Filed 3/5/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RYAN LUKE POWELL, Defendant and Appellant.	G046265 (Super. Ct. No. 10HF1992) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel Barrett McNerney, Judge. Reversed.

William Ha and Cavan M. Cox for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Heidi T. Salerno and Ifeolu Hassan, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A felony information charged Ryan Luke Powell with one count of second degree robbery in violation of Penal Code sections 211 and 212.5, subdivision (c) (further code references are to the Penal Code). Over Powell's objection, the trial court instructed the jury on theft by false pretense as a lesser included offense of the charged crime of second degree robbery. The jury acquitted Powell of robbery but convicted him of theft by false pretense, and the trial court sentenced him to a term of three years in jail.

We hold that theft by false pretense is not a lesser included offense of robbery under the elements test or under the accusatory pleading test as applied to the felony information in this case. The trial court therefore erred by instructing the jury on theft by false pretense and allowing the jury to return a verdict on that offense. The error was prejudicial because it allowed the jury to convict Powell of an offense of which he had no reasonable notice. As the jury acquitted Powell of the only offense for which he was charged, we reverse the judgment without addressing Powell's other contentions.

FACTS

I.

The Transaction

In November 2010, the sister of Juanita Ulloa was trying to enter into the United States from Mexico. Ulloa had received several telephone calls telling her "they" had her sister. Ulloa was told to bring $5,000 in cash to a McDonald's restaurant in Lake Forest. Ulloa went to the McDonald's on November 10, 2010. As instructed, she brought with her $5,000 cash in $100 bills contained in an envelope she kept in the front pocket of her pants.

While waiting in the McDonald's, Ulloa received a telephone call informing her that someone would arrive soon with her sister. About an hour after Ulloa

arrived at the McDonald's, Powell appeared, sat with Ulloa, and asked her, "did you bring the money for your sister?" Ulloa replied, "yes, I brought it, but I want to see my sister." Powell asked for the money several times, and each time Ulloa told him she wanted to see her sister or talk to her on the phone. Powell made a telephone call to the man, who had told Ulloa to go to the McDonald's, and spoke to him in English. Powell then handed the phone to Ulloa. Speaking in Spanish, the man told Ulloa he would have her sister there shortly, but Ulloa first had to give the money to Powell.

At this point in the story, the prosecution evidence and the defense evidence diverge.

II.

The Prosecution's Case: Ulloa's Testimony

Ulloa testified that Powell told her, "give me the money and so that you will trust me, I will give you my passport." She refused. Powell told her they should continue the transaction elsewhere. Powell and Ulloa left the McDonald's and walked to her van, which was parked close by. As Ulloa got into the van, Powell pushed her inside, got inside himself, and closed the door behind them. As Powell pushed Ulloa, he grabbed the envelope of money from her pants pocket.

Ulloa told Powell, "I want my money back or I want to see my sister." She tried to take the money back but was only able to grab a bag containing Powell's car key and driver's license. After telling Ulloa not to move and not to talk with anyone, Powell left and went to his own van. Scared, Ulloa locked the van doors and stayed inside. Powell sat in his van and talked on the phone for five to 10 minutes. He then got out, walked into a gas station, came out, and walked away. When Ulloa noticed that Powell did not return to his van, Ulloa walked to Powell's van and peeked through the window to see if her sister was inside. Ulloa did not see her sister and called the police.

III.

The Defense Case: Powell's Testimony

Powell testified that on November 10, 2010, he drove to a McDonald's restaurant in the City of Lake Forest to meet Ulloa. She was to give him $5,000, which he was going to take to Mexico and give to Eduardo, who was smuggling Ulloa's sister across the border into the United States.

Powell walked into the McDonald's and sat across from Ulloa. He apologized for being late, told her he was "Eduardo's friend," and asked if she had the money. She replied, "yes, I have the money, but where is my sister?" Powell told Ulloa he did not know; he did not transport people across the border but only collected money for Eduardo and "had no idea who, what, when, how the operation was supposed to go." Powell called Eduardo, who said somebody else would drop off Ulloa's sister in 10 to 15 minutes. Powell related to Ulloa what Eduardo had said and then passed the phone to her. After Ulloa spoke with Eduardo, she and Powell chatted awhile about their experiences in alien smuggling.

Powell called Eduardo several times to find out when Ulloa's sister was to be delivered. In one call, Eduardo said, "I want to know if this lady has paid for her sister or not." Powell replied, "she has not. She wants to see her sister." Powell told Ulloa he did not have her sister but believed she would be delivered any minute. Eduardo called back and told Powell, in no uncertain terms, "we have to receive payment before we deliver the sister." Powell said to Eduardo, "fine, just promise me this girl is going to be delivered," to which Eduardo responded: "[N]o problem at all. The lady is going to be there in 5 or 10 minutes. I just don't want her to be delivered while you're there."

When the conversation with Eduardo ended, Powell told Ulloa: "I tell you what I'm going to do, I am going to give you my driver's license and keys. I'm going to hand you my license and keys. You give me the money, and then I'm going to leave. . . .

[M]y car is right out there. When your sister gets delivered, put my license and keys in the console of the car." Powell handed Ulloa his driver's license and key to his van.

Ulloa spoke with Eduardo on Powell's phone. When the conversation ended, Ulloa reached into her purse, took out a white envelope, and slid the envelope across the table to Powell. As Powell dragged the envelope onto his lap, Ulloa got up and walked out of the McDonald's. Powell followed her out and placed the envelope in his back pants pocket. Powell told Ulloa he would "hang out" with her until her sister arrived, and they decided to sit together in her van.

Two or three minutes later, Eduardo called Powell and asked him to count the money. Powell stepped out of Ulloa's van, walked over to his van, and counted the money while seated inside. It was all there. Powell placed the money on the floorboard of his van, walked back to Ulloa's van, called Eduardo, and told him, "all the money was there." Eduardo told Powell the sister was a couple of blocks away and would be delivered "right now." Eduardo said he did not want Powell to see the driver make the delivery and instructed him to go to a Mexican restaurant on the other side of the freeway.

Powell told Ulloa he was going to "go around the corner for a little bit," and asked her to leave his key and driver's license in the console of his van. Eduardo called Powell and asked him if he was gone yet. When Powell confirmed he was, Eduardo said the sister would be dropped off in a couple of minutes. Powell told Eduardo: "[Y]ou better not screw this deal up. This girl's got my license and keys[.] . . . [T]his has to be a for sure deal, . . . because if it's not, the police are going to know right where to come get me." Eduardo assured Powell "everything's fine."

Eduardo again told Powell to go to the Mexican restaurant. When Powell arrived there, he called Eduardo, who instructed him to take a taxicab back to San Diego. Powell took a taxi to the Mexican border, walked across the border to meet Eduardo, and gave him the $5,000. Eduardo gave Powell $300 for his effort. Eduardo told Powell not

to worry about his van because it would be taken to San Diego for him. Powell walked back into the United States and checked into a hotel near the border.

IV.

The Criminal Investigation

About 5:00 p.m. on November 10, 2010, Orange County Sheriff's Department Investigator Jared Dahl arrived at the McDonald's restaurant in Lake Forest to investigate a robbery. He first spoke with a sheriff's deputy who had arrived earlier, and then spoke with Ulloa, who gave one of them Powell's driver's license and car key.

Dahl found Powell's vehicle registration inside the van and was able to obtain an address for Powell in San Diego. Dahl travelled to the address in San Diego, where he encountered Powell's ex-girlfriend, who was able to reach Powell by telephone. Powell disclosed he was at a motel at "the very last exit of the [border] into Mexico" and claimed his van had been stolen and he had intended to report the theft at a later time. Dahl informed Powell he had to report a stolen vehicle in person.

Two sheriff's investigators travelled to the Roadway Inn near the Mexican border and confirmed Powell had checked in there. Dahl followed, and, when he arrived at the motel, Powell had already been detained. Powell told Dahl he had met a woman at a McDonald's restaurant in Lake Forest and she had "drawn him into her van" where other people with weapons were going to rob him. Powell said he took a taxicab back to San Diego. When Dahl "confronted" Powell with a surveillance videotape from the McDonald's restaurant and with Ulloa's statements, Powell refused to say anything more.

DISCUSSION: THEFT BY FALSE PRETENSE IS NOT A LESSER INCLUDED OFFENSE OF ROBBERY.

I.
Background and Law Regarding Lesser Included Offenses

The felony information against Powell had a single count, for second degree robbery. He was tried solely on that charge, and Ulloa, the prosecution's chief

witness, testified he forcibly took the money from her. Over defense counsel's objection, the trial court decided to instruct the jury on the crime of theft by false pretense because "one interpretation, among many, of the evidence is that the defendant took the money or retained the money by false representation . . . of the delivery of the sister." The court instructed the jury with a modified form of CALCRIM No. 1804 (theft by false pretense) "as a lesser crime to robbery." The jury was given a verdict form for theft by false pretense. The jury, apparently disbelieving Ulloa, acquitted Powell of second degree robbery and instead convicted him of theft by false pretense.

A defendant may be convicted of an uncharged crime only if it is necessarily included in the charged crime. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) The reason for this rule is due process of law requires an accused be advised of the charges so that he or she has a reasonable opportunity to prepare and present a defense and is not surprised by evidence presented at trial. (*Ibid.*) "The required notice is provided as to any charged offense and any lesser offense that is necessarily committed when the charged offense is committed. [Citation.]" (*Ibid*.)

A lesser offense is necessarily included in the charged offense if either the "'elements'" test or the "'accusatory pleading'" test is met. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) The elements test is satisfied if all of the elements of the lesser offense are included in the elements of the greater offense. (*Ibid.*) "Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*Ibid.*) Under California law, "'[a] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.'" (*People v. Licas* (2007) 41 Cal.4th 362, 366, quoting *People v. Birks* (1998) 19 Cal.4th 108, 117-118.)

II.

The Elements Test: Robbery Does Not Necessarily Include All the Elements of Theft by False Pretense.

A.
Robbery Can Be Committed Without Committing Theft by False Pretense.

We first apply the elements test by comparing the elements of robbery with the elements of theft by false pretense. 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. Clark* (2011) 52 Cal.4th 856, 944.) The elements of robbery are (1) the defendant took property that was not his or hers; (2) the property was taken from another person's possession and immediate presence; (3) the property was taken against the 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, the defendant intended to remove it from the owner's possession for such an extended period of time the owner would be deprived of a major portion of the value of the property. (§ 211; see also *People v. Morehead* (2011) 191 Cal.App.4th 765, 771-772 & fn. 4; CALCRIM No. 1600.)

Theft by false pretense is the consensual but fraudulent acquisition of property from its owner. (§§ 484, subd. (a), 532.) The elements of theft by false pretense are "(1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation. [Citations.]" (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842.)[1]

[1] The instruction read to the jury was a modified form of CALCRIM No. 1804, which identifies the elements of theft by false pretense as (1) the defendant knowingly and intentionally made a false pretense or representation to deceive the owner of property;

A comparison of the elements of the crime of robbery and the elements of the crime of theft by false pretense establishes it is possible to commit robbery without necessarily committing theft by false pretense. Robbery does not require the making of a false pretense or representation, a necessary element of theft by false pretense. Robbery and theft by false pretense are mutually exclusive: With theft by false pretense, the acquisition of property is consensual, while robbery requires the property be obtained against the victim's will.

In addition, section 532, subdivision (b) requires evidence corroborating theft by false pretense.[2] Under that code section, a defendant cannot be convicted of theft by false pretense or criminal fraud if the pretense was "expressed in language unaccompanied by a false token or writing" unless the false pretense was in writing or memorialized by a note or memorandum, the pretense was proven by the testimony of two witnesses, or the pretense was proven by the testimony of one witness and corroborating circumstances. (§ 532, subd. (b).) Such corroboration is not required to convict a defendant of robbery.

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(2) the defendant did so with the intent to persuade the owner of that property to let the defendant take possession and ownership of the property; and (3) the owner let the defendant take possession and ownership of the property because the owner relied on the representation or pretense. The trial court added a fourth element, "[t]he value of the property was in excess of $950."

[2] Section 532, subdivision (b) reads: "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. This section does not apply to a prosecution for falsely representing or personating another, and, in that assumed character, marrying, or receiving any money or property."

B.

Explanation of Supreme Court Pronouncements That Theft Is a Lesser Included Offense of Robbery

Rather than compare the elements of robbery and theft by false pretense, the Attorney General relies on a pronouncement appearing in several California Supreme Court opinions that "'"[t]heft is a lesser included offense of robbery, which includes the additional element of force or fear." [Citation.]'" (*People v. Ortega* (1998) 19 Cal.4th 686, 694 (*Ortega*), quoting *People v. Bradford* (1997) 14 Cal.4th 1005, 1055 (*Bradford*); see also *People v. Castaneda* (2011) 51 Cal.4th 1292, 1331 (*Castaneda*) [quoting *Bradford*].) *Ortega*, *Bradford*, and *Castaneda* do not address whether theft by false pretense is a lesser included offense of robbery. Analysis of these cases and of the quoted passage's history reveals the word "theft" refers to only larceny.

In *Ortega*, *supra*, 19 Cal.4th at pages 689-690, the Supreme Court concluded that when a defendant is charged with carjacking, robbery, and theft, based on the commission of a single act or course of conduct, the defendant may be convicted of both carjacking and robbery, or of both carjacking and theft, but not of both robbery and theft. To reach this conclusion, the court had to decide whether grand larceny (which by definition includes theft of an automobile), as well as petit larceny, is a lesser included offense of robbery. (*Id.* at pp. 693-699.) The court determined that "[t]heft, in whatever form it happens to occur, is a necessarily included offense of robbery" and "reaffirm[ed] the well-established rule that a defendant may not be convicted of both robbery and grand theft based upon the same conduct." (*Id.* at p. 699.)

In *Bradford*, *supra*, 14 Cal.4th at page 1055, the California Supreme Court reversed a robbery conviction because the trial court failed to instruct the jury on the lesser included offense of theft. At trial, evidence was presented that the defendant did not form the intent to take the victim's wallet and makeup bag until after the victim was dead. (*Id.* at p. 1056.) "Thus," the court reasoned, "there was evidence that the property

was taken after the murder, and that robbery was not the primary motivating factor for the murder." (*Ibid.*)

Similarly, in *Castaneda*, *supra*, 51 Cal.4th at pages 1331-1332, the defendant argued the trial court erred by failing to instruct the jury on theft as a lesser included offense of robbery because the evidence supported his position he did not form the intent to steal from the victim until after killing her. The California Supreme Court concluded the trial court was not required to instruct on theft because "there is no substantial evidence that defendant formed the intent to steal only after he ceased applying force to the victim." (*Id.* at pp. 1332-1333.)

To understand why these cases state that "theft" is a lesser included offense of robbery, we turn first to an explanation of the various crimes identified as theft. At common law, larceny, embezzlement, and theft by false pretense were distinct crimes, and each had separate elements. (*People v. Davis* (1998) 19 Cal.4th 301, 304.) Larceny is the taking of the owner's property without consent and with the intent to permanently deprive the owner of possession. (*Id.* at p. 305; *People v. Gomez* (2008) 43 Cal.4th 249, 254-255.) Embezzlement is the fraudulent appropriation of property that has been entrusted to the perpetrator. (§ 503.) As explained, theft by false pretense is the consensual but fraudulent acquisition of property from the owner. (§§ 484, subd. (a), 532.)

In 1927, the Legislature consolidated the separate common law crimes of larceny, embezzlement, and theft by false pretense in section 484, subdivision (a).[3]

[3] The first sentence of section 484, subdivision (a) reads: "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, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains

(*People v. Gomez, supra*, 43 Cal.4th at p. 255, fn. 4.) The purpose of the consolidation was "to remove the technicalities that existed in the pleading and proof of these crimes at common law." (*People v. Ashley* (1954) 42 Cal.2d 246, 258.) Although consolidated into a single code section, the offenses are "aimed at different criminal acquisitive techniques" and maintain their distinct elements. (*Ibid.*) The consolidation was not entirely complete: Section 532 also defines criminal fraud "in terms nearly identical to [section] 484[, subdivision](a)" and "provides that these acts are punishable 'in the same manner and to the same extent' as larceny." (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 48, p. 76.)

Older California Supreme Court opinions, dating from before the 1927 consolidation of theft offenses in section 484, subdivision (a), state specifically that *larceny* is a lesser included offense of robbery. (*People v. Jones* (1878) 53 Cal. 58, 59 [larceny is lesser included offense of robbery]; *People v. Church* (1897) 116 Cal. 300, 302-304 [grand larceny is lesser included offense of robbery].) Larceny is, and has always been, a lesser included offense of robbery. "In robbery, the elements of larceny are intertwined with the aggravating elements to make up the more serious offense." (*People v. Gomez, supra*, 43 Cal.4th at p. 254.) As explained in *Ortega*, *supra*, 19 Cal.4th at page 694: "This rule dates back to the common law. Professor Perkins states: 'Since robbery "is a species of aggravated larceny" a single taking of property will obviously not support a conviction of larceny as a separate offense in addition to the conviction of robbery.' (Perkins, Criminal Law (3d ed. 1982) p. 350, fns. omitted.) Perkins left no doubt that this rule applies when the taking of property constitutes grand larceny, citing in support of this rule a case holding that grand larceny is a lesser included offense of robbery. [Citation.]"

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possession of money, or property or obtains the labor or service of another, is guilty of theft."

In 1927, the same year as the consolidation of larceny, embezzlement, and theft by false pretense, the Legislature enacted section 490a, which provided that whenever a law or statute refers to larceny, embezzlement, or stealing, that law "shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." Section 490a does not state, however, that "theft by false pretense" is to be read and interpreted as "theft."

In *People v. Covington* (1934) 1 Cal.2d 316, 320-321, issued after the 1927 consolidation of theft offenses and enactment of section 490a, the court stated that "'petty larceny'" is a lesser included offense of robbery. But, over time, the word "theft" was substituted for the word "larceny," so that in *People v. Cole* (1982) 31 Cal.3d 568, 582, the court referred to "grand theft" as a lesser included offense of robbery. In *People v. Melton* (1988) 44 Cal.3d 713, 746, the court stated, "[t]heft is a lesser included offense of robbery, which includes the additional element of force or fear." In support of that statement, the court cited *People v. Covington*, *supra*, 1 Cal.2d at pages 320-321, which, as explained, stated that petit *larceny* is a lesser included offense of robbery. (*People v. Melton*, *supra*, at p. 746.)

The quoted sentence from *People v. Melton* made its way into *Bradford*, and thence into *Ortega* and *Castaneda*. In that way, the "ancient rule that larceny is a necessarily included offense of robbery" (*Ortega*, *supra*, 19 Cal.4th at p. 694) was transformed into the proposition that *theft* is a necessarily included offense of robbery.

It takes only one more step to say *theft* by false pretense too is a lesser included offense of robbery. The California Supreme Court has never taken that step, which would be neither logical nor warranted. The consolidation of larceny, embezzlement, and theft by false pretense in a single code section did not eliminate the distinct elements of each offense, and theft by false pretense is also codified in section 532. Section 490a does not require that "theft by false pretense" be interpreted as, or substituted by the word, "theft."

The Attorney General also relies on *People v. Miller* (1974) 43 Cal.App.3d 77 (*Miller*), as holding theft by false pretense is a lesser included offense of robbery. In *Miller*, the defendant obtained money from the victim by means of a confidence game called a "Jamaican switch," which the appellate court described as "a form of theft" and appeared to be either theft by false pretense or theft by trickery. (*Id.* at p. 81.) A jury convicted the defendant of robbery. (*Id.* at p. 79.) The Court of Appeal held the trial court erred by failing to instruct the jury sua sponte on "theft" because "[i]t has long been the law of California that robbery is simply an aggravated form of theft with the additional element of force or fear, and that theft is therefore a lesser but necessarily included offense of robbery." (*Id.* at p. 81.) In support of that proposition, the *Miller* court cited *People v. Jones*, *supra*, 53 Cal. 58, *People v. Church*, *supra*, 116 Cal. 300, and *People v. Covington*, *supra*, 1 Cal.2d 316, all of which state that *larceny* is a lesser included offense of robbery. (*Miller*, *supra*, at p. 81.) The *Miller* court held the trial court's instructional error was harmless and affirmed the robbery conviction (*id.* at pp. 83-84); however, the case is wrongly decided to the extent it holds that theft by false pretense is a lesser included offense of robbery.

III.

The Accusatory Pleading Test: The Felony Complaint Did Not Allege Theft by False Pretense.

Under the accusatory pleading test, a lesser offense is necessarily included in the greater offense if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense. (*People v. Birks*, *supra*, 19 Cal.4th at p. 117.) "Under the accusatory pleading test, . . . we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime." (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.)

In this case, theft by false pretense is not a lesser included offense of robbery under the accusatory pleading test. Count 1 of the felony information against Powell alleged in full: "On or about November 10, 2010, in violation of Section 211/212.5(c) of the Penal Code (2ND DEGREE ROBBERY), a FELONY, RYAN LUKE POWELL did unlawfully by means of force and fear take the personal property against the will of and from the person, possession, and immediate presence of JUANITA U." Count 1 did not allege theft by false pretense and did not describe robbery "in language such that [Powell], if guilty, must necessarily have also committed [theft by false pretense]." (*People v. Moon*, *supra*, 37 Cal.4th at pp. 25-26.)

IV.

CONCLUSION AND DISPOSITION

Powell could not be convicted of theft by false pretense as it is not a lesser included offense of the charged offense of robbery. (*People v. Reed*, *supra*, 38 Cal.4th at p. 1227.) The jury acquitted Powell of robbery, the only crime charged in the felony information. The judgment is therefore reversed.

FYBEL, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.