S195187

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	S _____
	)	
DEMETRIUS LAMONT WILLIAMS,	)	
	)	
Defendant and Appellant	)	
	)	

Second Appellate District, Division Seven, No. B222845
Los Angeles Superior Court, No. MA046168
The Honorable Bernie C. LaForteza, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner and appellant, Demetrius Lamont Williams, respectfully petitions this Court for review of the published decision of the California Court of Appeal, Second Appellate District, Division Seven, filed on July 11, 2011, affirming his judgment of conviction following a jury trial. A

copy of the opinion is attached as Appendix A.

QUESTION PRESENTED

1. Is the crime of robbery (Penal Code, section 211[1]) committed when there was no larceny committed, but instead the underlying offense was theft by false pretenses?

INTRODUCTION

In a published opinion issued July 11, 2011, the Court of Appeal affirmed petitioner's convictions for four counts of second degree robbery (§ 211). The panel's decision was based on its conclusion that robbery may be predicated on the offense of theft by false pretenses. (Slip Op., p. 10.) This result is contrary to an unbroken line of decisions by this Court and the Courts of Appeal that the crime of robbery requires larceny plus the additional element that the taking be done by force or fear and be from the person or immediate presence.

Even while petitioner's case was pending in the Court of Appeal, this

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1 All statutory references are to Penal Code unless otherwise specified.

Court wrote that "[r]obbery is larceny with the aggravating circumstances that 'the property is taken from the person or presence of another ... ' and 'is accomplished by the use of force or by putting the victim in fear of injury.' [Citation.]" (*People v. Anderson* (2011) 51 Cal. 4th 989, 994.) As explained *post*, petitioner's underlying crime was not larceny, but was theft by false pretenses, committed when he used fraudulent credit cards to purchase gift cards at WalMart. The robbery convictions were based on appellant's struggling with four loss prevention officers who contacted him after the purchases were completed.

While the purchase of the gift cards is a form of theft that was separately charged as a single count of grand theft (count 7), all parties and the trial court agreed that the theft was theft by false pretenses and the jury was so instructed. (CT 116; Slip Op., p. 5-6.) The elements of false pretenses differ from those of larceny. Larceny (and, according the established precedent, therefore robbery) require a trespassory "taking" and "carrying away" of the victim's property. Theft by false pretenses does not. Even though the different forms of theft are referred to by simply as "theft," the substantive distinctions among the types of theft remain and are not altered.

As California authorities have uniformly established, robbery requires larceny; without larceny, there can be no robbery. The Court of Appeal dismissed the distinction between larceny and theft by false pretenses as the predicate for petitioner's convictions by stating that "[e]ssentially what occurred here was an *Estes*[2] robbery," adding that "[t]here is simply no public policy justification" to differentiate between larceny and false pretenses for the crime of robbery. (Slip Op., p. 12.) As demonstrated *post,* the conclusion reached by the Court of Appeal is inconsistent with the law that robbery requires larceny and it causes much mischief in its implications. It creates a new crime of robbery without caption and asportation of the property. By parity of reasoning, a host of other new crimes would also be created. It is well established that there are no common law crimes in California and the power to create new crimes is vested exclusively in the Legislature. If such a sweeping revision is deemed appropriate, it should come from the Legislature; absent such legislation, courts should hew to the rule that robbery requires larceny.

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2 *People v. Estes* (1983) 147 Cal.App.3d 28. (Hereafter "Estes.")

STATEMENT OF THE CASE AND FACTS

Petitioner accepts the statement of the case and of the facts contained in the opinion of the Court of Appeal (Exhibit A, Slip Op., pp. 2-7).

NECESSITY FOR REVIEW

Review is necessary to secure uniformity of decision and to settle important questions of law (Cal. Rules of Court, rule 8.500(b)(1)). By its ruling in petitioner's case, the Court of Appeal has created a new crime of robbery that does not require an unlawful "taking" (caption and asportation) that heretofore has been the *sine qua non* of robbery. As demonstrated *post*, the decision in petitioner's case ignores the firmly entrenched common law principle—expressly adopted by this Court—that robbery requires that there be larceny, committed from the person or immediate presence of the victim and accomplished by force or fear. (E.g., *People v. Gomez* (2008) 43 Cal.4th 249, 254, and fn. 2 [California law of robbery "incorporates common law robbery requirements"]; other cases cited *post.*)

This is an issue that, given the growing number of theft crimes that are committed based on fraud and identity theft, is certain to arise

repeatedly in future cases. Trial courts facing the issue will face conflicting authority—should they follow the declarations of this court that section 211 "incorporates" the common law requirements of the crime, including the requirement of a larcenous taking, or should they follow the rule announced by the Court of Appeal that the "taking" required by section 211 can include any form of fraudulent acquisition of the victim's property?

Too, this principle is of vital importance to petitioner, whose sentence of twenty-one years (as modified by the Court of Appeal based on unrelated issues) should properly have been no more than six years (the upper term of three years for either burglary (Count 5) or grand theft (Count 6), doubled by virtue of appellant's prior strike; the other counts being subject to the proscription of multiple punishments contained in section 654 and petitioner's prior serious felony prior conviction becoming inapplicable without the robbery counts.)

Moreover, by abandoning the requirement that robbery be premised on a larcenous taking, the opinion has other troubling implications. If the robbery may be premised on theft by false pretenses, then does the latter become a lesser included offense of robbery? Too, if the "taking" in the statute may include a non-larcenous acquisition of the victim's property,

then one who has just embezzled his employer's money by writing company checks to himself while on company property and who then resists attempts by company employees to detain him has also committed a robbery. If one passes or cashes a bad check – "taking" the store's property in return, though not a larcenous taking — and then resists store employees' efforts to detain him, that person will also have committed a robbery. The same would be true if the initial offense were obtaining a prescription drug by means of a false prescription – arguably a "taking" but not a larcenous one.

With due respect to the Court of Appeal, its conclusion is inconsistent with long-established principles that existed for good reason. The decision resulted in great detriment to petitioner in that it more than tripled the maximum sentence he would receive had the law been correctly applied, and it creates an untenable situation for future trial courts faced with the dilemma of whether to follow this Court's clear precedent that robbery requires a larcenous taking, or the Court of Appeal's decision that any unlawful taking will suffice. Review should be granted to secure uniformity of decision and to clarify this important area of the law.

ARGUMENT

I.

THE COURT SHOULD MAKE IT CLEAR THAT A LARCENOUS TAKING IS REQUIRED FOR THE CRIME OF ROBBERY TO BE COMMITTED.

A. Robbery Requires the Commission of Larceny.

Professor Witkin succinctly describes California's law of robbery as "a combination of assault and larceny." (2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Property, § 86, p. 115.) This characterization merely restates principles repeatedly established by California decisional law, following the common law origins of the robbery statute. "At common law, robbery consists of larceny plus two aggravating circumstances. Therefore, a defendant commits a robbery when, with the intent to permanently deprive, he trespassorily takes and carries away the personal property of another from the latter's person or presence by the use of force or threatened force." (4 Wharton, Criminal Law, 15th ed., § 454 (1996).)

In *People v. Gomez, supra,* 43 Cal.4th at p. 254, fn. 2, this Court reiterated that California law of robbery includes these common law principles: "Section 211, enacted in 1872, incorporates common law

robbery requirements. [Citation.] Under the common law, the crime of robbery consists of larceny plus two aggravating circumstances: (1) the property is taken from the person or presence of another; and (2) the taking is accomplished by the use of force or by putting the victim in fear of injury. (4 Wharton, Criminal Law (15th ed. 1995) § 454, pp. 2–3 (Wharton); 3 LaFave, Substantive Criminal Law (2d ed. 2003) § 20.3(a), pp. 996–997.)"

Earlier, in *People v. Dillon* (1983) 34 Cal.3d 441, 459, the Court explained the relationship between robbery and larceny:

> The relationship was acknowledged in the explanatory note of the California Code Commission accompanying the enactment of the robbery statute in 1872. The note stated in part, "Three elements are necessary to constitute the offense of robbery, as it is *generally understood*: 1. A taking of property from the person or presence of its possessor; 2. A wrongful intent to appropriate it; 3. The use of violence or fear to accomplish the purpose. The first and second of these elements, the third being wanting, constitute simply larceny; . . ." (Italics in original.)

(*People v. Dillon, supra*, 34 Cal.3d at p. 459 [italics in original].)

California decisional law has uniformly been in accord. (*People v. Tufunga* (1999) 21 Cal.4th 935, 938, 945-946 [holding claim of right defense applicable to robbery, despite modern concerns regarding self-help measures, because the robbery statute, as adopted, intended to incorporate the common law]; *People v. Ortega* (1998) 19 Cal.4th 686, 694 quoting

Perkins & Boyce, Criminal Law (3d ed. 1982) p. 350 [robbery is "a species of aggravated larceny"]; *People v. Nelson* (1880) 56 Cal. 77, 80; *People v. Sheasbey* (1927) 82 Cal. App. 459, 463 ["larceny is an essential part of robbery"]; *People v. Green* (1980) 27 Cal.3d 1, 54 ["robbery is but larceny aggravated by the use of force or fear to accomplish the taking of property from the person or presence of the possessor"]; *People v. Brock* (2006) 143 Cal. App. 4th 1266, 1276 ["[r]obbery is larceny, committed by violence"]; *People v. Hays* (1983) 147 Cal. App. 3d 534, 541 ["robbery is but larceny aggravated by the use of force or fear to accomplish the taking of the property from the person or presence of the possessor"].))

The taking required for larceny is trespassory, that is, the nonconsensual violation of the victim's right of possession of property that is in his possession. (*People v. Traster* (2003) 111 Cal.App.4th 1377, 1387; *People v. Davis* (1998) 19 Cal.4th 301, 305; 2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Property, § 13, p. 32.) In addition to the initial taking, larceny requires asportation or the "carrying away" of the property taken. (*People v. Sally* (1993) 12 Cal.App.4th 1621, 1627.) This Court has referred to the requirement of "taking" as including both the initial acquisition and the carrying away: "'Taking,' in turn, has

two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.'" (*People v. Gomez, supra,* 43 Cal.4th at p. 255, citing *People v. Davis, supra,* 19 Cal.4th at p. 305.)

Theft by false pretenses, the crime petitioner committed, has no taking requirement, and especially no requirement of asportation. The elements of false pretenses—essentially a fraud offense—are: (1) intent to defraud ("knowingly and designedly") . . . (2) actual fraud committed ("defraud another person") . . . (3) false pretenses ("false or fraudulent representation or pretense") . . . and (4) causation, i.e., reliance on the false representation." (2 Witkin and Epstein, *supra*, Crimes Against Property, § 45, p. 72.) In theft by false pretenses, both possession and title to the property are consensually delivered by the victim to the perpetrator; the act is criminal in that the delivery is induced by fraud or false pretense committed by the perpetrator and relied upon by the victim. (*People v. Traster, supra,* 111 Cal. App. 4th at p. 1387 ["obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession"].) In larceny—even "larceny by trick," in which a victim is deceived into yielding possession of his property to the perpetrator—the

victim does not intend to part with title or ownership to the property. "It is essential in such cases [larceny by trick] that the owner shall intend to part with the possession only, and not to pass the title as well. If he intends to pass both the possession and the title, the transaction, though it may amount to the crime of obtaining property by false pretenses, will not constitute larceny." (*People v. Traster, supra*, 111 Cal.App.4th at p. 1388 [brackets in original].)

The distinction between larceny and theft by false pretenses remains controlling and may not be ignored. "In this state, these two offenses, with other larcenous crimes, have been consolidated into the single crime of theft (§ 484), but their elements have not been changed thereby. [Citations.]" *People v. Traster, supra*, 111 Cal. App. 4th at p. 1387; *People v. Nazary* (2010) 191 Cal.App.4th 727, 741 [consolidation as theft "did not intend to abolish the substantive distinctions" of theft offenses].) As shown *post*, it is the existence of the "taking" element that allows the *Estes* doctrine to make sense. In theft by false pretenses, there is no taking element to be ongoing such that force or fear used to retain the property or escape can be a robbery.

B. The Decision by the Court of Appeal Mis-Applies the *Estes* Doctrine Because Theft by False Pretenses has no Ongoing "Taking" or "Carrying Away" Element During Which the Use of Force or Fear Could Occur.

In its discussion of the *Estes* doctrine, the Court of Appeal correctly notes that a theft by larceny is considered to be ongoing such that it becomes robbery if the accused "used force to prevent the guard from retaking the property and to facilitate his escape." (Slip Op., p. 11, quoting *Estes, supra,* 147 Cal.App.3d at p. 28.) The Court of Appeal then concludes there is "no public policy justification" for not applying the same rules to theft by false pretenses. (Slip Op., p. 12.) This reasoning is faulty in that fails to recognize that the *Estes* doctrine can legally exist only *because* the underlying offense was larceny and, as such, the "taking and carrying away" elements (caption and asportation) were ongoing until the perpetrator reached a position of relative safety. (*Estes, supra,* 147 Cal.App.3d at p. 28; *People v. Gomez, supra,* 43 Cal.4th at p. 258.)

The premise on which *Estes* is based is absent where the crime was theft by false pretenses because there is no larcenous taking and carrying away. Instead, there was the fraudulent acquisition of property, which crime was completed once the owner (WalMart) passed title and possession to the gift cards to appellant. As this Court observed:

> In robbery, the elements of larceny are intertwined with the aggravating elements to make up the more serious offense. The issue here is the temporal point at which the elements must come together. The answer lies in the fact that robbery, like larceny, is a continuing offense. All the elements must be satisfied before the crime is completed. However, as we explain in greater detail below, no artificial parsing is required as to the precise moment or order in which the elements are satisfied. This conclusion is consistent with decades of California jurisprudence.

(*People v. Gomez, supra*, 43 Cal.4th at p. 254.)

This Court added that "[d]ecades of case law have made clear that robbery in California is a continuing offense, the 'taking' comprising asportation as well as caption." (*People v. Gomez, supra*, 43 Cal.4th at p. 262.) The same cannot be said where the crime is theft by false pretenses. There is no authority for the proposition that the crime is continuing after it is completed, nor can there be any because there is no ongoing "taking" or "carrying away" element to false pretenses.

Unlike larceny, theft by false pretenses is not a continuing offense. The crime of false pretenses is complete when property delivered in reliance on false representation. (*People v. Kemp* (1954) 124 Cal.App.2d 683, 688; *People v. Pugh* (1955) 137 Cal.App.2d 226, 232; *People v. Bryant* (1898) 119 Cal. 595, 597; 2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Property, § 61, p. 90.) In order for the acquisition

of property by false pretenses to serve as the basis for the charge of robbery, an element would have to be added to the existing elements of false pretenses that would in some fashion make the crime ongoing. Not only is it difficult to envision how this could be accomplished, but, as discussed *post*, such a wholesale revision to the crime of robbery must come from the legislative branch rather than the judicial branch.

C. The Decision of the Court of Appeal that Robbery may be Based on a Non-Larcenous Taking Cannot be Reconciled with Existing Law.

The Court of Appeal dismisses the foregoing authority by concluding that "there is simply no public policy justification for treating theft by false pretenses differently from theft by larceny or by trick when, as in the case at bar, the defendant uses force or fear after the property owner, who consented to deliver ownership, immediately recognizes he or she is a victim of a scam and tries to reclaim the property." (Slip Op., p. 12.) Too, despite this Court's repeated holding that the "taking" in section 211 must be larcenous, the Court of Appeal concluded "[t]here is no basis in the broad language of the robbery statute" for so limiting the term "felonious taking." (Slip Op., p. 13.) The Court of Appeal acknowledges that the decisional law "refer[s] to robbery as 'aggravated larceny,'" but dismisses

that authority as being "a consequence of the fact that most robberies are accomplished by larceny, not because courts have intended to limit robbery to an aggravated form of that specific theft offense." (Slip Op., p. 13.)

These assertions mis-read this Court's holdings, specifically, that "section 211 . . . incorporates common law robbery requirements." (*People v. Gomez, supra*, 43 Cal.4th at p. 254, and fn. 2; *People v. Tufunga, supra.*) These requirements include that the taking be larcenous. Whether it is true, as the Court of Appeal asserts, that "there is simply no public policy justification" for the distinction, that fact is not a sufficient basis to disregard such clear precedent.

Moreover, the assertion by the Court of Appeal that the term "taking" in section 211 "is not limited by statute or case law to only certain theft crimes" (Slip Op., p. 13) stands in direct conflict to this Court's statements in *People v. Tufunga, supra.* There, this Court held, despite certain reservations about sanctioning self-help measures in modern times, that claim-of-right may in certain circumstances be raised in defense of a robbery charge because that defense existed at common law. In so holding, the Court stated "the fact that the Legislature used the same terminology, i.e., 'felonious taking,' in both the larceny and robbery statutes of 1850

(Stats. 1850, ch. 99, § 59, 60-61, p. 235) most reasonably indicates an intent to ascribe the same meaning to that element which is common to both offenses, that is, recognition of the common law claim of right defense as applying to both theft and robbery. Put differently, *by adopting the identical phrase 'felonious taking' as used in the common law with regard to both offenses, the Legislature in all likelihood intended to incorporate the same meanings attached to those phrases at common law.*" (*People v. Tufunga*, *supra*, 21 Cal.4th at p. 946 [emphasis added].) Theft by false pretenses does not contain the "felonious taking" language common to both larceny and robbery. Contrary to the conclusion reached by the Court of Appeal, *Tufunga* is direct authority that the "taking" in the robbery statute refers only to a larcenous taking.

The discrepancy between the common law rule that robbery requires larceny and the rule created by the Court of Appeal is stark. With due respect to the Court of Appeal, its explanation that the firmly established authority is not authority at all but instead simply reflects the happenstance that "most robberies are accomplished by larceny" (Slip Op., p. 13) simply cannot be reconciled with the rule announced by this Court that section 211 incorporates the common law requirements. The two conclusions are

inconsistent and irreconcilable. A grant of review in this case is necessary to security uniformity of decision, consistent with this Court's jurisprudence.

D. The Decision of the Court of Appeal Violates Principles of Stare Decisis and Creates a Conflict with Existing Law.

By its ruling, the Court of Appeal failed to abide by principles of *stare decisis.* "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.)

This failure is no mere technicality. Given the rise in fraud and other crimes based on identity theft, it is virtually certain that circumstances similar to those presented by petitioner's case will arise with some degree of frequency. Future trial courts addressing the issue will face conflicting authority: On one hand, this Court has unequivocally announced that the California law of robbery "incorporates common law requirements." (*People v. Garcia, supra.*) Those requirements include a larcenous taking and do not include theft based on a fraudulent transfer of ownership. On

the other hand, the decision of the Court of Appeal announces that the term "feloniously takes" as used in the robbery statute is *not* limited to larcenous takings, but includes other forms of wrongful acquisition such as theft by false pretenses. Trial courts must then determine which authority should be followed, and counsel will face a similar dilemma in trying to reach negotiated dispositions of such cases.

Aside from the significant ramifications of the decision in petitioner's case to other prosecutions state-wide, the failure of the Court of Appeal to hew to this Court's precedent is of enormous significance to petitioner. The trial court originally imposed a sentence of twenty-three years, eight months. (4 RT 2115, CT 160, 168, Slip Op., p. 7.) This term was reduced by the Court of Appeal to twenty-one years. (Slip Op., p. 18.) The sentencing calculus was as follows:

Count 1	Robbery	Upper Term X 2	10 years
2	Robbery	1/3 mid term X 2	2 years
3	Robbery	1/3 mid term X 2	2 years
4	Robbery	1/3 mid term X 2	2 years
5	Burglary	1/3 mid term X 2	1 yr, 4 mos
6	Access card	Stay 654	

7	Grand theft	Stay sec. 654	
8	Forgery	1/3 mid term X 2	1 yr, 4 mos
9	Forgery	Stay sec 654	
10	Forgery	Stay sec 654	
Serious Felony Prior Conviction			5 years
Total Term			23 years 8 mos

The Attorney General conceded that the forgery convictions, counts 8-10, were not supported by the evidence, and the Court of Appeal agreed. (Slip Op., p. 7.) The Attorney General similarly conceded that a separate term for count 5, commercial burglary, was impermissible pursuant to section 654. (Slip Op., p. 8.) Petitioner's term of imprisonment, therefore, now stands at twenty-one years. (Slip Op., p. 18.)

The significance of the robbery convictions is patent. Without them, no term could be imposed for the serious felony prior conviction, the principal term would be six years rather than ten years, and there could be no consecutive terms for the other robbery counts, counts 2 through 4. If this Court's pronouncements (1) that the law of robbery tracks the common law and (2) that robbery requires larceny are correct, then petitioner is improperly incarcerated a decade and a half based on "non-crimes." In

addition to settling the law, eliminating conflicting authority, and providing guidance to future courts and counsel, review should be granted to ameliorate the unjust result reached in petitioner's case.

E. Such a Fundamental Revision to the Law of Robbery, if Desirable, must Come from the Legislature.

The decision of the Court of Appeal in petitioner's case has created a new, court-made crime that is more aptly described as "use of force or fear against a property owner or his agents if contacted immediately after an unlawful acquisition of property is committed." It is well established that there are no common law crimes in California; instead, the power to create crimes "is vested exclusively in the Legislature." (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) Yet, the Court of Appeal has, in fact, created a new crime since the statute, section 211, was based on common law principles that preclude the very result reached by the Court. Such a wholesale revision of the robbery statute, if deemed desirable, must come from the Legislature rather than from the judicial branch.

This principle was found controlling in *People v. Nguyen* (2000) 24 Cal.4th 756. As in petitioner's case, in *Nguyen* the Fourth District Court of Appeal approved a conviction for robbery based on circumstances not contemplated by the statute or the common law, holding that a visitor on the

premises of a computer assembly business in which a robbery occurred was a victim of the robbery. The defendants robbed employees of the business of computer parts valued at $400,000, as well as of items of personal property in the possession of the employees. (*People v. Nguyen, supra,* 24 Cal.4th at p. 758.) Also present at the time was the husband of one of the employees, who had no connection with the business and from whom no personal property was taken, though force and fear were applied to him to accomplish the computer robbery. (*Ibid.*) Defendants' convictions for the robbery of that person were affirmed by the Court of Appeal. (*Id.* at p. 759.)

This Court reversed the convictions for the robbery of the visitor. The Court noted that, under section 222.1 of the Model Penal Code and under the robbery law of several states, a possessory interest in the property taken is not required, because that code defines robbery "to include the use of force or fear against any person during the commission of a theft." (24 Cal.4th at p. 763, at fn. 8.) The Court emphasized, however, that the language of Penal Code section 211 is different:

> Section 211 reflects, instead, the traditional approach that limits victims of robbery to those persons in either actual or constructive possession of the property taken. We take no position on which of these differing approaches is preferable.

> Our Legislature has adopted the traditional approach, as reflected in the language of section 211. It is up to the Legislature to implement any change that may be desirable.

(*People v. Nguyen, supra*, 24 Cal.4th at p. 764.)

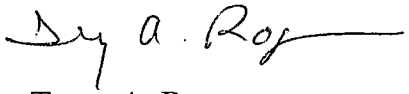
This Court's holding in *Nguyen* is significant for two reasons. First, it emphasizes that California hews to the common law elements of robbery, even if—as the Court of Appeal said here—"there is simply no public policy justification" for not expanding the robbery statute. Secondly, because the change wrought by the Court of Appeal to the robbery statute in petitioner's case is comparable to that made by the Court of Appeal in *Nguyen,* this Court's observation that "it is up to the Legislature" to implement such a change is particularly *a propos*. Here, as was true in *Nguyen,* the Court of Appeal declined to follow the established common law principles the Legislature contemplated when it enacted section 211; moreover, the Court did so because it determined that its interpretation of the law was preferable. As this Court held in *Nguyen*, it was not up to the Court of Appeal to determine which approach was preferable, given the language of section 211 and the common law heritage of that language. Such a significant departure must come from the Legislature, however, or not at all.

CONCLUSION

This Court has long recognized the "fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of *stare decisis*, is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system . . . ." (*People v. Latimer* (1993) 5 Cal. 4th 1203, 1212.) Though the Court of Appeal believed that there is no public policy justification for the rule being so, long-established precedent establishes that robbery requires a larcenous taking. The petition for review should be granted to resolve the conflict and settle this important question of law.

DATED: July 23, 2011

Respectfully Submitted,



Tracy A. Rogers
State Bar No. 190562
Attorney for Petitioner

CERTIFICATION OF WORD COUNT

I, Tracy A. Rogers, hereby certify that, according to the computer program used to prepare this document, appellant's petition for review, contains 5,815 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 23, 2011, in San Diego, California.

Tracy A. Rogers
State Bar No. 190562

Appendix A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DEMETRIUS LAMONT WILLIAMS, Defendant and Appellant.	B222845 (Los Angeles County Super. Ct. No. MA046168)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Affirmed in part, reversed in part.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Demetrius Lamont Williams appeals from the judgment entered following his conviction by a jury on four counts of robbery, three counts of forgery, and one count each of burglary, theft and fraudulent use of an access card. Williams's primary contention is that the use of force when fleeing from a retail store following the successful acquisition of personal property through a theft by false pretenses, as opposed to theft by larceny or theft by trick, does not constitute robbery. The People concede Williams's forgery convictions are not supported by sufficient evidence and the trial court should have stayed imposition of the sentence for burglary pursuant to Penal Code section 654,[1] but dispute Williams's other challenges to his convictions and sentencing. We reverse the forgery convictions, modify the remaining judgment to stay imposition of the burglary sentence and affirm in all other respects.

FACTS AND PROCEDURAL BACKGROUND

1. *The Charges*

Williams was charged by information with second degree robbery (§ 211) (counts 1-4), second degree burglary (§ 459) (count 5), fraudulent use of an access card or account information (§ 484g) (count 6), grand theft (§ 487, subd. (a)) (count 7) and forgery (§ 484i, subd. (b)) (counts 8-10). The information specially alleged Williams had suffered one prior serious or violent felony conviction (robbery) within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1), and had served five separate prison terms for prior felony convictions (§ 667.5, subd. (b)). Williams pleaded not guilty and denied the special allegations.

2. *Summary of the Evidence Presented at Trial*

a. *The People's evidence*

Williams went to a Wal-Mart store in Palmdale on July 4, 2009. Michael Ortiz, a cashier who had been working at the store for about six months, testified he was covering

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[1] Statutory references are to the Penal Code.

register 22 during Jackie Pena's break when Williams attempted to purchase four gift cards in two separate transactions.[2] During the first transaction, Williams requested the value of the gift card he was purchasing be set at $200 and paid for it with a "gold looking card" that he swiped through the card processing machine.[3] After the transaction was approved, Williams attempted to purchase three more gift cards. As Ortiz was processing the transaction, Pena returned and noticed Williams was using what appeared to be a credit card to purchase the gift cards. Pena informed Ortiz and Williams that gift cards could only be purchased with a debit card or cash. Williams returned the three cards, and Ortiz voided the transaction. Shortly thereafter Ortiz told a store manager he had permitted a gift card to be purchased with a credit card because he did not know Wal-Mart had a policy prohibiting it.

Scotty Southwell, a plain-clothes loss prevention officer at the Wal-Mart store, testified he was in the loss prevention office, which has more than 500 surveillance monitors, when he was notified suspicious transactions were taking place. Southwell was given a description of Williams and determined he was at register one. Southwell went to a bench across from register one and observed Williams purchase a gift card with a red or orange colored card.

After Williams finished the transaction, Southwell, now with loss prevention officer Vyron Harris, approached Williams. Southwell identified himself and asked Williams for the receipt and card used to pay for the transaction he had just completed. Williams handed Southwell a receipt and a red or orange colored card. The last four

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[2] The exchange between Williams and the cashiers was recorded on Wal-Mart's security cameras. The recording was played for the jury while Ortiz described his interaction with Williams.

[3] Some gift cards sold at the store have fixed denominations; others may be programmed for a value specified by the customer. Additionally, some gift cards may only be used at specified retail or food outlets; others may be used at any location.

digits of the card did not match the four digits of the card on the receipt.[4] Williams apologized, claiming he had given Southwell the wrong card, and gave him two gold cards. The last four digits of those cards also did not match the numbers on the receipt.

Williams began walking toward an exit door. Southwell, followed by Harris, asked Williams why the card numbers did not match those on the receipt. Williams handed Southwell another card; the numbers again did not match. Southwell then asked Williams to come to the loss prevention office for further investigation. Williams kept walking. A few feet from the exit door Williams pushed Southwell, dropped some receipts and tried to run. Southwell, Harris and two additional loss prevention officers attempted to detain Williams, who struggled to break free. After Williams was wrestled to the ground, he moved his left arm toward his waistband and said he was reaching for a gun. Williams was finally restrained and handcuffed.

Much of the incident was recorded on the store's surveillance cameras. The surveillance tapes of Williams's attempted escape and ultimate capture were shown to the jury.

Los Angeles County Sheriff Deputy Erich Doepking, who at the time of trial had two years of experience investigating financial crimes, testified the cards recovered from Williams had been altered so the account number on the face of the cards did not match the account information on the magnetic strips.

b. *The defense's evidence*

Williams, testifying on his own behalf, admitted he had previously been convicted of nine felonies and one misdemeanor. Williams contended he had gone to the Wal-Mart store on July 4, 2009 with a friend who had given him two gift cards with a combined limit of $300 as payment for catering services Williams had provided. Williams said he tried to use these cards to purchase several small denominational gift cards from the

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[4] The card Williams handed Southwell had a "SpongeBob" sticker on it. When Southwell peeled back the sticker, it revealed it was a gift card with a fixed value of $50. The gift card Williams had purchased with it had a $200 value.

cashiers at registers five and 22. Williams denied going to register one, claiming he had gone to the service manager's area to get approval for the purchase of the gift cards when Southwell approached him.

Williams further testified he began walking toward the exit after he had given Southwell all the cards and receipts in his possession, but Southwell kept questioning him. Williams was nervous in part because he had smoked marijuana and consumed alcohol that morning and had used methamphetamine the day before. Williams denied intentionally pushing Southwell, contending Southwell had cut him off just as Williams was trying to open the exit door. Williams also denied struggling with the loss prevention officers or threatening that he had a gun.

3. *The Jury Instructions, Verdict and Sentencing*

The trial court instructed the jury, in part, on the crimes of robbery (CALCRIM Nos. 1600 and 3261)[5] and grand theft by false pretense (CALCRIM

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[5] CALCRIM No. 1600 as given to the jury stated, "The defendant is charged in Counts 1, 2, 3, 4 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. [¶] 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 store employee who is on duty has possession of the store owner's property. [¶] Fear, as used here, means fear of injury to the person himself or herself."

CALCRIM No. 3261 as given to the jury stated, "The People must prove that the defendant used force or fear during the commission of the robbery. [¶] The crime of robbery continues until the perpetrator has actually reached a temporary place of safety. [¶] The perpetrator has reached a temporary place of safety if: [¶] He has successfully escaped from the scene; [¶] He is no longer being chased; [¶] He has unchallenged possession of the property; and [¶] He is no longer in continuous physical control of the person who is the target of the robbery."

No. 1804).[6] Williams did not object to the instructions.

The jury found Williams guilty of all the crimes charged. In a bifurcated proceeding Williams waived his right to trial and admitted the prior robbery conviction allegation. The People dismissed the prior prison term allegations.

The People submitted a sentencing memorandum urging the court to impose an aggregate state prison term of 23 years eight months, including the upper term for the first robbery conviction and consecutive terms for the remaining three robbery convictions. The People argued the upper term was warranted because Williams had been an inveterate criminal with six criminal convictions in the 1980's (plus an escape), six convictions in the 1990's (plus a parole violation), and a conviction in 2008, and the crimes had escalated in seriousness. (Nine of the 12 convictions are felonies, and five are for theft or robbery offenses.) The People also argued the crime showed a degree of sophistication and planning in part because Williams had tested each cashier with one purchase before attempting a second one.

At the outset of the sentencing hearing the court denied Williams's motion to dismiss his prior felony strike conviction on the grounds of his "extremely long criminal history" and "the dangerousness" of the case. The court explained, "[The case] involved four victims . . . and that makes it even more dangerous. If it was just one person, so be it but the person who is challenging four people, to me, indicates a serious potentially dangerous situation."

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[6] CALCRIM No. 1804 as given to the jury stated, in part, "The defendant is charged in Count 7 with grand theft by false pretense. [¶] To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant knowingly and intentionally deceived a property owner or the owner's agent by false or fraudulent representation or pretense. [¶] Two, the defendant did so intending to persuade the owner or the owner's agent to let the defendant take possession and ownership of the property. [¶] And [¶] Three, the owner or the owner's agent let the defendant or another person take possession and ownership of the property because the owner or the owner's agent relied on the representation or pretense. [¶] You may not find the defendant guilty of this crime unless the People have proved that the false pretense was accompanied by either a writing or a false token . . . ."

The court then announced its tentative decision to sentence Williams to the term recommended by the People. The court found the aggravating factors for selecting the upper term for count 1 were "the crime involved great violence, great bodily harm or threat of great bodily harm to others. It indicates high degree of viciousness and callousness. The manner in which the crime was . . . committed, indicates planning, sophistication and professionalism. The defendant has engaged in violent conduct which indicates a serious danger to society. Defendant's prior convictions as an adult are numerous and of increasing seriousness. The defendant was on probation when he committed the crime."

After hearing argument, the court sentenced Williams to an aggregate state prison term of 23 years eight months: A principal term of five years, the upper term, for robbery (count 1), doubled to 10 years under the Three Strikes law, plus an additional five years for the section 667, subdivision (a)(1), enhancement, and consecutive subordinate terms of one third the middle term of three years, doubled to two years, for each of the three additional robbery convictions (counts 2, 3 and 4); one third the middle term of two years, doubled to one year and four months for burglary (count 5); and one third the middle term of two years, doubled to one year and four months for forgery (count 8). Sentences for the remaining counts were stayed pursuant to section 654.

CONTENTIONS

Williams contends his robbery convictions must be reversed because robbery cannot be predicated on theft by false pretenses; even if the robbery convictions are valid, the trial court erred in imposing consecutive sentences for them; and the court's failure to advise him of the penal consequences of his admission of the prior conviction rendered the admission involuntary. The Attorney General concedes Williams's additional arguments that the forgery convictions must be reversed for insufficient evidence and the

trial court should have stayed imposition of the sentence for burglary pursuant to section 654.[7]

DISCUSSION

1. *The Robbery Convictions Were Properly Predicated on Theft By False Pretenses*

a. *Law generally governing robbery and theft*

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; see *People v. Gomez* (2008) 43 Cal.4th 249, 254 (*Gomez*).) "The crime is essentially a theft with two aggravating factors, that is, a taking (1) from [the] victim's person or immediate presence, and (2) accomplished by the use of force or fear." (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 221 (*Miller*); see *Gomez*, at p. 254 ["[i]n robbery, the elements of larceny are intertwined with the aggravating elements to make up the more serious offense"].) Robbery is

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[7] To be convicted of forgery under section 484i, subdivision (b), the evidence must demonstrate the defendant modified or altered access card account information or authorized or consented to such alteration or modification. There was no evidence of either, and "'[a]n inference is not reasonable if it is based only on speculation.'" (See *People v. Hughes* (2002) 27 Cal.4th 287, 365.)

Regarding the burglary sentence, section 654 prohibits separate punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of criminal conduct. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Latimer* (1993) 5 Cal.4th 1203, 1216.) Courts have repeatedly found section 654 to bar separate punishment when a defendant commits robbery after being confronted during a burglary as occurred in the case at bar. (See, e.g., *People v. Perry* (2007) 154 Cal.App.4th 1521, 1527 ["it cannot be said that appellant acted with multiple independent objectives in committing the burglary and the robbery"]; *People v. Le* (2006) 136 Cal.App.4th 925, 931 [§ 654 barred punishment for both burglary and robbery; "the robbery offense arose from defendant's use of force to steal the [drugstore's] merchandise, which occurred when defendant struggled with the [drugstore's] department manager over the car keys and then drove off while the manager's upper body was still in the vehicle, in an effort to depart with the [whiskey and diapers] obtained in the store burglary"].)

"a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.'" (*People v. Anderson* (2011) 51 Cal.4th 989.)

The crime of theft is comprised of several different common law crimes, including theft by larceny, theft by trick[8] and theft by false pretenses. (See *People v. Cuellar* (2008) 165 Cal.App.4th 833, 837.) In 1927 these common law crimes were consolidated in section 484 into the single statutory crime of theft.[9] (See *Gomez, supra*, 43 Cal.4th at p. 255, fn. 4; *Cuellar*, at p. 793.) Although consolidated, the offenses are "aimed at different criminal acquisitive techniques" and have different elements. (*People v. Ashley* (1954) 42 Cal.2d 246, 258.) "The purpose of the consolidation was to remove the technicalities that existed in the pleading and proof of these crimes at common law. . . . Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an 'unlawful taking' has been proved." (*Ibid.*; accord, *People v. Counts* (1995) 31 Cal.App.4th 785, 793.) Nevertheless, "[w]hile a general verdict of guilt may be sustained on evidence establishing any one of the consolidated theft offenses [citations], the offense shown by the evidence must be one on which the jury was instructed and thus could have reached its verdict." (*People v. Curtin* (1994) 22 Cal.App.4th 528, 531.)

Theft by larceny "requires the taking of another's property, with the intent to steal and carry it away. [Citation; fn. omitted.] 'Taking,' in turn, has two aspects:

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[8] Theft by trick is also known as larceny by trick and/or device. For ease of reference, we refer to the offense as theft by trick.

[9] Section 484, subdivision (a), provides, in part, "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property . . . is guilty of theft. . . . For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. . . ."

(1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.' [Citations.] Although the slightest movement may constitute asportation [citation], the theft continues until the perpetrator has reached a place of temporary safety with the property." (*Gomez, supra*, 43 Cal.4th at pp. 254-255.) Thus, like robbery, theft by larceny is a continuing offense.

Distinct from theft by larceny, theft by trick and theft by false pretenses both involve appropriation of property when consent to its possession was obtained by fraud or deceit. With theft by trick, however, the property owner transfers, and intends to transfer, only possession, whereas with theft by false pretenses the owner transfers both possession and ownership. (See *People v. Ashley, supra*, 42 Cal.2d at p. 258 ["[theft by trick] is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession"]; *People v. Traster* (2003) 111 Cal.App.4th 1377, 1387 ["presence or absence of the fourth element of transferring 'ownership' or 'title' distinguishes the crime of theft by false pretenses from the crime of theft by trick"]; compare CALCRIM No. 1805 [to prove theft by trick, People must prove property owner "consented to the defendant's possession of the property because the defendant used fraud or deceit"] with CALCRIM No. 1804 [to prove theft by false pretenses, People must prove property owner allowed defendant to take possession and ownership of property because owner relied on defendant's false or fraudulent representation or pretense].)

b. *Robbery may be predicated on theft by false pretenses*

Williams's felonious acquisition of the gift cards was theft by false pretenses, rather than theft by trick. Based on that distinction Williams contends his robbery convictions must be reversed because theft by false pretenses lacks the elements of a trespassory taking and asportation and is completed when the defrauded party passes possession and title to the thief. Williams's argument unduly focuses on the "acquisitive technique" underlying the theft (*People v. Ashley, supra*, 42 Cal.2d at p. 258)—that is, the consensual delivery of possession *and* ownership of the property based on false

pretenses—rather than the "'central element of the crime of robbery'" that "'force or fear [is] applied to the individual victim in order to deprive him of his property.'" (*Gomez*, *supra*, 43 Cal.4th at p. 265.)[10]

Robberies in which the victim and the thief confront each other only after the perpetrator has initially gained possession of the stolen property are sometimes referred to as "*Estes* robberies" by California attorneys who practice criminal law and the judges before whom they appear. (See, e.g., *Miller*, *supra*, 115 Cal.App.4th at p. 223; *Gomez*, *supra*, 43 Cal.4th at pp. 258-259.) In *People v. Estes* (1983) 147 Cal.App.3d 23 (*Estes*) the defendant argued his robbery conviction should be set aside because "his assaultive behavior was not contemporaneous with the taking of the merchandise from the store." (*Id.* at p. 28.) In rejecting the defendant's argument, similar to Williams's here, that he was at most guilty of petty theft and a subsequent assault, the court explained, "It is sufficient to support the conviction that appellant used force to prevent the guard from retaking the property and to facilitate his escape. The crime is not divisible into a series of separate acts. Defendant's guilt is not to be weighed at each step of the robbery as it unfolds. The events constituting the crime of robbery, although they may extend over large distances and take some time to complete, are linked by a single-mindedness of purpose. [Citation.] Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction." (*Id.* at p. 28.)

Many decisions since *Estes* have reaffirmed theft by larceny or theft by trick becomes robbery even when possession of property is peacefully or fraudulently obtained if force or fear is used to either carry it away or retain it. (See, e.g., *People v. Anderson*, *supra*, 51 Cal.4th. at p. 994 [citing *Estes*]; *Gomez*, *supra*, 43 Cal.4th at pp. 258-261

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[10] Issues of statutory interpretation are questions of law subject to our independent or de novo review. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; see *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 546.)

[discussing *Estes* in holding robbery victim need not be present when defendant initially takes money; "California has described robbery as a continuing offense for decades"]; *People v. Hill* (1998) 17 Cal.4th 800, 850 ["'"even if the perpetrator used peaceful means, such as a pretext, to separate the property from the victim, "what would have been a mere theft is transformed into robbery if the perpetrator . . . [later] uses force to retain or escape with [the property]"'"]; *People v. Webster* (1991) 54 Cal.3d 411, 441 [same]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [citing *Estes* with approval; "mere theft become robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while carrying away the loot"].)

Essentially what occurred here was an *Estes* robbery. There is simply no public policy justification for treating theft by false pretenses differently from theft by larceny or by trick when, as in the case at bar, the defendant uses force or fear after the property owner, who consented to deliver ownership, immediately recognizes he or she is a victim of a scam and tries to reclaim the property. (See *Gomez*, *supra*, 43 Cal.4th at p. 264 "'[w]hen the perpetrator and victim remain in close proximity, a reasonable assumption is that, if not prevented from doing so, the victim will attempt to reclaim his or her property'"].) Regardless of the victim's fraudulently induced intent in transferring the property, the key factors are the defendant's intent "to deprive the victim of the property permanently" (*People v. Anderson*, *supra*, 51 Cal.4th at p. 994), the defendant's greater culpability resulting from the application of force or fear and the need to deter more dangerous conduct. (See *Gomez*, at p. 264 ["[i]t is the conduct of the perpetrator who resorts to violence to further his theft, and not the decision of the victim to confront the perpetrator, that should be analyzed in considering whether a robbery has occurred"]; cf. *People v. Cooper*, *supra*, 53 Cal.3d at pp. 1167-1168 ["[T]he escape rule serves the legitimate public policy considerations of deterrence and culpability in the context of determining certain ancillary consequences of robbery . . . . In [*People v.*] *Laursen* [(1972)] 8 Cal.3d 192, 198, we recognized that the escape rule served public policy because the primary purpose of the kidnapping-to-commit-robbery statute is to impose

harsher criminal sanctions to deter activity that substantially increases the risk of harm."].)

Contrary to Williams's contention, consent to deliver ownership cannot be a distinguishing feature. "The act of taking personal property from the possession of another is always a trespass [fn. omitted] unless the owner consents to the taking freely and unconditionally," and consent procured by fraud is "invalid." (*People v. Davis* (1998) 19 Cal.4th 301, 305 & fn. 3; *id.* at p. 306 [element of trespass and consent to steal present when store customer returned shirt he had just taken for refund, voucher was issued and defendant was immediately confronted by security personnel; consent cannot be viewed "in artificial isolation from the intertwined issue of intent to steal"]; *People v. Brock* (2006) 143 Cal.App.4th 1266, 1275, fn. 5 ["force, fear or duress negates consent for the purpose of proving a taking has occurred"].)

There is also no basis in the broad language of the robbery statute supporting Williams's argument. Section 211 defines robbery as the "felonious taking" of property using force or fear. The word "taking" is not limited by statute or case law to only certain theft crimes. To be sure, many cases refer to robbery as "aggravated larceny," language repeatedly quoted by Williams to support his argument robbery can only be predicated on larceny. (See, e.g., *Gomez, supra*, 43 Cal.4th at p. 254; *People v. Tufunga* (1999) 21 Cal.4th 935, 947.) This, however, is a consequence of the fact most robberies are accomplished by larceny, not because courts have intended to limit robbery to an aggravated form of that specific theft offense. Indeed, the whole premise of theft by false pretenses is that possession and ownership are obtained fraudulently, thus there generally is no confrontation with the victim. Simply because it is unusual for theft by false pretense to be discovered while the perpetrator and victim are within each other's presence does not mean that this form of "felonious taking of personal property," when completed through the use of force or fear, is excluded from the scope of robbery.

2. *The Trial Court Did Not Err in Sentencing Williams*

a. *The court did not abuse its discretion in ordering consecutive, rather than concurrent, sentences*

The trial court has "broad discretion . . . in choosing whether to impose concurrent or consecutive terms." (*People v. Monge* (1997) 16 Cal.4th 826, 850-851.) California Rules of Court, rule 4.425 sets forth specific criteria affecting the decision, including, the presence of any circumstances in aggravation or mitigation.[11] "Only one criterion or factor in aggravation is necessary to support a consecutive sentence" (*People v. Davis* (1995) 10 Cal.4th 463, 552);[12] however, a factor in aggravation used to impose an upper term cannot be used as the basis for imposing a consecutive sentence. (Rule 4.425(b)(1).)

In deciding to sentence Williams to the upper term on count 1, the court identified five aggravating factors, some of which the court had just explained in denying

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[11] California Rules of Court, rule 4.425 provides, "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) Criteria relating to crimes [¶] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) Other criteria and limitations: Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences."

References to rule or Rules are to the California Rules of Court.

[12] Rule 4.421(a) identifies aggravating factors relating to the crime including that it involved great violence, threat of great bodily harm and callousness (rule 4.421(a)(1)); and "[t]he manner in which the crime was carried out indicates planning, sophistication or professionalism" (rule 4.421(a)(8)).

Rule 4.421(b) identifies aggravating factors relating to the defendant including "[t]he defendant has engaged in violent conduct that indicates a serious danger to society" (rule 4.421(b)(1)); "[t]he defendant's prior convictions as an adult . . . are numerous or of increasing seriousness" (rule 4.421(b)(2)); "[t]he defendant was on probation or parole when the crime was committed" (rule 4.421(b)(4)).

Williams's motion to strike his prior felony conviction: the crime involved great bodily harm or threat of great bodily harm; the manner in which the crime was committed demonstrated planning and sophistication; Williams had engaged in violent conduct as demonstrated by the fact he had challenged four security officers, not one; Williams's prior convictions were numerous and had been increasing in severity; and Williams was on probation when he committed the crime. Having identified at least two factors that would support the imposition of the upper term and consecutive terms, it cannot be said the court trial abused its broad discretion in sentencing Williams to consecutive terms. (Cf. *People v. Osband* (1996) 13 Cal.4th 622, 728-729 ["Only a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation]. In this case, the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so. Resentencing is not required."].)

b. *Williams has forfeited his claim the court erred in failing to state its reasons for imposing consecutive sentences*

The trial court must state its reasons for choosing to impose consecutive sentences. (Rule 4.406(b)(5).) However, Williams did not object at sentencing and has forfeited his contention the trial court erred in failing to do so. (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*) [forfeiture rule applies to "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" including its failure "to state any reasons or give a sufficient number of valid reasons"]; *People v. Morales* (2008) 168 Cal.App.4th 1075, 1084.)

Quoting language from *People v. Scott, supra*, 9 Cal.4th at page 356, Williams contends the forfeiture rule may not be applied unless the court clearly advises the defendant "of the sentence the court intends to impose and the reasons that support any discretionary choices." Williams argues the court apprised him of its intention to impose the maximum term and the reasons it chose the upper term for count one as the base term, but not the reasons supporting consecutive sentences for counts 2 through 4.

Williams's proffered "prerequisite" to application of the forfeiture rule is based on an unduly narrow reading of *Scott* and would undermine the purpose of the rule. (See *People v. Scott*, *supra*, 9 Cal.4th at p. 353 ["Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them."].) As the Supreme Court explained in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, "It is only if the trial court fails to give the parties any meaningful opportunity to object that the *Scott* rule becomes inapplicable." "The parties are given an adequate opportunity to seek such clarifications or changes if, at *any time* during the sentencing hearing, the trial court describes the sentence it intends to impose and the reasons for the sentence, and the court thereafter considers the objections of the parties before the actual sentencing." (*Ibid.*) Here, the trial court announced its tentative decision to impose the sentence recommended by the People, including the upper term for count 1 and consecutive terms for the other robbery convictions. To the extent the court did not articulate at the hearing that the aggravating factors supported both imposition of the upper term and consecutive sentences, it was incumbent on trial counsel to seek clarification. This is precisely the kind of readily correctible error the forfeiture rule is intended to prevent.[13]

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[13] Williams's alternative argument his counsel provided ineffective assistance in failing to object is without merit. As discussed, only two aggravating factors were necessary to support imposition of the upper term on count 1 and consecutive terms on counts 2, 3 and 4. In light of the trial court's identification of five distinct aggravating factors justifying an upper term for robbery, it clearly would not have imposed a different sentence if it had realized it needed to allocate at least one of those factors to its decision to impose consecutive terms. Counsel's failure to object, therefore, did not prejudice Williams. (See *People v. Williams* (1997) 16 Cal.4th 153, 215 [to prevail on ineffective assistance of counsel claim, the defendant must demonstrate a "reasonable probability" that absent the error the result would have been different]; see also *People v. Coelho* (2001) 89 Cal.App.4th 861, 889-890 [where it is "virtually certain" court would impose same sentence on remand, remand would be an idle act exalting form over substance];

3. *Williams Has Forfeited His Claim the Court Erred in Failing To Advise Him of the Penal Consequences of Admitting His Prior Robbery Conviction*

a. *Williams's admissions*

After the jury returned its verdict, counsel for Williams informed the court Williams had agreed to admit his prior robbery conviction with the understanding the prior prison term allegations would be dismissed. After advising Williams of his right to a jury trial on the prior robbery conviction, Williams confirmed he understood that right and agreed to waive it. The court then inquired, "Do you admit that you have a prior conviction within the meaning of Penal Code section 667(a)(1), that you suffered the following prior conviction of a serious felony?" Williams answered, "Yes." After his counsel joined in the admission, the court inquired, "It is further alleged under Penal Code section[s] 1170.12(a) through (d) and 667(b) through (i), as to counts 1 [through] 10, that you suffered the following conviction of a serious or violent felony. Do you admit or deny that conviction for the purposes of the code section[s] which I just stated?" Although the question called for Williams to either "admit or deny," Williams answered, "Yes," joined by counsel. The court stated, "The court finds the defendant has made a knowing, voluntary and intelligent waiver of his right to a jury trial. The court further finds the defendant has made a knowing and intelligent admission of his prior conviction with regard to the prior strike within the meaning of [sections] 1170.12(a) through (d) and 667(b) through (i) as well as Penal Code section 667(a)(1)."

As a threshold matter Williams's suggestion the record is ambiguous whether he admitted or denied his prior robbery conviction for purposes of the Three Strikes law is without merit. While we recognize Williams answered "yes" to a question that did not call for a yes or no answer, Williams had just properly admitted the robbery conviction for purposes of section 667, subdivision (a)(1), his counsel joined in his "yes" answer and

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People v. Williams (1996) 46 Cal.App.4th 1767, 1783 [remand for court to state reasons for imposing consecutive sentence not required where it is not reasonably probable court would impose a different sentence].)

the court immediately advised him, without objection, he had just admitted the conviction for purposes of both section 667, subdivision (a)(1), and the Three Strikes law.

Williams has also forfeited his argument the court erred in failing to advise him of the penal consequences of his admission. To be sure, "A defendant who admits a prior criminal conviction must first be advised of the increased sentence that might be imposed. [Citations.] However, unlike the admonition required for a waiver of constitutional rights, advisement of the penal consequences of admitting a prior conviction is not constitutionally mandated. Rather, it is a judicially declared rule of criminal procedure. [Citations.] Consequently, when the only error is a failure to advise of the penal consequences, the error is waived if not raised at or before sentencing." (*People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771; see *People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023.) By failing to object during sentencing, Williams has forfeited his argument the trial court's failure to advise him of the penal consequences of his admission rendered his admission involuntary and not intelligent.

DISPOSITION

The convictions for forgery are reversed. The judgment is further modified to stay imposition of sentence for second degree burglary pursuant to section 654, thus correcting Williams's sentence to a total aggregate state prison term of 21 years. In all other respects the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

DECLARATION OF SERVICE BY MAIL

Law Offices of Tracy A. Rogers
3525 Del Mar Heights Rd. #193
San Diego, CA 92130

Case Number: B222845

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, and not a party to the subject cause. My business address is 3525 Del Mar Heights Rd. #193, San Diego, California. I served the Petition for Review, of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

State of California Attorney General
Office Criminal Division
300 S Spring St
Los Angeles, CA 90013-1230

Los Angeles Superior Court, Clerk
Antelope Valley Courthouse
42011 4th St. West
Lancaster, CA 93534

Los Angeles District Attorney's Office
42011 4th St. West
Lancaster, CA 93534

California Appellate Project
520 S. Grand Ave., Fourth Floor
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Mr. Wayne Redmond, Esq.
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#AD0136
CSP A-2/103U
P.O. Box 5006
Calipatria, CA 92233-5006

Second District Court of Appeal
Division Seven
300 S. Spring Street, Suite 2217
Los Angeles, CA 90013

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California on July 26, 2011.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 26, 2011, at San Diego, California.

Tracy A. Rogers