefendants. (*Ibid.*) None of those factors is present in the case before us. The testimony of the witnesses was not foundational or peripheral, and the witnesses had not testified against the defendant in a previous trial. There were no codefendants who could have served the "psychological function" of the defendant's presence. Thus, *Toliver* is distinguishable on its facts.

to harmless error analysis. For example, in *Campbell v. Rice*, the court stated, "[T]he right to be present during all critical stages of the proceedings and the right to be represented by counsel, 'as with most constitutional rights, are subject to harmless error analysis *unless the deprivation, by its very nature, cannot be harmless.*' [Citation.]" (*Campbell v. Rice*, *supra*, 408 F.3d at p. 1172, italics added; quoting from *Rushen v. Spain*, *supra*, 464 U.S. at p. 119.)

The court in *Rice v. Wood*, *supra*, 77 F.3d at p. 1141, focused on how the defendant's presence could have affected the proceedings: "Had he been present, he couldn't have pleaded with the jury or spoken to the judge. He had no active role to play; he was there only to hear the jury announce its decision."

Similarly, in *Hegler v. Borg*, the court stated that "In the usual case [an error in the defendant's absence from proceedings] will be subject to a harmless error analysis, *but a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal.*" (*Hegler v. Borg*, *supra*, 50 F.3d at p. 1476, italics added.) In *Hegler v. Borg*, the court described the readback of testimony to the jury as "prosaic" and focused on the role the defendant could have played had he been present in determining that the error was subject to harmless error analysis: "The only role Hegler could have played, had he been present, was as an observer. . . . Admittedly, Hegler could have objected to inaccuracies in the readback, or protested against any impropriety on the court reporter's part; but any mistake or lapse that may have tainted the jury's decision is capable of being quantified and assessed in an evidentiary hearing." (*Hegler*

v. Borg, *supra*, 50 F.3d at p. 1477, fn. omitted.) The court concluded, "In sum, we think that before a court can classify a 'presence error,' the character of the proceeding from which the defendant was excluded must be evaluated to ascertain the impact of the constitutional violation on the overall structure of the criminal proceeding. In so doing, we conclude that where, as here, the deprivation occurred during a proceeding in which the defendant had little ability to influence its outcome, and the harm that resulted from the defendant's absence can be quantified, the constitutional error is a trial error, amenable to harmless error analysis." (*Ibid*.)

These courts impliedly recognized that at some point, the deprivation of the defendant's rights through his involuntary absence from all of or substantial portions of his criminal trial becomes structural error. We conclude that line was crossed in the present case. The "character of the proceeding from which the defendant was excluded" was the People's presentation of *all the evidence* offered with respect to three criminal counts. This is qualitatively different from the defendant's absence from the readback of testimony to the jury, from sentencing, or from an in-chambers conference. We conclude that the effect of the error was not subject to qualitative assessment, and the error was therefore structural, requiring reversal.

We need not, therefore, address defendant's remaining contentions of error.

IV. DISPOSITION

The judgment is reversed.

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HOLLENHORST
J.

I concur:

MCKINSTER
J.

[*People v. Concepcion*, E036353]

RAMIREZ, P.J., dissenting.

Today my colleagues hold that proceeding with trial in a defendant's absence during the presentation of evidence to support certain criminal charges—an absence which was a direct consequence of the defendant's jail escape earlier that day—is decisively structural error requiring reversal of the defendant's convictions. In applying the structural error standard to these circumstances—a use which has yet to be sanctioned by either the United States Supreme Court or the California Supreme Court—my colleagues gloss over the fact it was the defendant's own conduct that gave rise to the situation about which he now complains. That is, in characterizing the defendant's absence from the courtroom as *involuntary*, the majority gives short shrift to the *reason* for the absence, not to mention the painstaking steps the court initially took to assure a fair trial for the defendant despite his *voluntary* absence due to his escape that morning. I simply cannot, as my colleagues have chosen to do, ignore the circumstances surrounding the defendant's absence or the reality that, but for his jail escape, this troublesome issue would not now be before us.

Of course, "[a] criminal defendant has a right under the Sixth and Fourteenth Amendments to the federal Constitution, and under article I, section 15 of the California Constitution, to be present at his [or her] trial. [Citation.] A defendant also has statutory rights to be present under Penal Code sections 1043 and 977. [Citation.] The right to be present, however, is a right that is not absolute. For example, a disruptive defendant can

be removed from the courtroom without violating his [or her] right to be present. [Citations.] A defendant who voluntarily absents himself [or herself] from a trial that has commenced in his [or her] presence cannot later complain when the trial continues to a verdict in his [or her] absence. [Citations.] A defendant can also waive his [or her] personal appearance at trial and allow the trial to proceed in his [or her] absence. [Citation.]" (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1393-1394 (*Howze*).)[1]

In this case, the defendant—whose jail escape was undeniably a deliberate choice on his part—gave up his right to be present in that he voluntarily absented himself when trial got under way that morning, and the court so found. That he was later apprehended and returned to custody does not, in my view, alter the fact that his absence from trial that afternoon was a consequence of that same deliberate conduct.

It follows that the court's decision to proceed in the defendant's absence—despite its knowledge that he had been returned to custody—is not the stuff of structural error. It is trial error, subject to harmless error analysis. And, in light of the overwhelming evidence, including eyewitness testimony from the victims, to support a verdict of guilty beyond a reasonable doubt as to all counts of which the defendant was convicted, the error is harmless. Indeed, there is no question that the defendant, an ex-felon, was in possession of a firearm at the time he unlawfully appropriated a vehicle, that he evaded a peace officer's vehicle while being chased by the officer, and that on another occasion

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[1] In *Howze,* the defendant was estopped from asserting a violation of his right to be present when the court commenced trial in his absence where his absence was caused by his own deliberate conduct. (*Id*. at p. 1395.)

committed larceny by surreptitiously removing a firearm from a residence without the owner's permission. Moreover, it seems rather telling that the jurors, with knowledge of the jail escape, acquitted the defendant of residential burglary *despite* the reasonable implication that he went to the victim's residence intending to take the gun, underscores the seriousness with which they viewed their roles as jurors and the workings of the criminal justice system. Surely the notion of structural error requiring per se reversal was not intended to undermine the purpose to be served by the harmless error doctrine. As stated in *Arizona v. Fulminante, supra*, 499 U.S. 279 (*Fulminante*), the harmless error doctrine is "essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' [Citation.]" (*Id.* at p. 308.) There is no question that the trial in this case accomplished this purpose.

Any notion that the defendant in this case was denied a fair trial is belied by the record. Indeed, proceeding in his absence was not of such dimension as to undermine the integrity of the trial process and require automatic reversal. Short of continuing the trial, the court did everything feasible to protect the defendant's interests. Thus, while it seems clear enough that it would have been prudent for the court *not* to proceed in the defendant's absence—even though no objection was made—I cannot say that the error pervaded the fairness of the trial in the eyes of the jurors so as to impair the integrity of the judicial system. The error in this case is, in my opinion, harmless beyond a reasonable doubt.

I therefore respectfully dissent.

I.

To be characterized as a structural defect, a constitutional error must be so pervasive and debilitating as to contravene the very essence of the criminal justice system. The category of structural error has been reserved for a very limited class of cases, including the total deprivation of the right to counsel at trial and trial before a judge who is biased. A structural defect affects the framework within which the trial proceeds. (*Fulminante, supra*, 499 U.S. at p. 310.) The common denominator of structural errors is that they infect the entire conduct of the trial "*from beginning to end*." (*Fulminante*, *supra*, 499 U.S. at pp. 309-310, italics added.) It "def[ies] analysis by 'harmless-error' standards," and "'transcends the criminal process.'" (*Fulminante, supra*, 499 U.S. at pp. 309, 311.) An error may be properly categorized as structural only if it so fundamentally undermines the fairness or the validity of the trial that the result must be voided regardless of identifiable prejudice. (*Yarborough v. Keane* (1996) 101 F.3d 894, 897.) In contrast, a trial error is one "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Fulminante*, *supra*, 499 U.S. at pp. 307-308.) Moreover, most constitutional errors can be harmless. (*Fulminante, supra*, 499 U.S. at p. 306.)

In categorizing the error in this case as structural, the majority reasons that it "cannot know what [the defendant] would have said or done" had he been present "during the taking of testimony against him." (Maj. opn., at p. 8.) Nor, it explains, can it

"determine how the demeanor and testimony of witnesses might have changed had the defendant been present and able to participate fully in the process." (Maj. opn., at p. 8.) Thus, the majority concludes, the error is structural, requiring reversal, because "the effect of the error was not subject to qualitative assessment. . . ." (Maj. opn., at p. 13.)

Indeed, based on the law as it currently exists, whether an error is a trial error or a structural defect depends upon the reviewing court's ability to "quantitatively assess," in the context of the other evidence presented, the effect of the error on the conviction. (*Fulminante, supra*, 499 U.S. at p. 308.) If the error can be measured against other evidence in the case to determine its effect on the outcome, then it is a trial error. The test for determining if the error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. 18, 24 (*Chapman*).)

The majority cites a number of out-of-state cases finding a defendant's absence from portions of proceedings to be structural error. (Maj. opn., at pp. 8-9.) Among them, and discussed at some length in its opinion, is *State v. Calderon*, *supra*, 270 Kan. 241 [13 P.3d 871] (*Calderon*). There, the Kansas Supreme Court held that absence of the defendant's interpreter during closing arguments violated the defendant's right to be present at his trial and was structural error. There, for reasons undisclosed in the decision, the trial judge had ordered that closing argument not be translated for the defendant, to which defense counsel did not object. As the majority indicates, the *Calderon* court explained that a defendant's right to be present includes a right to have proceedings translated into a language which is understandable so that he or she can

participate in his or her own defense and that the denial of that right "implicates the basic consideration of fairness." (Maj. opn., at p. 9.) The *Calderon* court further stated, "At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. [Citation.]" (*Calderon, supra,* 270 Kan. at p. 253.)

What the majority overlooks, however, is that a dissenting justice in *Calderon*—who had no quarrel with the defendant's constitutional right to be present—was "not persuaded that, under the facts of this case, the presence of a translator for the defendant would have been of any benefit. It is hard to imagine what benefit a jury would have watching a defendant hearing a translation in a language the jury does not understand with some delay between what the jury hears in English and what the defendant later hears in a foreign language. [¶] I would follow the reasoning in *Luu v. Colorado*, 841 P.2d 271, 275 (Colo. 1992). . . ." (*Calderon, supra,* 270 Kan. at p. 257.)

In *Luu*, the defendant's interpreter was unavailable for closing argument and jury instructions. To avoid any potential problems, the court, at defense counsel's request, mentioned the interpreter's absence to the jury. The Colorado Supreme Court found "no evidence that the absence of an interpreter interfered with Luu's ability to cross-examine witnesses. Nor is there any indication in the record that the absence of an interpreter during closing arguments and the giving of jury instructions compromised the basic *fairness* of the trial. . . . In light of the entire record, we conclude under these facts that any error suffered by Luu was harmless beyond a reasonable doubt." (*Luu v. Colorado,*

supra, 841 P.2d. at p. 275, italics added (*Luu*).) That a dissenting justice believed that the defendant *was* denied his fundamental right to be present at a critical stage of the criminal proceedings brought against him because "[t]he record does not contain any information that would permit a quantitative assessment of the impact of such deprivation on the fairness of the deliberative process," (*id*. at p. 282), underscores the reality that reasonable minds do, of course, differ. Nonetheless, in both *Calderon* and *Luu*, the majority's decision turned on what was deemed *fair*, under the circumstances, *to the defendant*.

And so it is here. The defendant, under the circumstances, received a fair trial. As far as I can tell, in none of the out-of-state cases cited by the majority, in which presence error was characterized as structural error, was the defendant's absence or exclusion from a trial court proceeding a product of a deed undertaken at his or her own volition. Although the majority opinion glosses over the series of events that took place in the present case on the morning of the second day of trial, it may be useful to describe them in more detail inasmuch as I feel strongly that the defendant's jail escape—and its aftermath—play a significant role in my decision.

When the trial court learned of the defendant's absence on the morning of the second day of trial, it indicated that it had some concern as to the events that had transpired and opted to question the jurors to see how much they knew. The court told the jurors, as a group, that the defendant would not be present for the remainder of the trial and instructed them not to guess or speculate as to why he was not there. The court then questioned each juror separately, asking what he or she had heard in light of the

"lockdown" each had witnessed that morning, how he or she felt about the defendant not being present, and whether he or she would be affected by the defendant's absence. Each juror responded, in turn, that the situation at hand would have no bearing on his or her performance as a juror. The court interrupted its questioning of the jurors to hear the testimony of an officer assigned to the Southwest Justice Center at the courthouse. According to the officer, the defendant was "definitely missing" and was "definitely unavailable for a court appearance." He indicated the reason the defendant was missing was related to the fact there had apparently been an escape from the Southwest Detention Center. Later, the court heard testimony from a deputy public defender who, earlier that morning had overheard a juror talking to another juror about the possibility that defendant was one of the escapees.

After the court concluded its questioning of the jurors, defense counsel renewed his motion for a mistrial. Based on the officer's testimony, the court made a finding that the defendant had voluntarily absented himself from trial. The court denied the defense motion and ruled that trial would continue in the defendant's absence, having been assured that the jurors were able to proceed as a fair and impartial jury in the case.

Then after the noon recess, but prior to opening statements, the court learned that the defendant was back in custody and so informed counsel outside the jury's presence. The defendant, who had escaped from the Southwest Detention Center next to the Murrieta courthouse, was now situated in Perris, about 20 miles away, and was expressly told that he could not be transported to court until the following day. No further objection was made, and the court allowed trial to proceed.

The defendant was present the following day, and at the conclusion of the prosecution's case, over objection by defense counsel, two correctional officers who worked at the Southwest Detention Center were permitted to testify with regard to the defendant's escape from jail and his return at 7:00 p.m. that same night dressed in civilian clothing. Prior to the testimony, defense counsel was given an opportunity to speak with both witnesses. Defense counsel had also expressly asked the court for an instruction that would advise the jury that the evidence of flight from custody is not proof of the substance of the charges. The court replied: "There is actually an instruction on that. [CALJIC No.] 2.52 can also be tailored for an escape from custody. In fact, I have looked at that particular instruction, recognizing that this might be an issue that will be raised today. So there is a way to structure the 2.52 instruction so that it is presented in a legal manner to the jury for their consideration." The jury was subsequently instructed accordingly.

In light of the foregoing, I suspect the jurors went away thinking that the court had bent over backwards to assure this defendant a fair trial, even though he had escaped from jail. And, in spite of his objection to the testimony surrounding the defendant's jail escape, defense counsel was amenable to an instruction advising the jury not to view the escape as evidence of guilt (see discussion, *infra*). I recognize the majority's concern that the defendant was absent during all the testimony offered to convict him of counts 1 through 3, and its view that "we cannot know what he would have said or done [ ] [nor] determine how the demeanor and testimony of witnesses might have changed had the defendant been present and able to participate fully in the process." (Maj. opn., at p. 8.)

Be that as it may, I can think of nothing the defendant could have done, had he been present, which would have or could have influenced the outcome. Nor does the defendant suggest anything that might have altered the outcome.

Nor do I believe that proceeding with trial in his absence deprived the defendant of any "basic protections, [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, [citation], and no criminal punishment may be regarded as fundamentally fair." (*Rose v. Clark* (1986) 478 U.S. 570, 577-578.) Most importantly, as indicated hereinabove, I simply cannot ignore the reality that the defendant himself, by his own volition, created the very problem about which he now complains.

In making her decision to proceed with trial, the trial judge was undoubtedly faced with a dilemma. I agree with the majority that the better course of action would have been to trail the matter until the next morning. However, I fail to see how, in view of the unique circumstances of this case vis-à-vis the jail escape, proceeding in the defendant's absence (which is what would have happened in any event had the news of his capture been delayed by even just a few moments)[2] could have contaminated the proceeding as a

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[2] The timing of the defendant's capture, and the speed with which the news reached the court, is, in my view, a happenstance not unlike that described by Chief Justice Roberts in his dissenting opinion in *Georgia v. Randolph* (2006) 126 S.Ct. 1515, 1536:

"The majority states its rule as follows: '[A] warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.' [Citation.] [¶] Just as the source of the majority's rule is not privacy, so too the interest it protects cannot reasonably be described as such. *That interest is not*

[footnote continued on next page]

whole, or call into question its fundamental fairness. In light of society's interest in the fair and proper administration of criminal justice, I believe the error cannot be classified as structural. As the United States Supreme Court has said, "Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant. 'At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily

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[footnote continued from previous page]

protected if a co-owner happens to be absent when the police arrive, in the backyard gardening, asleep in the next room, or listening to music through earphones so that only his co-occupant hears the knock on the door. That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive. Usually when the development of Fourth Amendment jurisprudence leads to such arbitrary lines, we take it as a signal that the rules need to be rethought. [Citation.] We should not embrace a rule at the outset that its *sponsors* appreciate will result in drawing fine, formalistic lines." (First italics added.)

Like the co-occupant in *Randolph* who, in Justice Roberts' view, experienced a stroke of good luck in that he happened to be present when the police arrived—despite the fact his estranged wife had consented to a search of the premises, it was fortunate for the defendant in the present case to have been captured—and for the court to have been alerted to his changed circumstances—*before* the afternoon session got under way. But what if the defendant had been apprehended one hour later, or five hours later, or not until the following morning, so that trial actually would have proceeded while he was still *voluntarily* absent? Would the majority's conclusion then be the same? I suspect that my colleagues would have reached a different conclusion had the defendant's capture taken place *after* the taking of testimony had begun—and for that reason, I ask them why the defendant should now benefit from this chance occurrence.

infringe on competing interests.' [Citations.]" (*Rushen v. Spain, supra,* 464 U.S. 114, 117-118, fn. omitted.)

II.

"Presence error" is the term used to describe error resulting from a defendant's exclusion or absence from various stages of trial court proceedings. The Ninth Circuit Court of Appeals recently observed that the Supreme Court "has *never* held that the exclusion of a defendant from a critical stage of his [or her] criminal proceedings constitutes a structural error." (*Campbell v. Rice, supra,* 408 F.3d 1166, 1172, italics added.)

Nonetheless, the majority, in recognizing that some courts *have* held that error pertaining to a defendant's absence from certain stages of criminal proceedings was subject to a harmless error analysis, attempts to distinguish *this* case on the basis that the defendant here was absent "during the prosecution's presentation of all the evidence to support certain criminal counts. Thus, the errors before those courts applying harmless error analysis were qualitatively different from that in the present case. . . ." (Maj. opn. at p. 11.)

In *Campbell v. Rice,* defendant's exclusion from an in-chambers conference was said to be trial error subject to harmless error analysis. However, the court recognized that "the right to be present during all critical stages of the proceedings and the right to be represented by counsel, 'as with most constitutional rights,' are subject to harmless error analysis *unless the deprivation, by its very nature, cannot be harmless.*' [Citation.]" (*Campbell v. Rice, supra,* 408 F.3d at p. 1172, italics added.) The source of this language

is *Rushen v. Spain, supra*, 464 U.S. at p. 119, footnote 2, where the Supreme Court observed: "These rights [to be present at all critical stages of the proceedings, and to be represented by counsel], as with most constitutional rights, are subject to harmless error analysis [citing *United States v. Morrison* (1981) 449 U.S. 361, 364-365, and *Snyder v. Massachusetts* (1934) 291 U.S. 97, 114-118], *unless the deprivation, by its very nature, cannot be harmless*. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)." (Italics added.) The majority makes much of the italicized portion of the above quotation, ostensibly in an effort to bolster its position that the denial of *this* defendant's right to be present at trial warrants application of the exception to the general rule. In so doing, however, the majority overlooks *Rushen*'s citation to *Gideon v. Wainwright* as an example of a case where a deprivation *cannot be harmless*. Indeed, in contrast to *United States v. Morrison* (where the Supreme Court, assuming a Sixth Amendment violation occurred when federal agents met with defendant without her counsel's knowledge, found the error to be harmless), *Gideon* involved a *total* denial of assistance of counsel. It seems to me that because such a deprivation, by its nature, affects the very essence of our judicial system, it cannot be harmless; thus, it is a structural error.

Additionally, in *Hegler v. Borg, supra,* 50 F.3d 1472, certiorari denied (1995) 516 U.S. 1029 (*Hegler*), the court found that although an error in the defendant's absence from proceedings is usually subject to a harmless error analysis, "a defendant's absence from certain stages of a criminal proceeding may *so undermine the integrity of the trial process* that the error will necessarily fall within that category of cases requiring an

automatic reversal." (*Id*. at p. 1476, italics added.) According to that court, before a presence error can be classified as either a trial error or a structural error, "the character of the proceeding from which the defendant was excluded must be evaluated to ascertain the impact of the constitutional violation on the overall structure of the criminal proceeding. . . . [If] the defendant's absence can be quantified, the constitutional error is a trial error, amenable to harmless error analysis." (*Id*. at p. 1477.)

In *Hegler*, the defendant claimed that the trial court erred in failing to classify as structural error a violation of his right to be present when a portion of trial testimony was reread to the jury in his absence. The trial court found it to be harmless trial error rather than structural error, and the decision was affirmed on appeal. (*Hegler, supra*, 50 F.3d at p. 1476.) Said the court: "*Fulminante* and *Rushen* require us to consider the nature of a 'presence error' in the context of the specific proceeding from which the defendant was excluded. In the usual case, such an error will be susceptible to harmless error analysis, but a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal." (*Hegler, supra*, 50 F.3d at p. 1476.) Having considered the nature of the error in the context of the proceeding, the court found that the error did not render the trial process defective; "[t]he only role Hegler could have played, had he been present, was as an observer. [Citations.] Admittedly, Hegler could have objected to inaccuracies in the readback, or protested against any impropriety on the court reporter's part; but any mistake or lapse that may have tainted the jury's decision is capable of being quantified and assessed in an evidentiary hearing. [Citation.] In other

words, any harm stemming from the violation of Hegler's right to be present during the prosaic reading of the trial testimony is susceptible to harmless error analysis. [Citations.]" (*Id*. at p. 1477, fn. omitted.)

The *Hegler* court concluded: "In sum, we think that before a court can classify a 'presence error,' the character of the proceeding from which the defendant was excluded must be evaluated to ascertain the impact of the constitutional violation on the overall structure of the criminal proceeding. In so doing, we conclude that where, as here, the deprivation occurred during a proceeding in which the defendant had little ability to influence its outcome, and the harm that resulted from the defendant's absence can be quantified, the constitutional error is a trial error, amenable to harmless error analysis." (*Id.* at p. 1477.)

In *Rice v. Wood* (1996) 77 F.3d 1138, another Ninth Circuit decision, the defendant was absent from the courtroom when the jury returned a death verdict, an error which the prosecution conceded was constitutional error. Thus, the only issue before the court was whether the error was structural or trial error. Concluding that it was not structural error, the court offered the following reasoning: "Rice's absence when the jury announced his sentence simply does not fall within the narrow category of structural errors. Had he been present, he couldn't have pleaded with the jury or spoken to the judge. He had no active role to play; he was there only to hear the jury announce its decision. *The error in this case does not, like the denial of an impartial judge or the assistance of counsel, affect the trial from beginning to end*. Rather, like most trial

errors, it can be quantitatively assessed in order to determine whether or not it was harmless." (*Id*. at p. 1141, italics added.)

Furthermore, as the majority aptly notes (maj. opn., at p. 11, fn. 5), a defendant in *United States v. Toliver, supra,* 541 F.2d 958 (*Toliver*) challenged the taking of testimony of two witnesses, over her attorney's objection, after she was forced to be absent from the courtroom due to illness. The Second Circuit found the error to be trial error subject to harmless error analysis: "During the cross-examination of a witness . . . a defendant does not exercise any absolute prerogative comparable to a preemptory challenge [of a prospective juror]. He may assist his counsel in preparing the cross-examination and suggest areas to be explored or avoided, but the extent to which his absence may impair his ability to do so is capable of appraisal by a reviewing court." (*Id*. at p. 965.)

Although the absence of the defendant in *Toliver* was under circumstances unlike those in the present case, the effect of the absence was comparable. In both, the defendant was absent during portions of testimony, and here, as in *Toliver,* there is no indication that the defendant would have been in a position to assist his counsel in cross-examining the witnesses had he been present. I disagree with the majority's view that the present case is distinguishable in that in *Toliver*, the appealing defendant's presence could be accomplished by the presence of her codefendants. I fail to see how the "psychological function" served by a defendant's presence in court was not served in the instant case. Although it is true that the defendant was absent during a portion of the testimony, he was present during the entire remainder of the trial. Moreover, even the *Toliver* court recognized that the extent to which a defendant's absence may impair his or

her ability to assist counsel during cross-examination *is* capable of appraisal by a reviewing court. (*Toliver, supra,* 541 F.2d at p. 965.)

III.

Although the majority does not reach defendant's remaining contentions of error, I offer the following to support my view that the judgment ought to be affirmed.

A. The jury was instructed with CALJIC No. 2.52 as follows: "The escape of a person from custody after the commission of a crime or after he is accused of a crime is not sufficient, in itself, to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding whether the defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

The defendant argues there is a conflict between this instruction and the trial court's earlier admonitions to jurors that his absence from trial be disregarded. He contends the effect of the court's admonitions was undermined by the instruction authorizing the jury to consider the reason for his absence, i.e., his escape from jail. We disagree.

As indicated earlier in this opinion, on the second day of trial, without full knowledge of the circumstances surrounding the defendant's absence, the court went to great lengths to ensure he would have a fair trial. The court questioned each juror individually as to what he or she knew about the events which had taken place that morning outside the courthouse and the jail. But this was before the defendant was apprehended and taken into custody. By the time he was returned to custody,

circumstances had changed dramatically. Notwithstanding its earlier admonitions, the court determined that the escape was relevant and that the jury needed to know about it.

More importantly, after learning that the court intended to allow testimony from the correctional officers regarding the escape, defense counsel expressly asked the court to instruct the jury that flight from custody is not proof of the substance of the charges. The court indicated there already was an instruction to that effect, i.e., that CALJIC No. 2.52 can be tailored for an escape from custody. Defense counsel asked for nothing else, indicating he was ready to proceed. On appeal the defendant apparently overlooks this fact and that the result is invited error.

As stated in *People v. Wader* (1993) 5 Cal.4th 610, "[w]hen a defense attorney makes a 'conscious, deliberate tactical choice' to forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted in error. [Citations.] When defense counsel makes an equally conscious and deliberate tactical choice to request a particular instruction—such as the instruction defense counsel specifically requested here—there is no reason to apply a different rule. Accordingly, we conclude the error was invited, and defendant cannot raise it on appeal." (*Id*. at p. 658.)

Furthermore, defense counsel could have requested a clarifying instruction to take into account the admonitions given earlier that day. He failed to do so. Thus, he has waived any claim that, in light of the unusual facts of this case, amplification was required. (*People v. Craig* (1991) 227 Cal.App.3d 644, 650.)

B. With regard to the defendant's contention the evidence is insufficient to support the firearm theft conviction based upon theft by larceny, the pertinent evidence

was presented by means of testimony from Lettie Hall and Crystal Hall, as follows: On July 9, 2003, the defendant visited Mrs. Hall's Lake Elsinore home, where she resided with her son James and granddaughter Crystal. The defendant knew Crystal through a mutual friend and had visited the home several times before. During the visit the defendant and Mrs. Hall engaged in conversation regarding a gun that Mrs. Hall owned and wished to sell. The defendant told Mrs. Hall he knew of someone who might be interested and would bring him to the house to look at the gun. Mrs. Hall indicated the gun was a collector's item in its original box and was kept in a "secret place" in her bedroom. Two of her guns were on consignment at a gun shop; she had planned to keep the third one. The potential buyer could look at the remaining gun and, if he had any interest in acquiring it, he could then go to the gun shop.

The defendant returned to Mrs. Hall's home the following evening, accompanied by the man who was supposedly interested in purchasing the gun. Mrs. Hall called out to Crystal, who was in her bedroom, to get the gun. The defendant followed Crystal to Mrs. Hall's bedroom, where Crystal retrieved the gun box and handed the unopened box to him. She did not open the box to see if the gun was there; however, she could feel that the gun was in the box because of its weight.

The would-be potential buyer stayed with Mrs. Hall in the kitchen. Crystal and the defendant engaged in a brief conversation about a mutual friend, after which Crystal returned to her own bedroom.

When the defendant returned to the kitchen, he said nothing to Mrs. Hall and left through the garage door with the other man. Mrs. Hall did not notice anything in the

defendant's hands. As the defendant was exiting the house, Mrs. Hall heard him say to the other man, "Now, she wants $1,000, you know." Mrs. Hall became suspicious about the defendant's behavior and called to Crystal to get the gun. Crystal found the gun box on the couch in the living room. She did not open the box, which felt lighter to her, and handed it to her grandmother. Mrs. Hall opened the box and noticed the gun was gone. Crystal ran outside to the front gate, but the defendant was already gone.

Neither Mrs. Hall nor Crystal had given the defendant permission to take the gun. The gun, which was worth $1,200, was never returned.

"The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away." (*People v. Davis*, *supra*, 19 Cal.4th 301, 305.)

Here, the jury was instructed as follows: "Every person who steals, takes, carries away the firearm of another with the specific intent to deprive her permanently of her property is guilty of the crime of gran[d] theft of a firearm, in violation of Penal Code section 487 subdivision (d)(2). [¶] In order to prove this crime, each of the following elements must be proved: A person took a firearm belonging to another person. When the person took the firearm, he had the specific intent to deprive the owner permanently of her property, and the person carried the property away by obtaining physical possession and control for some period of time and by some movement of the property."

The defendant contends that because Crystal handed him the gun, he received it as part of a consensual transaction; thus he could not have taken it by means of trespass. He

argues CALJIC No. 14.35 requires a trespassory taking rather than a consensual transfer of possession. And, insisting that the applicable theory was theft by trick and device, as defined in CALJIC No. 14.05, an instruction which was not given to the jury, he argues that without evidence to support the only theory of theft presented to the jury, his conviction on count 4 cannot stand. We disagree.

In *People v. Davis*, *supra*, 19 Cal.4th 301, the defendant was convicted of theft by larceny. On appeal he argued there was insufficient evidence of trespass in that he was given a credit voucher when he tried to return an item he had taken from the store for a refund. Our high court disagreed, stating "[t]he act of taking personal property from the possession of another is always a trespass unless the owner consents to the taking freely and unconditionally, or the taker has a legal right to take the property. [Citation.]" (*Id.* at p. 305, fn. omitted.)

The same rationale applies here. In making this argument, the defendant hangs his hat on the fact that Crystal handed the gun box to him. What he overlooks, however, is that Crystal was not the owner. Rather, Crystal was instructed to retrieve the box for her grandmother, which she did not do. In any event, the gun box was not handed to the defendant with permission to freely and unconditionally "carry it away." Thus, the defendant's rationale is flawed.

Nor does *People v. Curtin* (1994) 22 Cal.App.4th 528 (*Curtin*) support the defendant's position. There, the court reversed a conviction for theft by trick and device where the evidence did not support that particular variety of theft. (*Id*. at p. 531.) As the People note, however, the court in *People v. Counts* (1995) 31 Cal.App.4th 785, 791-792

(*Counts*) construed as dictum the holding in *Curtin* (i.e., "'the offense shown by the evidence must be one on which the jury was instructed and thus could have reached its verdict'") and concluded that the error in any event was a technical one: "We interpret the *Curtin* dictum as meaning that there may be a technical error when the particular theory of theft upon which the jury is instructed turns out to be the wrong one. However, neither *Curtin* nor any decision cited therein actually holds there is a rule of per se reversal in such circumstances." (*Id.* at pp. 791-792.)

The rationale of *Counts* is sound. Moreover, because the evidence against the defendant on the theft of the firearm is overwhelming, we fail to see how he was prejudiced. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. The defendant's final contention, that his constitutional right to control the assertion or withdrawal of his not guilty plea was violated by defense counsel's concession that he was guilty of the offenses charged in the second and third counts, also lacks merit.

The following pertinent evidence was presented with regard to counts 2 and 3: In the evening on July 30, 2003, Hector Lopez was outside his San Jacinto home with his family, planting in the yard. His 1983 Toyota Corolla was parked on the street. The defendant, whom Lopez did not know, approached him and said he needed a ride. Lopez replied there was no way he could give him a ride. The defendant said, "Give me the keys for the car." Observing the semi-automatic gun in the defendant's hand, Lopez promptly complied. Lopez removed the ignition key from his key chain and gave it to

the defendant, who then got into the car and drove away, making a right turn onto 7th Street.

At approximately 8:40 p.m. that same night, Detective William Guimont of the San Jacinto Police Department was in uniform, driving a marked police car. Detective Guimont noticed a yellow Toyota Corolla automobile, an early 1980's model, without its headlights on, traveling eastbound on 7th Street. As the vehicle approached the intersection of San Jacinto Avenue and 7th Street, the driver almost collided with a bicyclist. The detective activated his siren and overhead lights and followed the Corolla, attempting to pull it over. The car slowed and drove into a car wash, accelerated around the car wash, and returned to 7th Street, still driving eastbound. The automobile accelerated at a high rate of speed and ran a stop sign; it was doing approximately 55 miles per hour. The vehicle traveled a few more blocks when the driver slammed on the brakes and turned left onto Andrews Avenue. The car came to a stop on the curb of Andrews and 7th Street at which point the driver began to back up and attempt to make a U-turn. The car was then driven up onto the northwest curb of 7th and Andrews where it hit a telephone pole.

The officer got out of his car, approached the Corolla, and told the driver (the defendant) to show him his hands. The defendant finally showed the officer his hands, but not before leaning down to the passenger side. The officer, and his partner who had arrived on the scene, approached the car and arrested the defendant, placing him in handcuffs. Inside the car the officer found a .45 caliber semi-automatic handgun, along with a police scanner.

During closing argument, defense counsel conceded that the defendant was guilty of the felony evasion offense charged in count 2 and the firearm possession offense charged in count 3, noting that the evidence is "very strong" on those counts. On appeal, the defendant concedes that in view of the ample evidence, his trial lawyer's concession of guilt may have been a sound tactical approach. Nonetheless, he contends counsel's approach was "fundamentally flawed" because a withdrawal of a plea of not guilty requires the concurrence of the defendant in that the decision to abandon a not guilty plea is subject to his control. Thus, he maintains the trial court should have insisted that defense counsel first obtain his express agreement. The defendant's argument fails for several reasons.

First, a concession during closing argument is not tantamount to a guilty plea. (*People v. Lucas* (1995) 12 Cal.4th 415, 446; *People v. Cain* (1995) 10 Cal.4th 1, 30.) Moreover, where, as here, the evidence is overwhelming, it is a reasonable tactical approach for a trial lawyer to enhance his or her credibility by conceding guilt on some charges while arguing others. (*People v. Memro* (1995) 11 Cal.4th 786, 858; *People v. Ochoa* (1988) 19 Cal.4th 353, 434-435.)

In any event, as the People point out, the prosecutor cured any possible error when, in his rebuttal argument, he urged the jury "[d]on't be fooled" by defense counsel's concession: "They are conceding the chase, and I guess the felon with the gun. Lawyers do things for certain reasons. I will say this, as you heard at the beginning, there is a not guilty plea still in effect on the chase and the gun. That is the defense stance. There is a never-ending attempt by lawyers, lawyers on both sides, to appear reasonable. The

evidence in this case as to all charges is overwhelming. They are going to concede a couple of them to appear reasonable. [¶] Don't be fooled by that statement that they concede that. Look at each charge. Look at the evading. Look at the felon with a gun. Make sure we're proved all of them beyond a reasonable doubt, and they have been, but make sure."

For all of the reasons set forth herein, I would affirm the judgment in its entirety.

/s/ Ramirez
P.J.