

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DEMETRIUS WILLIAMS,

Defendant and Appellant.

Case No. S195187

Court of Appeal Second Appellate District, Case No. B222845
Los Angeles County Superior Court, Case No. MA046168
The Honorable Bernie C. LaForteza, Judge

RESPONDENT'S BRIEF ON THE MERITS

**SUPREME COURT
FILED**

FFR X 6 2012

Frederick K. Ohlrich Clerk

Deputy

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
SCOTT A. TARYLE
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
MICHAEL C. KELLER
Deputy Attorney General
State Bar No. 168908
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2258
Fax: (213) 897-6496
Email: Michael.Keller@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	1
INTRODUCTION	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
APPELLANT WAS PROPERLY CONVICTED OF ROBBERY BASED ON HIS USE OF FORCE AND FEAR AGAINST THE LOSS PREVENTION OFFICERS IN CARRYING AWAY THE PROPERTY HE HAD STOLEN FROM THE STORE BY FALSE PRETENSES	6
A. A Robbery Is Committed When Force Or Fear Is Used During The Asportation Of Stolen Property Without Regard To The Means By Which The Defendant Originally Acquired The Property.....	6
B. This Court Has Specifically Found That An <i>Estes</i> Robbery Can Arise From A Theft By False Pretenses.....	9
C. A Robbery Stemming From A Theft By False Pretenses Is Consistent With Both The Purpose Of The Robbery Statute And The Legislature’s Consolidation Of The Various Theft Offenses.....	9
D. Appellant Erroneously Relies On Language Taken From Decisions Of This Court That Have Not Even Suggested That An <i>Estes</i> Robbery Must Begin With A Larceny.....	11
E. <i>Estes</i> Robberies Are Premised On The Continuing Nature Of Robbery, Not On The Nature Of The Initiating Theft.....	13
F. Appellant’s Acquisition Of The Wal-Mart Property By False Pretenses Did Not Deprive The Loss Prevention Officers Of Their Constructive Possession Of The Stolen Property	16

TABLE OF CONTENTS
(continued)

	Page
G. Upholding Appellant's Robbery Convictions Would Not Amount To A Judicial Expansion Of The Robbery Statute	19
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

	Page
CASES	
<i>People v. Anderson</i> (1966) 64 Cal.2d 633	9, 15, 18
<i>People v. Anderson</i> (2011) 51 Cal.4th 989	12
<i>People v. Ashley</i> (1954) 42 Cal.3d 246	10, 11
<i>People v. Bacon</i> (2010) 50 Cal.4th 1082	7
<i>People v. Bradford</i> (1997) 14 Cal.4th 1005	12
<i>People v. Cooper</i> (1991) 53 Cal.3d 1158	15
<i>People v. Davis</i> (1998) 19 Cal.4th 301	10, 14, 17
<i>People v. Estes</i> (1983) 147 Cal.App.3d 23	passim
<i>People v. Gomez</i> (2008) 43 Cal.4th 249	passim
<i>People v. Hill</i> (1998) 17 Cal.4th 800	passim
<i>People v. Jennings</i> (2010) 50 Cal.4th 616	13
<i>People v. Lopez</i> (2003) 31 Cal.4th 1051	7
<i>People v. McKinnon</i> (2011) 52 Cal.4th 610	18

<i>People v. Melton</i> (1988) 44 Cal.3d 713	12
<i>People v. Ortega</i> (1998) 19 Cal.4th 686	12
<i>People v. Scott</i> (2009) 45 Cal.4th 743	passim
<i>People v. Tufunga</i> (1999) 21 Cal.4th 935	7, 9
<i>People v. Webster</i> (1991) 54 Cal.3d 411	8, 9

STATUTES

Pen. Code, § 211	3, 6, 19, 20
Pen. Code, § 484(a)	10, 14
Pen. Code, §§ 487-490	11
Pen. Code, § 532(a)	10
Pen. Code, § 837	17
Pen. Code, § 952	11

ISSUE PRESENTED

Can a conviction for robbery be based on the use of force in the attempt to escape with stolen property after committing the crime of theft by false pretenses as opposed to theft by larceny?

INTRODUCTION

A person who uses force or fear in attempting to retain or escape with stolen property is guilty of robbery without regard to the particular means by which the property was stolen. Recognizing as much, this Court has already found that a robbery can be based on the use of force in an attempt to escape with stolen property after committing a theft by false pretenses. (*People v. Hill* (1998) 17 Cal.4th 800, 850.) Appellant's claim that a robbery cannot be predicated on a theft by false pretenses is at odds with *Hill* and this Court's decisions interpreting the robbery statute. It is also inconsistent with the purpose underlying the robbery statute and the Legislature's consolidation of theft by larceny and theft by false pretenses into one criminal offense.

STATEMENT OF THE CASE

Appellant entered a Wal-Mart in Palmdale with MasterCard and Visa gift cards that had been altered such that the magnetic strip on the back of the cards corresponded to another person's credit card information. (2RT 641-647; 3RT 991-992.) Appellant used the altered cards to purchase Wal-Mart gift cards. (2RT 660-661, 719-723; 3RT 993-994.)

Using one of his altered MasterCard gift cards, appellant purchased a \$200 Wal-Mart gift card from a cashier, Michael Ortiz, who was covering register 22 for another cashier, Jackie Pena. (2RT 661-665.) After the transaction was approved, appellant sought to purchase three more Wal-Mart gift cards from Ortiz. But as the transaction was being processed, Pena returned from her break and noticed that appellant was apparently

using a credit card to purchase the gift cards. (2RT 665-667, 681-682.) According to Pena, Wal-Mart's policy only allowed a gift card to be purchased with a debit card or cash. (2RT 682.) After Pena explained the policy, Ortiz voided the transaction, and appellant returned the three gift cards before walking away with the \$200 gift card from the initial purchase. (2RT 667, 674, 682.) Ortiz then went to his manager and explained that he had allowed a gift card to be purchased with a credit card because he did not know Wal-Mart had a policy prohibiting it. (2RT 675.)

Scotty Southwell, a Wal-Mart loss prevention officer who was responsible for deterring, detecting, and preventing theft from the store, then received notification that a suspicious transaction was occurring. (2RT 686, 691.) In response, Southwell responded to the vicinity of register 1 and observed appellant in the process of a transaction at that register. (2RT 691-694.) After appellant used his altered Visa gift card to purchase another \$200 Wal-Mart gift card, Southwell approached him and asked to see both the receipt and card he had used to pay for the transaction he just completed. (2RT 697, 700.)

Although appellant handed a receipt and the altered Visa gift card to Southwell, the last four digits on the front of the card did not match the four digits on the receipt. Appellant then showed Southwell three altered MasterCard gift cards, but the number on the receipt also did not match any of those cards. (2RT 697-703.)

Because appellant had started walking toward the exit without having produced a card that matched the number on his receipt, Southwell asked appellant to stop and come to the loss prevention office for further investigation. Appellant, however, kept walking. When appellant and Southwell came within three to five feet of the exit door, appellant pushed Southwell and dropped some receipts as he attempted to flee. (2RT 706-707.)

Southwell and three additional loss prevention officers who came to his assistance attempted to detain appellant. Appellant struggled with them. (2RT 707, 713-715.) After being taken to the ground, appellant moved his hand toward his waistband while stating that he was reaching for his gun. Because he did not know whether appellant had a gun, Southwell was afraid. (2RT 715-716.) Eventually, the loss prevention officers were able to restrain and handcuff appellant. (2RT 716.)

The Wal-Mart had surveillance cameras that captured and recorded the incident. The surveillance video was played for the jury. (2RT 661.)

Appellant was convicted of four counts of robbery among other charges. In challenging his robbery convictions on appeal, appellant asserted that a robbery could not be predicated on a theft by false pretenses. In a published decision, the Court of Appeal rejected the claim and found no basis to treat a theft by false pretenses differently from a theft by larceny where a perpetrator has used force or fear in seeking to retain or carry away property that he had just stolen from the victim.

SUMMARY OF ARGUMENT

A robbery is committed when force or fear is used to retain stolen property without regard to whether the property was stolen in a theft by larceny or by false pretenses. (*People v. Hill, supra*, 17 Cal.4th at p. 850.) Both the purpose underlying the robbery statute and the 1927 consolidation of the theft crimes support a finding that each type of theft may result in a robbery conviction.

Robbery, whether by force or by fear, is a crime of violence. The purpose of the robbery statute, Penal Code section 211, is to prohibit and to single out for severe punishment the use of violence to perpetrate a theft. The statute was intended to protect not only property rights, but “the societal interest in the safety and security of the person.” As this Court has already held, it is immaterial whether that violence occurs in the initial

caption of the property or in retaining or carrying it away. As this Court has likewise held, it does not matter what precise type of theft—larceny or false pretenses—precipitated the thief’s resort to violence to retain or carry away the stolen goods. Under either of these scenarios, the purpose underlying the robbery statute is implicated and the elements of robbery are satisfied.

Over eight decades ago, the Legislature consolidated the various categories of theft, including larceny, theft by false pretenses, and others, into a single statutory offense. The Legislature’s purposes in doing so were to treat all forms of theft in the same manner, and to avoid unnecessary complications of pleading and proof in cases where the precise species of theft is difficult to discern. Contrary to the Legislature’s intent, appellant would have this Court resurrect the distinction between larceny and false pretenses in the context of robbery.

Arguing to the contrary that robbery cannot be based on a theft by false pretenses, appellant parses the phrasing of various decisions in which this Court referred to robbery as an aggravated form of “larceny.” But those decisions did not address the current issue, nor do they suggest any intent by this Court to preclude robbery convictions where the initial theft of the property was accomplished by false pretenses rather than larceny. Appellant ignores other decisions by this Court referring to robbery as an aggravated form of “theft.”

Appellant further argues that theft by false pretenses cannot form the basis for robbery because that crime, unlike larceny, has no element of asportation and is therefore not “continuing” in nature. But regardless of whether asportation is an element of theft by false pretenses, a defendant (like appellant) who commits such a theft and actually asports the stolen property, using force against the victim while doing so, has satisfied all of the elements of robbery. The type of theft by which a defendant initially

gains possession of the property should not matter in the determination of whether the defendant is guilty of robbery.

Appellant also argues that his use of force against the loss prevention officers could not support a robbery because the officers no longer had constructive possession of the stolen goods at the time the force was used. But the loss prevention officers had authority to prevent appellant from getting away with the stolen property, and therefore their constructive possession of the property continued. A loss prevention officer's authority to stop a thief and recover stolen property exists whether the thief acquired the property by means of a larceny or a false pretense. Thus, the possession element was satisfied in this case for the same reason it is satisfied when a common larceny is followed by the use of force or fear against the victim to retain or escape with the goods, a scenario which this Court has also recognized as robbery. In other words, appellant's argument regarding constructive possession fails to draw a meaningful distinction between the current case and cases involving an initial larceny.

Lastly, appellant argues that to permit robbery convictions to be based on the use of force or fear following a theft by false pretenses would constitute an improper judicial expansion of the robbery statute, invading the province of the Legislature. But as noted, appellant's offense satisfies all of the elements of the robbery statute: a taking (caption and carrying away) of property from the possession and immediate presence of another by means of force or fear. To deem such a crime to be "robbery" could not possibly amount to an expansion of the statute.

For all of these reasons, this Court should hold that the use of force or fear to retain or escape with personal property feloniously taken from the immediate presence of another constitutes robbery, whether the theft was by larceny or by false pretenses.

ARGUMENT

APPELLANT WAS PROPERLY CONVICTED OF ROBBERY BASED ON HIS USE OF FORCE AND FEAR AGAINST THE LOSS PREVENTION OFFICERS IN CARRYING AWAY THE PROPERTY HE HAD STOLEN FROM THE STORE BY FALSE PRETENSES

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (Pen. Code, § 211.) Most robberies involve the use of force or fear at the time property is acquired. But it is well-settled that a robbery can also be committed when a perpetrator first uses force or fear in an attempt to retain or escape with stolen property. It does not matter whether the property was stolen by means of a theft by larceny or a theft by false pretenses. Indeed, this Court has already recognized that a robbery can arise from a theft by false pretenses in a situation where a victim discovers the ruse and attempts to reclaim the stolen property while the perpetrator is still in his or her presence. (*People v. Hill, supra*, 17 Cal.4th at p. 850.)

As appellant was unable to produce a credit card with numbers that matched his receipt, his ruse or theft by false pretenses came to light while he was still inside the Wal-Mart. When the four loss prevention officers attempted to detain appellant for further investigation, he used force and fear in attempting to retain and escape with the stolen property. Accordingly, as the Court of Appeal properly found, the evidence was sufficient to support appellant's robbery convictions.

A. A Robbery Is Committed When Force Or Fear Is Used During The Asportation Of Stolen Property Without Regard To The Means By Which The Defendant Originally Acquired The Property

Section 211 defines robbery 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.” The “taking” element of robbery includes two necessary parts: (1) caption or gaining possession of the other person’s property, and (2) asportation or carrying away the loot. (*People v. Gomez* (2008) 43 Cal.4th 249, 255; *People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) The taking is felonious if it is accompanied by an intent to steal or to deprive another person of his or her property with the taker knowing he had no right or claim to the property. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1117; *People v. Tufunga* (1999) 21 Cal.4th 935, 950 [a claim-of-right defense exists with respect to robbery].) The asportation requirement is satisfied by the slightest movement of the property, but the crime is deemed to continue until the perpetrator has reached a place of temporary safety with the property. (*People v. Gomez, supra*, 43 Cal.4th at p. 255.)

For purposes of robbery, possession may be actual or constructive. “A person who owns property or who exercises direct physical control over it has possession of it, but neither ownership nor physical possession is required to establish the element of possession for the purposes of the robbery statute.” (*People v. Scott* (2009) 45 Cal.4th 743, 749.) A theory of constructive possession has expanded the concept of possession to include any person who has a special relationship with the owner of the property such that the victim has some authority or responsibility to protect the stolen property on behalf of the owner. (*Id.* at pp. 749-750.) All employees on duty during a robbery have constructive possession of their employer’s property. (*Id.* at pp. 754-755.) Thus, more than one employee may be in joint constructive possession of a single item of personal property. (*Id.* at p. 750.)

As noted, the “taking” element of robbery includes both caption and asportation. (*People v. Gomez, supra*, 43 Cal.4th at p. 255.) Although most robberies involve the use of force or fear at the time of caption, the

statute is also satisfied by the use of force or fear during asportation. (*Id.* at p. 258 [recognizing that this Court’s prior decisions affirm that, “if the ‘force or fear’ element comes into play not during caption but during asportation, the crime is still a robbery”]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28 [“a robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner’s immediate presence regardless of the means by which the defendant originally acquired the property”].) Robberies in which the force or fear is not used until after the perpetrator has already gained possession of the loot are sometimes called *Estes* robberies¹ in reference to one of the first cases to recognize that force or fear during asportation is sufficient because a defendant’s “guilt is not to be weighed at each step of the robbery as it unfolds.” (*People v. Estes, supra*, 147 Cal.App.3d at p. 28 [also stating that robbery “is not divisible into a series of separate acts”].)

In the context of an *Estes* robbery, this Court has repeatedly found that it makes no difference how the defendant originally acquired the stolen property. In *Gomez*, this Court explained, “a robbery can be accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away.” (*People v. Gomez, supra*, 43 Cal.4th at p. 256.) On another occasion, this Court recognized that, “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, internal citation omitted.) In yet another case, this Court rejected an argument that the evidence was insufficient to support the defendant’s robbery conviction

¹ For convenience, respondent will use the same term in this brief.

merely because the salesperson gave him possession of the store property before the defendant employed any force or fear. (*People v. Anderson* (1966) 64 Cal.2d 633, 638.)

B. This Court Has Specifically Found That An *Estes* Robbery Can Arise From A Theft By False Pretenses

The issue presented in this case is whether an *Estes* robbery can arise from a theft by false pretenses. In *Hill*, this Court answered that question in the affirmative. (*People v. Hill, supra*, 17 Cal.4th at p. 850.)

The defendant in that case challenged the sufficiency of the evidence underlying his conviction for robbing Stuart Margetts. As part of the challenge, the defendant argued “he could have obtained Margetts’s money by false pretenses (passing off the bunk as real cocaine), stabbing him only when he discovered the ruse and attempted to reclaim his money.” (*People v. Hill, supra*, 17 Cal.4th at p. 850.) But this Court found that the defendant’s scenario satisfied the elements of robbery. Quoting *Webster*, this Court explained that even if the defendant had used a pretext to separate the property from the victim, the later use of force to retain the property transformed the theft into a robbery. (*Ibid.*)

Like the defendant in *Hill*, appellant asserts that he could not be convicted of robbery because he initially obtained the property by means of a false pretense. But under *Hill*, appellant’s use of a pretext to acquire the property did not preclude a robbery conviction. To the contrary, appellant’s use of force to retain the stolen property transformed the theft into a robbery.

C. A Robbery Stemming From A Theft By False Pretenses Is Consistent With Both The Purpose Of The Robbery Statute And The Legislature’s Consolidation Of The Various Theft Offenses

Robbery is a crime against both person and property. (*People v. Tufunga, supra*, 21 Cal.4th at p. 948.) “Robbery violates the social interest

in the *safety and security of the person* as well as the social interest in the protection of property rights.” (*People v. Gomez, supra*, 43 Cal.4th at p. 264, italics added, quoting Perkins & Boyce, *Criminal Law* (3d ed. 1982) p. 350; see *People v. Scott, supra*, 45 Cal.4th at p. 749 [“Robbery is a crime of violence committed against a person”].) Both interests are implicated when a perpetrator uses force or fear against a victim who is attempting to regain stolen property without regard to the particular manner of theft that was employed. The same societal interest in protecting property rights exists whether the property was stolen by means of a larceny or a false pretense.²

The California Legislature’s consolidation of different theft crimes into one offense called “theft” further supports a finding that a robbery conviction can be premised on a theft by false pretenses. In 1927, larceny, larceny by trick, theft by false pretenses, and embezzlement were all consolidated into one criminal offense. (§ 484, subd. (a).) The purpose of the consolidation was to remove technicalities in pleading and proof. (*People v. Ashley, supra*, 42 Cal.3d at p. 258.) As a result of the consolidation, an indictment or information can charge the crime of theft by simply alleging that “the defendant unlawfully took the labor or property of

² 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 the intent to steal the property, and (6) carries the property away.” (*People v. Davis* (1998) 19 Cal.4th 301, 305.) Property taken from another is always done by means of trespass unless the owner consented to the taking or the taker had a legal right to the property. (*Ibid.*)

A theft by false pretenses requires proof that (1) the defendant made a false pretense or representation to the owner of the property (2) with the intent to defraud the owner of the property, and (3) the owner transferred the property to the defendant in reliance on the representation. (§ 532, subd. (a); *People v. Ashley* (1954) 42 Cal.3d 246, 259.) In a theft by false pretenses, the victim intends to part with both possession and title to the property. (*Id.*, at p. 258.)

another.” (§ 952.) Moreover, “[j]uries 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.” (*People v. Ashley, supra*, 42 Cal.3d at p. 258.) Finally, the sentence for theft is the same irrespective of the particular means used to unlawfully take the property. (§§ 487-490.) Given this legislative intent to treat the different types of theft so similarly, the thefts also should be treated similarly with respect to the consequences for using force in connection with the theft.

Appellant would have this Court resurrect, in the context of robbery, distinctions between the theft crimes that the Legislature sought to abolish long ago. Under appellant’s view of robbery, a jury presumably would need to be concerned with the “technical differences” between the different thefts when force is used because only certain types of theft could result in a robbery. Additionally, under appellant’s view, while the sentence for theft is the same irrespective of the particular means used to unlawfully take the property, the different types of theft would be subject to unequal treatment when violence is used to retain the stolen property.

But appellant’s view of robbery is inconsistent with both the purpose of the robbery statute and the Legislature’s consolidation of the various theft crimes. In contrast, a finding that both types of theft can result in an *Estes* robbery will produce results that are rationally related to the offender’s culpability and consistent with the purpose of both the robbery statute and the legislative consolidation of the theft crimes.

D. Appellant Erroneously Relies On Language Taken From Decisions Of This Court That Have Not Even Suggested That An *Estes* Robbery Must Begin With A Larceny

In support of his claim that a robbery cannot arise from a theft by false pretenses, appellant places heavy reliance on decisions from this

Court that have referred to robbery as a species of aggravated larceny rather than aggravated theft. (AOB 9, 19-21, 30-32.) But his reliance is misplaced for four reasons.

First, this Court's language has not been consistent. On occasion, this Court has referred to robbery as a form of aggravated larceny. (See, e.g., *People v. Anderson* (2011) 51 Cal.4th 989, 994; *People v. Gomez, supra*, 43 Cal.4th at p. 254.) On other occasions, this Court has used the broader term, theft. (See, e.g., *People v. Ortega* (1998) 19 Cal.4th 686, 699 ["theft in whatever form it happens to occur is a necessarily included offense of robbery"]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055 ["Theft is a lesser included offense of robbery, which includes the additional element of force or fear,"] quoting *People v. Melton* (1988) 44 Cal.3d 713, 746[.] Given the use of both terms, no inference should be drawn from the use of either.

Second, this Court's prior references to robbery as a form of aggravated larceny simply reflect the reality that most robberies are accomplished by means of a larceny. Because the victim of a theft by false pretenses intends to convey possession and title of the property to the thief, there is necessarily no victim resistance at the time the property is acquired and consequently, no occasion to use force to overcome any resistance. The situation, however, can change in the less typical circumstance where the victim discovers the false pretenses while the perpetrator is still in his or her presence. If the victim seeks to reclaim the property upon discovery of the false pretenses, any use of force or fear by the thief in an effort to retain the stolen property transforms the theft into a robbery. (*People v. Hill, supra*, 17 Cal.4th at p. 850.)

Third, none of the decisions cited by appellant have considered whether an *Estes* robbery can be predicated on a theft by false pretenses as opposed to a theft by larceny. Because it is "axiomatic" that a case cannot

be used as authority for a proposition that was not considered and that the holding of a decision is limited by the facts of the case being decided, no significance should be attached to this Court's prior references to robbery as a form of aggravated larceny. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 864 [rejecting defendant's attempt to rely on language quoted from another case where the issue was never raised or considered].)

Finally, one of the cases upon which appellant relies actually tends to support a finding that robbery can arise from a theft by false pretenses. Specifically, in no less than three places in his opening brief, appellant quotes *Gomez* as referring to robbery as a "species of aggravated larceny." (AOB 9, 21, 30.) But in discussing the nature of an *Estes* robbery, this Court explained in *Gomez* that "a robbery can be accomplished even if the property was peacefully or *dupliciously* acquired, if force or fear was used to carry it away." (*People v. Gomez, supra*, 43 Cal.4th at p. 256, emphasis added.) Because a theft by false pretenses is by its very nature a duplicitous or deceptive manner of acquiring property, *Gomez* is consistent with a finding that a robbery can arise from a theft by false pretenses.

E. *Estes* Robberies Are Premised On The Continuing Nature Of Robbery, Not On The Nature Of The Initiating Theft

Next, appellant asserts that an *Estes* robbery cannot arise from a theft by false pretenses because the crime is "finished or completed" as soon as the property has been acquired. (AOB 27.) Appellant further argues that such a robbery cannot arise from a theft by false pretenses because that theft offense, again unlike robbery and larceny, has no asportation requirement that could be continuing at the time the force or fear was used. (AOB 23-27.)

But appellant can draw no meaningful distinction between a theft by false pretenses and a theft by larceny with respect to the time in which the

elements are satisfied for each crime. The elements of a larceny are satisfied, “finished or completed” by even “the slightest movement” or asportation. (*People v. Gomez, supra*, 43 Cal.4th at pp. 254-255; *People v. Davis* (1998) 19 Cal.4th 301, 305.) Thus, in *Estes* robberies premised on an underlying larceny, the elements of larceny are typically satisfied prior to the use of force or fear. (See, e.g., *People v. Gomez, supra*, 43 Cal.4th at p. 253 [by the time force or fear was used, the defendant had carried the stolen money from the lobby to the second floor, back downstairs into the restaurant’s kitchen, and then outside where he was followed by the victim for some distance].)

Similarly, appellant can draw no meaningful distinction with respect to whether the theft offenses have been deemed continuing in nature.³ *Estes* robberies are not predicated on the continuing nature of the underlying theft offense. Rather, such robberies are a result of the continuing nature of robbery itself. Because a robbery continues until the perpetrator has reached a place of temporary safety, the “force or fear” and “immediate presence” elements of the crime can occur at any point during either the caption or asportation of the stolen property. (*People v. Gomez, supra*, 43 Cal.4th at p. 258.)

³ At the outset, respondent notes that appellant is mistaken with respect to his premise that theft by false pretenses is not a continuing offense. Section 484, subdivision (a), provides in relevant part, “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.” As such, a theft by false pretenses may be deemed to continue over a period of days. In contrast, a larceny continues only until the perpetrator has reached a place of temporary safety. (*People v. Gomez, supra*, 43 Cal.4th at pp. 254-255.) Thus, it appears that a theft by false pretenses may sometimes continue for a longer period of time than a theft by larceny.

In *Gomez*, this Court upheld an *Estes* robbery even though the victim was not present when the defendant initially took the money. Citing *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, and *People v. Anderson, supra*, 64 Cal.2d at p. 638, for the proposition that a robbery arises even if the “force or fear” element comes into play for the first time during asportation, this Court then identified and resolved the issue presented by defendant Gomez as follows:

The question raised by the facts of this case is a related one: If the “immediate presence” element arises not at caption but during asportation, is there a robbery? The answer is yes and for the same reason articulated in *Cooper* and *Anderson*: robbery is a continuing offense. If the aggravating factors are in play at any time during the period from caption through asportation, the defendant has engaged in conduct that elevates the crime from simple larceny to robbery.

(*People v. Gomez, supra*, 43 Cal.4th at p. 258.) Thus, this Court clearly explained that the reason a robbery does not require all of the elements (including “force or fear” and “immediate presence”) to be satisfied at the same time is because “robbery is a continuing offense.”⁴

The issue presented to this Court is not whether appellant’s conduct satisfied the elements of larceny—or, for that matter, theft by false pretenses—but whether his conduct satisfied the elements of *robbery*. Irrespective of whether theft by false pretenses contains an asportation element, *robbery* requires one. Appellant was guilty of robbery because he used force or fear in asporting stolen property. The fact that appellant also

⁴ At another point in the opinion, this Court stated that there was no precise moment or order in which all the elements of robbery had to come together and that the reason lied “in the fact that robbery, like larceny, is a continuing offense.” (*People v. Gomez, supra*, 43 Cal.4th at p. 254.) Although this language recognized that both robbery and larceny are continuing offenses, it placed reliance only on the fact that robbery is a continuing offense.

committed a theft by false pretenses was relevant only insofar as it established that he stole Wal-Mart property. Although that particular theft crime does not require any asportation, the evidence showed that appellant did, in fact, asport or carry away the stolen property and that he used force while in the process of doing so. Accordingly, the evidence satisfied all of the elements of robbery. (See *People v. Gomez, supra*, 43 Cal.4th at pp. 255-260; *People v. Hill, supra*, 17 Cal.4th at p. 850.)

F. Appellant's Acquisition Of The Wal-Mart Property By False Pretenses Did Not Deprive The Loss Prevention Officers Of Their Constructive Possession Of The Stolen Property

Next, appellant argues that as soon as the cashier gave him possession and title to the Wal-Mart gift cards, the loss prevention officers could no longer be deemed to possess the property he had stolen by false pretenses. (AOB 32-35.) Appellant reasons that the "element of possession cannot exist where the underlying theft was false pretenses because the store has yielded both title and possession of the property to the perpetrator." (AOB 33.)

Appellant misunderstands the nature of possession. All employees on duty during a robbery have constructive possession of their employer's property because they have some authority or responsibility to protect the stolen property on behalf of the owner. (*People v. Scott, supra*, 45 Cal.4th at pp. 749-750, 754-755.) A loss prevention officer's authority or responsibility to protect a store's property does not end at the conclusion of a fraudulent purchase by false pretenses any more than it ends once a thief has acquired store property by means of a larceny. Irrespective of the manner in which the goods were stolen, loss prevention officers are authorized to stop the thief and recover whatever stolen property he was attempting to carry out of the store. As such, the loss prevention officers

maintained constructive possession of the stolen property at the time the force was used.

This analysis is not altered by the fact that the cashier intended to transfer title to the Wal-Mart property as a result of appellant's false pretenses. The theft by false pretenses did not give appellant any lawful right to the property he had just stolen. Indeed, upon discovery of the false pretenses, the security guards had authority to arrest appellant for the theft he committed and recover the stolen property. (See § 837 [authority of private persons to make an arrest].) Neither Wal-Mart nor its loss prevention officers had any intent to relinquish Wal-Mart property to a person who was seeking to "pay" with stolen credit card information. (See *People v. Davis, supra*, 19 Cal.4th at p. 317.)⁵ Once the theft was discovered, the store and its loss prevention officers were entitled to assert their lawful interest in the stolen property. (See *People v. Scott, supra*, 45 Cal.4th 743 at pp. 754-755 [recognizing that all employees on duty during a robbery have constructive possession of their employer's property].) Because appellant then used force in seeking to retain the stolen property,

⁵ In *Davis*, the defendant entered a Mervyn's Department store, picked up an item of merchandise that was displayed for sale, walked to a sales counter, and then acted as if he owned the item while informing the clerk that he wanted to "return" the item for cash or credit. As the clerk was in the process of issuing a credit voucher, a store security agent who had been watching the defendant via a surveillance camera called the clerk and directed her to issue the voucher. After the voucher was issued to the defendant, he was detained and later convicted of theft by larceny. (*People v. Davis, supra*, 19 Cal.4th at pp. 303-304.) On appeal, the defendant asserted that the trespass element of larceny was missing because the store, acting through the security agent, consented to the issuance of the voucher with full knowledge of how he came into possession of the shirt. Rejecting his claim, this Court explained, "Because Mervyn's cannot be deemed to have consented to defendant's taking possession of the shirt with the intent to steal it, defendant's conduct also constituted a trespassory taking within the meaning of the law of larceny." (*Id.* at p. 317.)

the theft was transformed into a robbery. (See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 687-688 [teacher stationed at exit door of the school cafeteria constructively possessed cashbox stolen from cashier].)

In short, the element of possession was satisfied in this case for the same reason it is satisfied in the more typical *Estes* robbery that involves a larceny. This Court's recent decision in *People v. McKinnon* (2011) 52 Cal.4th 610, provides such an example. There, the defendant stole a cashbox from a cashier in the school cafeteria and then pushed a teacher who was stationed at the exit door as he fled with the box. (*Id.* at 687.) Citing *Scott* for the proposition that on-duty employees have constructive possession of their employer's property for purposes of a robbery, this Court found that the defendant committed a robbery against the teacher because even if the teacher did not have actual possession or control of the cashbox, the teacher had constructive possession of the property that the defendant stole from the cashier. (*Id.* at pp. 687-688.) Similarly, the loss prevention officers in this case constructively possessed the property that appellant stole from the cashier. (*Ibid.*; see *People v. Estes, supra*, 147 Cal.App.3d at p. 27 ["By preventing the guard from regaining control over the merchandise, defendant is held to have taken the property as if the guard had actual possession of the goods in the first instance"]; see also *People v. Anderson, supra*, 64 Cal.2d at p. 638.)

Seeking to undermine a finding that the loss prevention officers constructively possessed the property that he stole, appellant asserts that the loss prevention officers had no information that the gift cards had been stolen when they first contacted him. (AOB 34 ["When the store security personnel contacted appellant, at best the only information they had was that a sales person had sold gift cards to somebody who used a credit card, in violation of the store's internal policies"].) But such information surfaced before the use of force when the last four digits on appellant's

receipt failed to match any of the Visa or MasterCard gift cards that he produced. (2RT 697-703.) In any event, as the victim in *Gomez* had no knowledge that the defendant had stolen any of his property when the force was used (*People v. Gomez, supra*, 43 Cal.4th at p. 253), robbery convictions were warranted in this case whether the loss prevention officers knew, at the time that appellant used force and fear, that he had stolen Wal-Mart property.

In sum, the possession element was satisfied because the loss prevention officers constructively possessed the stolen Wal-Mart property that appellant was seeking to carry out of the store. At the time the force and fear was used, the loss prevention officers constructively possessed the property because they were authorized to detain or arrest appellant for the theft he committed and recover the stolen property.⁶

G. Upholding Appellant's Robbery Convictions Would Not Amount To A Judicial Expansion Of The Robbery Statute

Finally, appellant concludes that his robbery convictions would require such a wholesale revision of the law of robbery that any such expansion of the statutory offense must be left to the Legislature. (AOB 35-38.) But the statutory language of section 211, this Court's prior

⁶ In any event, appellant would be guilty even if the loss prevention officers no longer possessed the gift cards at the time appellant employed force and fear. With respect to robbery, "no artificial parsing is required as to the precise moment or order in which the elements are satisfied." (*People v. Gomez, supra*, 43 Cal.4th at p. 254.) Indeed, *Gomez* expressly found, in the context of an *Estes* robbery involving a larceny, that the "immediate presence" element of robbery can be satisfied during either the caption or asportation of the stolen property. (*Id.* at p. 261.) Thus, as the loss prevention officers constructively possessed the gift cards at the time of caption, the possession element should be deemed satisfied even if the loss prevention officers were not in possession of the stolen property at the time the force was used.

authority, and the legislative intent underlying both the robbery statute and the consolidation of the theft offenses, all support the Court of Appeal's conclusion that a robbery may be premised upon a theft by false pretenses. (See, e.g., *People v. Hill, supra*, 17 Cal.4th at p. 850.) This is true because such a crime plainly satisfies each of the statutory elements of robbery as codified in section 211.

Accordingly, upholding appellant's convictions would not expand the statutory definition of robbery in any manner reserved for the Legislature. (See *People v. Gomez, supra*, 43 Cal.4th at p. 261 [finding no legislative amendment to section 211 was necessary to support a conclusion that the elements of robbery, including "force or fear" and "immediate presence," can be satisfied either during caption or asportation of the stolen property].) Appellant properly stands convicted on four counts of robbery in this case.

CONCLUSION

Robbery requires the felonious taking (i.e. caption and carrying away) of personal property in the possession of another, from his or her person or immediate presence, and against his or her will, accomplished by means of force or fear. It is well-established in California that the “force or fear” element of robbery can occur during either the caption or carrying away of the property. So long as all of the robbery elements are met, that crime is committed, regardless of whether the perpetrator first took possession by means of larceny, theft by false pretenses, or any other form of “felonious taking.” In short, robbery does not require larceny.

Here, appellant stole Wal-Mart gift cards and then used force and fear against store employees in asporting those stolen goods. Appellant was guilty of robbery. This Court should affirm the decision of the Court of Appeal.

Dated: February 3, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
SCOTT A. TARYLE
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General



MICHAEL C. KELLER
Deputy Attorney General
Attorneys for Respondent

MCK:lds

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5,910 words.

Dated: February 3, 2012

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read 'MK', is written over the printed name of Michael C. Keller.

MICHAEL C. KELLER
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: **People v. Demetrius Williams**
Case No.: **S195187**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 3, 2012, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Tracy A. Rodgers (2 copies)
3525 Del Mar Heights Road, #193
San Diego, CA 92130

Ryan Williams
Deputy District Attorney
Los Angeles District Attorney's Office
210 West Temple Street
Los Angeles, CA 90012

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
To be delivered to:
Hon. Bernie C. LaForteza, Judge

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

On February 3, 2012, I caused the original and 13 copies of the Respondent's Brief on the Meirts in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by Federal Express Mail Delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 3, 2012, at Los Angeles, California.

Linda Sarenas
Declarant



Signature