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October 8, 2010

Frederick K. Ohlrich, Clerk
Supreme Court of California
350 McAllister Street, First Floor
San Francisco, CA 94102-4797

SUPREME COURT
FILED

OCT 12 2010

RE: *People v. Anderson/Reply to Appellant's Supplemental Brief*
California Supreme Court, Case No. S175351
Fourth Appellate District, Division One, Case No. D054740
Riverside Superior Court, Case No. RIF113459

Frederick K. Ohlrich Clerk

Deputy

Dear Mr. Ohlrich:

In its opinion, the Court of Appeal determined that, beyond the specific intent to steal, robbery also requires "a secondary mental state equivalent to a general intent to commit the act of using force or fear against the victim to accomplish the initial taking of the property or retaining it during the defendant's escape or asportation of the property." (Opinion at p. 16.) In his supplemental letter brief (SLB), appellant contends that the Court of Appeal's conclusion is correct. He says that robbery is an "assaultive crime" so that a conviction requires proof that the thief purposefully or willfully committed a forceful act for the purpose of achieving the consequence of escaping with the loot. (See SLB at pp. 1-4.) But appellant's assertion that robbery is an "assaultive crime" that necessarily includes the elements of assault is wrong. Further, although appellant purports to seek recognition of a mere "general criminal intent" to commit the act that results in force, the true nature of his argument is that the thief must possess the specific intent to apply force for the specific purpose of achieving the additional consequence of facilitating his escape with the stolen loot. This specific intent requirement is unfounded and drastically changes the law of robbery.

1. Appellant argues that robbery necessarily includes the elements of assault. He states:

"Robbery is 'an assaultive crime against the person.' (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.) Thus, under [*People v. Colantuono* (1994) 7 Cal.4th 206,] . . ." the crime of robbery carries a ". . ." secondary mental state equivalent to a

general intent to commit the act using force or fear against the victim to accomplish the initial taking of the property or retaining it during the defendant's escape or asportation of the property.' (Opn. at 16.)."

(SLB at p. 3.) Because robbery is an "assaultive crime," appellant concludes, it must include the elements of assault. Appellant's argument, however, lacks authority and would lead to absurd consequences.

While robbery may be said to fall within the general category of assaultive crimes, appellant fails to explain how exactly robbery therefore includes, beyond the statutory mens rea of specific intent to steal (Pen. Code, § 211), the secondary mens rea that "the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery." (*People v. Wyatt* (2010) 48 Cal.4th 776, 781.) Appellant cites *People v. Alvarez, supra*, 14 Cal.4th 155, for the principle that robbery is an assaultive crime against the person. (SLB at p. 3.) But this Court in *Alvarez*, in discussing the application of severance under Penal Code section 954, merely observed that "[r]ape is an assaultive crime against the person, as are robbery and murder." (*Id.* at p. 188.) This hardly establishes that robbery necessarily includes the crime of assault.

Employing appellant's reasoning, the assaultive crime of rape also includes the elements of the distinct crime of assault. Thus, forcible rape also would necessarily include a "secondary mental state equivalent to a general intent to commit the act using force or fear against the victim to accomplish" (SLB at p. 3) sexual penetration of the victim. Instead, and similar to the crime of robbery, rape requires proof that the defendant "accomplished the intercourse" through "force, violence, duress, menace, or fear." (CALCRIM 1005; Accord Pen. Code § 261, subd. (a)(2); 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice (2010) Crimes Against the Person, Ch. 142, § 142.20[2][a], [i]-[v] (Matthew Bender).)

2. Despite employing "general intent" language, appellant in essence argues that, to prove the "secondary mental state" of an "inten[t] to commit the act using force or fear against the victim to accomplish [the consequence of securing escape]" (SLB at p. 3), the state must prove that the thief not only intended the act that causes the force or fear but that he also intended that the force or fear be the result or consequence of that intended act. His interpretation of *People v. Colantuono, supra*, 7 Cal.4th 206 betrays this. *Colantuono* explained that, in order to commit an assault, the defendant must "willfully commit[] an act that by its nature will probably and directly result in injury to another, i.e., a battery[,]," and that "the prosecution need not prove a specific intent to inflict a particular harm." (SLB at pp. 2-3, quoting *Colantuono* at p. 214.) Yet appellant advocates the creation of precisely such a specific intent: i.e., that the robber must commit his act intending that his act will result in force that will assist his escape with the loot. This intent to achieve a future consequence (i.e. the ability to escape unhindered with the loot) is by definition a specific intent. (*People v. Davis* (1995) 10

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Cal.4th 463, 518, fn. 15 ["When the definition refers to defendant's intent to do some future act or achieve some additional consequence, the crime is deemed to be one of specific intent."].) As discussed in respondent's supplemental letter brief, this creation of a specific intent is not supported by the history of section 211.

Here, appellant admitted that he intended the act that caused the force as he willfully and purposefully accelerated the victim's stolen car through the closing security gate in order to facilitate his escape with the stolen car. Appellant was aware of his use of force against the victim as he applied it, and he capitalized on that use of force for the purpose of escaping with the victim's stolen property. In proceeding, he chose to accomplish the theft by his use of force. He thus committed robbery; and the jury instructions, which described the crime in such terms, were sufficient.

Sincerely,

A handwritten signature in black ink, appearing to read "James H. Flaherty III", with a stylized flourish at the end.

JAMES H. FLAHERTY III
Deputy Attorney General
State Bar No. 202818

For EDMUND G. BROWN JR.
Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Anderson**

No.: **S175351**

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 that same day in the ordinary course of business.

On October 8, 2010, I served the attached **REPLY TO APPELLANT'S SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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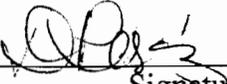
Court of Appeal of the State of California
Fourth Appellate District, Division One
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **October 8, 2010** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

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 October 8, 2010, at San Diego, California.

Debra Perez

Declarant


Signature