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2nd

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

PAUL D. ANDERSON,

Defendant and Appellant.

SUPREME COURT
FILED
AUG 11 2009
Case No. S Frederick K. Onizich Clerk
DEPUTY

Fourth Appellate District, Division Two, Case No.
D054740

Riverside County Superior Court Case No.
RIF113459

The Honorable Richard Couzens, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

**TO THE HONORABLE RONALD M. GEORGE, CHIEF
JUSTICE, AND TO THE HONORABLE ASSOCIATE
JUSTICES OF THE CALIFORNIA SUPREME COURT:**

Respondent, the People of the State of California, respectfully petition this Court to grant review in this matter pursuant to rule 28(b) of the California Rules of Court. In an unpublished opinion, authored by Justice Alex McDonald and filed on July 2, 2009, the Court of Appeal reversed appellant's first-degree murder and robbery convictions, and the jury's special-circumstance finding that appellant murdered his victim during the commission of a robbery. A copy of the opinion is attached to this petition as Exhibit A.

On July 24, 2009, the Court of Appeal denied respondent's petition for rehearing.

ISSUE PRESENTED

In a prosecution for robbery, can it be prejudicial error for the trial court not to give the jury, sua sponte, a pin-point instruction on the issue of accidental or unintended application of force, when the jury otherwise receives proper standardized instructions on all the elements of robbery?

STATEMENT OF THE CASE

Appellant entered a gated apartment building parking lot, broke into and stole Pamela Thompson's car, and waited for the security gate to open

in order to escape. (1 RT 64; 5 RT 855-856.) As the gate opened, appellant was spotted by Thompson, a nineteen-year-old woman. (1 RT 22, 26-27.) Standing at the gate, between the parking lot and the street, Thompson ordered appellant to stop. (2 RT 104-104, 185; 2 RT 185-186.) But, as the gate was closing, appellant accelerated the vehicle towards the exit, hitting and running over Thompson from "head to toe." (1 RT 27; 2 RT 159, 163; 4 RT 791; 5 RT 858.) Appellant fled. (5 RT 859-860.) Thompson, found on the sidewalk by her father, died three days later. (1 RT 99-100.)

In his defense testimony, appellant admitted that he was stealing Thompson's vehicle. However, he testified, he did not mean to run her over. (5 RT 860, 866.) Although acknowledging that he heard Thompson order him to "stop," saw her "looking" at him, and saw that her hand was up, and that ultimately "felt" the car run over her, appellant claimed that his running the vehicle over her was purely "accident[al]." (5 RT 880, 912; 6 RT 1074-1075.)

The jury convicted appellant of robbery and first-degree murder, and found as a special circumstance that the murder was committed during the commission of robbery.

On appeal, appellant argued that the trial court erred by failing, sua sponte, to instruct the jury that, if appellant's use of force against Thompson had been accidental, then as a matter of law it could not find

appellant guilty of robbery. The Court of Appeal agreed. It held that the “[Penal Code] section 26 defense of accident” applied and that, because appellant was relying on that “defense,” the trial judge was obliged to instruct the jury, on its own motion and without any request by the defense, that appellant would not be guilty of robbery if he had applied force to the victim only accidentally. (Opn. at p. 18.) Further, the Court of Appeal ruled that the trial court’s failure to so instruct the jury amounted to prejudicial error requiring reversal of the murder and robbery convictions and the special-circumstance finding. (Opn. at pp. 18, 20.)

REASONS FOR GRANTING THE PETITION

The Court of Appeal’s conclusion -- that the trial court prejudicially erred by failing to instruct sua sponte that appellant’s accidental application of force would constitute a complete defense to robbery -- conflicts with this Court’s decision in *People v. Bolden* (2002) 29 Cal.4th 515. Further, to the extent it relied on Penal Code section 26, the Court of Appeal’s opinion ignored the statutory language making the defense unavailable to a culprit acting with evil intent.

In *Bolden*, the defendant complained that the standard robbery instructions were inadequate as they “failed to state that defendant’s application of force must have been motivated by an intent to steal . . .” (*People v. Bolden, supra*, 29 Cal.4th at p. 556.) But this Court rejected that contention, explaining that the standard robbery jury instructions

adequately explained that “the defendant must apply the force for the purpose of accomplishing the taking.” (*People v. Bolden, supra*, 29 Cal.4th at p. 556.)) “More specific instructions” would amount to pinpoint instructions that the trial court is required to give, if at all, only upon request. (*Ibid.*, citing *People v. Hughes* (2002) 27 Cal.4th 287, 361.)

But no such “pin point” instruction, directing the jury that appellant’s application of force must *not* have been accidental,¹ was ever requested by appellant at trial. And, as in *Bolden*, the standard instructions otherwise fully set out the elements of robbery. There, the jury was instructed, with CALJIC 9.40, “the standard [robbery] instruction[.]” (*People v. Bolden, supra*, 29 Cal.4th at p. 556.) That instruction provided:

Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code § 211. In order to prove this crime, each of the following elements must be proved: ¶ 1. A person had possession of property of some value however slight; 2. The property was taken from that person or from [his] [her] immediate presence; 3. The property was taken against the will of that person; 4. The taking was accomplished either by force or fear; and 5. The property was taken with the specific intent permanently to deprive that person of the property.

(CALJIC 9.40.)

¹ The Court of Appeal never spelled out the terms of this instruction, other than to say that the trial court had a duty “to instruct on the defense of accident [Pen. Code, § 26] to the charge of robbery.” (Slip Opn. at p. 20.)

In the instant case, the trial court instructed the jury with the standard robbery instruction, CALCRIM 1600. (2 CT 300.) That instruction provides:

To prove that the defendant is guilty of this crime, the People must prove that: ¶ 1. The defendant took property that was not (his/her) 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/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).¶ The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

(CALCRIM 1600.)

Under *Bolden*, then, a further instruction was not required sua sponte. Indeed, even if appellant had requested such an instruction, the trial court could have properly refused it, as the concept was adequately covered by the robbery instruction (*People v. Bolden, supra*, 29 Cal.4th at p. 556).

The Court of Appeal erred, further, in treating Penal Code 26 as setting up a formal “defense” that somehow might overcome proof of the elements of robbery. Section 26 provides for a defense for accident or misfortune – with the provision that such a defense is not available in cases of “evil intent.” Here, it is undisputed that appellant acted with the criminal

intent to steal. So any Penal Code section 26 defense drops from the equation. The question here, instead, is whether appellant's testimony required a sua sponte pinpoint instruction amplifying the standard instructions setting out the elements of robbery. Under *Bolden*, it did not. The Court of Appeal erred, that is, in discerning in Penal Code 26 a rule requiring a sua sponte instruction that trumps the no-sua-sponte-instruction rule of *Bolden*.

Appellant's own testimony showed that his force employed against Thompson was intentional and purposeful -- that it was "motivated by the intent to steal." Specifically, after breaking into Thompson's car and waiting several minutes for the secured gate to move into the open position, activated by an incoming vehicle, appellant accelerated the car towards the closing gate, "swerv[ing] the car" to avoid the closing gate and to make his escape. (5 RT 856-858, 890.) Moreover, his own testimony proved that he was contemporaneously aware of that force and its effect on the victim. Specifically, appellant testified that immediately prior to hitting Thompson, traveling at a speed of no more than 30 miles per hour, appellant observed Thompson some 10 to 12 feet in front of the vehicle holding out her hand. (5 RT 902, 907.) Appellant conceded that he thought he heard her yell "stop." (5 RT 902, 907.) Appellant claimed that he swerved to avoid her. (5 RT 896.) Notwithstanding, appellant testified that his evasive maneuver failed and he hit Thompson and ran over her. (5 RT 903.) Appellant

admitted, "I knew that I hit her." (5 RT 913.) Appellant felt the vehicle run something over. (5 RT 912.) And he never stopped.

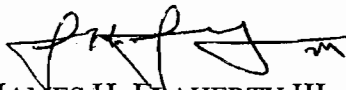
CONCLUSION

The petition for review should be granted.

Dated: August 11, 2009

Respectfully submitted,

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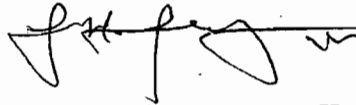


CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Review uses a 13 point Times New Roman font and contains 1,723 words.

Dated: August 11, 2009

EDMUND G. BROWN JR.
Attorney General of California

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

JAMES H. FLAHERTY III
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EXHIBIT A

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL D. ANDERSON,

Defendant and Appellant.

D054740

Flaherty

(Super. Ct. No. RIF113459)

FILED
Stephen M. Kelly, Clerk
JUL 02 2009
Court of Appeal Fourth District

APPEAL from a judgment of the Superior Court of Riverside County, Richard Couzens, Judge. Affirmed in part, reversed in part and remanded with directions.

Paul D. Anderson appeals a judgment following his jury conviction of first degree murder (Pen. Code, § 187),¹ robbery (§ 211), and receiving stolen property (§ 496, subd. (a)). The jury also found true the special circumstance allegation that the murder was committed during the commission of robbery (§ 190.2, subd. (a)(17)). On appeal,

¹ All statutory references are to the Penal Code.

Anderson contends (1) there is insufficient evidence to support his robbery and felony murder convictions and the related special circumstance finding; (2) the trial court erred by not instructing sua sponte on the defense of accident; (3) the trial court erred by not instructing sua sponte on the defense of mistake of fact; (4) the trial court erred by instructing on robbery that the requisite intent to take may be formed before the defendant used force or fear; (5) he was wrongly convicted of both robbery and receiving stolen property; and (6) the court's minutes should be corrected to specify that his robbery conviction was of the second degree.

FACTUAL AND PROCEDURAL BACKGROUND

During the evening of November 7, 2003, Anderson, an unemployed methamphetamine addict, was socializing with Ginger Lyle, a drug dealer, at her Riverside home. Robert Sanchez, Lyle's boyfriend, was also there. While Anderson smoked methamphetamine, he and Lyle made plans to leave the home separately to surreptitiously meet at a nearby park and then go to a motel room or friend's house to "get together or something." Lyle left the home first, believing she and Anderson would walk to a motel or house because neither one had access to a car at the time. Anderson left the home second. However, rather than going directly to meet Lyle, Anderson walked to an apartment complex a few blocks away to steal a car. The fenced and gated complex had eight buildings, each of which contained carports. In one carport, Anderson, using a shaved key, gained entry into a blue Nissan car. The car belonged to Pamela Thompson, who had recently arrived home from work with the plan to then visit her boyfriend. After

entering Thompson's car, Anderson started its engine and drove toward the complex's gate, expecting it to automatically open. When the gate did not open, he backed the car into a parking stall about 30 yards from the gate and waited for another driver to open the gate. He kept the car's engine running so that he could drive through the open gate as soon as another car entered or left.

Thompson left her apartment and found her car was missing from its assigned parking spot. She called Joe Dietz, her stepfather with whom she lived, to inquire whether he had moved her car. When Dietz told her he had not moved her car, Thompson told him it had been stolen. Dietz, at a friend's nearby apartment, walked to his apartment to locate the car's documentation so he could report the stolen car to police. Thompson telephoned her mother, Barbara Dietz, and told her that her car, along with her purse inside it, had been stolen and she was outside looking for her car. Shortly thereafter, in an animated tone, Thompson exclaimed to her mother: "Oh, my God. Here comes my car real fast." Thompson's cellular telephone then went dead.

Rudy Espinoza, in his apartment about 30 yards from the gate, heard a woman yelling "very close" outside. He described the yelling as "a quarrel between a couple." Anya Gonzalez, Espinoza's girlfriend, was also there and heard a female yelling. Gonzalez believed there was "a fight going on." To Gonzalez, it sounded like the female was yelling at someone. Gonzalez heard the female voice move toward the gate's location. She then heard the female shout: "Stop, stop, stop." Two or three seconds later, Gonzalez heard "a real loud thump." Espinoza heard the noise of a car accelerating and

then heard the impact. After the impact, he heard "screeching tires going off, going away" as the car left the complex.

Thompson had been struck by her car on the street just outside the gate to the parking area. She fell to the ground and Anderson drove over her. Thompson was taken to a hospital and, three days later, died of multiple blunt force trauma to her brain.

Anderson abandoned Thompson's car less than one mile away. He took Thompson's Visa check card and driver's license from her purse, and walked to Lyle's home. During the next few days, Anderson repeatedly attempted to use the check card, successfully doing so on November 8 and unsuccessfully doing so on November 11 and 13.

On November 14, police contacted Anderson, who identified himself as Michael Mitchell. He had Thompson's check card and driver's license in his pocket. After he was arrested, he admitted to police he had used the check card, which he claimed he had obtained from a guest at Lyle's home. Anderson denied any involvement in a robbery or homicide.

Count 1 of an information charged Anderson with first degree murder based on the alternative theories of premeditated murder of Thompson and murder during the commission, or attempted commission, of robbery (i.e., felony murder). Count 2 charged him with robbery. Count 3 charged him with receiving stolen property (i.e., Thompson's check card and driver's license).

At trial, the prosecution presented witnesses who testified substantially as described above. In his defense, Anderson testified that he wanted a car to visit his ex-wife and children. He took Thompson's car by using a shaved key and waited near the gate for another car to open it so he could leave the complex. He did not hear or see Thompson or anyone else in the complex. When an entering car opened the gate and drove into the complex, Anderson ducked down so its driver would not see him. After that car passed him, he accelerated Thompson's car toward the gate with its headlights off and its windows closed. Because the gate was beginning to close, Anderson swerved sharply left to swing out around the closing gate and after passing through the gate turned back to the right. At that point, he first saw a woman (Thompson) standing outside the gate, 10 to 12 feet in front of him with her hand out as if to signal "stop." He thought he also may have heard her say "stop," but he was not sure because events occurred so quickly. Because he knew he could not stop in time, he swerved sharply left and then felt an impact. Although he knew he had hit the woman, he did not stop or look back because he was scared. He had not intended to hit or run over her.

The jury convicted Anderson on all three counts and found true the special circumstance allegation that the murder was committed during the commission of robbery. The trial court sentenced him to life in prison without the possibility of parole, plus a consecutive three-year term. Anderson timely filed a notice of appeal.

DISCUSSION

I

Substantial Evidence to Support Robbery and Felony Murder Convictions

Anderson contends the evidence is insufficient to support his robbery conviction, and his felony murder conviction and the special circumstance finding based on the robbery. He argues the evidence is insufficient to support a finding he intended to permanently deprive Thompson of possession of her car, which is an element of robbery.

A

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones, supra*, 51 Cal.3d at p. 314.) Alternatively stated, "[i]f the circumstances reasonably justify the jury's

findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

"The same standard applies to the review of circumstantial evidence. [Citation.]" (*People v. Ceja, supra*, 4 Cal.4th at pp. 1138-1139.) Therefore, "[w]hether the evidence presented at trial is direct or circumstantial, . . . the relevant inquiry on appeal remains whether *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Towler* (1982) 31 Cal.3d 105, 118-119.)

B

Section 211 defines the offense of 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." Robbery, like larceny, requires the taking of another person's property with the intent to steal and carry it away. (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255.) However, robbery is a species of aggravated larceny, requiring that the larceny also be accomplished by force or fear and the property be taken from the victim or his or her presence. (*Id.* at p. 254.) In general, robbery requires a specific intent to deprive the victim of his or her property permanently. (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 417.) However, the required felonious intent to steal, "although often summarized as the intent to deprive another of the property permanently, is [also] satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive

the person of a major portion of its value or enjoyment." (*People v. Avery* (2002) 27 Cal.4th 49, 58.)

In this case, the trial court instructed with CALCRIM No. 1600 on the elements of robbery:

"The defendant is charged in Count 2 with robbery. Robbery is also charged as a special circumstance in the commission of the murder charged in count 1.

"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* or to remove it from the owner's possession that owner would be deprived of a major portion of the value or enjoyment of the property.

"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 some distance. The distance moved may be short.

"The property taken can be of any value, however slight.

"A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.

"Fear, as used here, means fear of injury to the person himself or herself or immediate injury to someone else present during the incident or to that person's property.

"Property is within a person's immediate presence if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.

"The use of force or fear can occur with the initial taking of the property, or it can occur while the defendant attempts to get away with the stolen property." (*Italics added.*)

C

Anderson argues that because the evidence is insufficient to support a finding he intended to deprive Thompson of her car permanently (or, alternatively, to remove from her a major portion of the car's value or enjoyment), the evidence is insufficient to support his robbery conviction, and his felony murder conviction and the special circumstance finding based on that robbery. He argues the only rational inference from the evidence is that he intended to deprive Thompson of her car temporarily (e.g., for a single evening).

We conclude there is substantial evidence to support a reasonable inference by the jury that Anderson intended to *permanently* deprive Thompson of her car. The record shows he took her car using a shaved key, accelerated the car to pass through the closing gate, and drove away after he cleared the gate. A witness (Gonzalez) heard Thompson shout "stop" three times. Anderson admittedly saw Thompson holding up her hand, in

effect signaling that he should stop. Although he believed he hit and ran over her, he did not stop and continued on his way. Another witness (Espinoza) heard "screeching tires going off, going away" as the car left the complex after striking Thompson. Based on that evidence, the jury could have reasonably concluded Anderson did not intend to return the car to Thompson or take it only temporarily, but rather intended to permanently deprive her of it. (Cf. *People v. Carroll* (1970) 1 Cal.3d 581, 584 [intent to permanently deprive could be reasonably inferred from defendant's acts]; *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099 [intent may be inferred from defendant's act and surrounding circumstances].) Based on our review of the entire record, we conclude there is substantial evidence to support the jury's finding that Anderson intended to permanently deprive Thompson of her car.

In general, "an intent to permanently deprive someone of his or her property may be inferred when one unlawfully takes the property of another. [Citations.]" (*People v. Morales* (1993) 19 Cal.App.4th 1383, 1391.) Evidence that the defendant subsequently abandoned a stolen car or purportedly intended to use it only temporarily does not disprove a contrary reasonable inference that the defendant intended to permanently deprive the victim of his or her car. (*Id.* at pp. 1391-1392; *People v. DeLeon* (1982) 138 Cal.App.3d 602, 604-606; cf. *People v. Mainhurst* (1945) 67 Cal.App.2d 882, 883-884; *In re Albert A.*, *supra*, 47 Cal.App.4th at p. 1008 [substantial evidence of intent to permanently deprive owner of bicycle because defendant did not return bicycle until contacted by police].) In the circumstances in *Morales*, the court stated: "Drawing on

their "knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience" [citations], reasonable jurors could infer that this break-in of a locked vehicle was done with the intent to permanently deprive the owner of her property. [Citations.]" (*Morales*, at pp. 1391-1392.) In *DeLeon*, a coin dealer was stopped in his car by the defendants, who forcibly took and drove away his car. (*DeLeon*, at pp. 604-605.) His car was found abandoned one hour later less than one mile away. (*Id.* at p. 605.) Rejecting the defendants' contention that there was insufficient evidence to show they intended to permanently deprive the owner of the car, *DeLeon* stated: "The fact that the car was subsequently abandoned does not compel the conclusion that [the defendants] intended to deprive the owner of the car only temporarily. [The defendants'] intent was to be inferred from circumstances and was a question of fact for the jury to decide." (*Id.* at p. 606.) The court explained the jury may have reasonably inferred that the defendants initially intended to permanently deprive the owner of his car, but on discovery of the valuable coins in the car they may have decided to abandon the car quickly because police would not consider it to be a routine car theft. (*Ibid.*) *DeLeon* concluded: "Giving all reasonable inferences in favor of the judgment, substantial evidence supports a conviction of robbery for taking the car by force." (*Ibid.*)

The cases cited by Anderson do not persuade us to reach a contrary conclusion. (See e.g., *People v. Butler* (1967) 65 Cal.2d 569, overruled on another ground in *People v. Tufunga* (1999) 21 Cal.4th 935, 939; *People v. Pillsbury* (1943) 59 Cal.App.2d 107; *People v. Neal* (1940) 40 Cal.App.2d 115; *People v. Gherna* (1947) 80 Cal.App.2d 519.)

The jury was not compelled to conclude that he intended to take the car only temporarily to have a romantic rendezvous with Lyle that night. Anderson's evidence that he relied on friends and others to give him rides for his transportation needs did not show he necessarily intended to take Thompson's car only temporarily. Likewise, evidence that Anderson had previously broken into cars only to steal valuable property inside did not disprove that on the instant occasion he broke into Thompson's car with the intent to permanently deprive her of it. Anderson has not carried his burden on appeal to show there is insufficient evidence to support his robbery conviction based on his argument he did not intend to permanently deprive Thompson of possession to her car. He does not contend the evidence is otherwise insufficient and we therefore conclude there is substantial evidence to support Anderson's robbery conviction, and to support his felony murder conviction and the special circumstance finding based on that robbery.

II

Failure to Instruct Sua Sponte on the Defense of Accident

Anderson contends the trial court erred by not instructing sua sponte on the defense of accident to the robbery charge.

A

Anderson testified in effect that his collision with Thompson was accidental. He testified the car's headlights were not on when he drove toward and around the closing gate. He estimated he was traveling about 25 to 30 miles per hour at the time. He could not see anyone at or behind the gate. Gonzalez's testimony was consistent with

diminished visibility in the gate area; she stated that after she heard the impact she could not see through the gate to determine what had happened. Anderson further testified:

"Q. [A]s you're going through the gate, do you see anyone in front of you as you're going through the gate?

"A. No, I didn't see anything.

"Q. As you get through the gate, what happens now?

"A. Everything happened just so fast. [¶] . . . [¶] . . . I went around the gate and . . . [a]s I . . . came around the gate I looked up and that's when I first seen [Thompson].

"Q. How far away was she from that point, if you know?

"A. It feels like she was only -- must have been 8 to 10 feet. That's it. It was really close, and . . . it happened just so fast.

"Q. Had you seen her before that instant?

"A. No.

"Q. What did you do?

"A. I immediately just -- I swerved to the left. I just swerved as fast as I could.

"Q. Why did you swerve to the left?

"A. She was right in front of me, and I wanted to miss her. I didn't think I had enough time to stop so I swerved to the left. It happened so fast"

He testified that he thought the woman (Thompson) was someone walking on the sidewalk. He further testified:

"Q. Did you mean to run over [Thompson]?

"A. No.

"Q. Did you intend to in any way?

"A. No, I would never do that. I would never do that."

In closing argument, Anderson's counsel argued Anderson's collision with Thompson was an accident. He argued:

"And as [Thompson] appeared suddenly in front of [Anderson] without any warning and as he swerved to try to avoid her, this impact . . . [,] as tragic and devastating as it was, was clearly unintentional, inadvertent and accidental. And it was not in any way the application or . . . the use of force to obtain or retain that car. . . . [T]his force was accidental rather than intentional to steal that car. . . . This is not a robbery. This is a theft of a car and a terrible accident."

He further argued: "[T]he hitting was not intended as a use of force against [Thompson] to take or keep her car. . . . This was an accident. He tried not to hit her. He tried not to apply force to her." He further argued: "[Anderson] saw no one around, . . . until that last split second he tried to avoid her. And this was an accident, an accident, an accident."

The trial court instructed with CALCRIM No. 1600 on the elements of robbery, including the element that "[t]he defendant used force or fear to take the property or to prevent the person from resisting" and "[t]he use of force or fear can occur with the initial taking of the property, or it can occur while the defendant attempts to get away with the stolen property." However, Anderson's counsel did not request an instruction, and the court did not instruct sua sponte, on the defense of accident (e.g., CALCRIM No. 3404). The trial court instructed with CALCRIM No. 540A on the offense of felony murder,

stating that: "A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent."

B

Section 26 provides: "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five--Persons who *committed the act* or made the omission charged through misfortune or *by accident*, when it appears that there was no evil design, intention, or culpable negligence." (Italics added.) "The accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime. [Citations.]" (*People v. Lara* (1996) 44 Cal.App.4th 102, 110.)

"[E]ven in the absence of a request, a trial court must instruct on general principles of law . . . commonly or closely and openly connected to the facts before the court and . . . necessary for the jury's understanding of the case. [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) A trial court has a duty to instruct sua sponte on a defense if the defendant appears to be relying on that defense *or* if there is substantial evidence to support that defense and the defense is not inconsistent with the defendant's defense theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389 (*Gonzales*); *People v. Breverman* (1998) 19 Cal.4th 142, 157 (*Breverman*).) CALCRIM No. 3404 sets forth the standard instruction on the defense of accident:

"<General or Specific Intent Crimes>

"[The defendant is not guilty of _____ <insert crime[s]> if (he/she) acted [or failed to act] without the intent required for that crime, but

acted instead accidentally. You may not find the defendant guilty of _____ <insert crime[s]> unless you are convinced beyond a reasonable doubt that (he/she) acted with the requisite intent.] . . ."²

"If the crime charged requires general criminal intent, then the defense should apply to acts committed 'through misfortune or by accident, when it appears there was no . . . [general intent] . . .,' [citation]" (*People v. Lara, supra*, 44 Cal.App.4th at p. 110.)

Although robbery generally may be considered a specific intent crime in that it requires a specific intent to permanently deprive the victim of his or her property (*In re Albert A., supra*, 47 Cal.App.4th at p. 1007), 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. 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.*" (Italics added.)

² Because robbery is a qualifying general or specific intent crime, we omit the alternative instruction that applies when the charged offense is a criminal negligence crime. *Lara* stated: "If the crime charged requires general [or specific] criminal intent, then the [accident] should apply to acts committed 'through misfortune or by accident, when it appears there was no . . . [general or specific intent] . . .,' (§ 26, subd. Five) regardless of whether the defendant was criminally negligent. [¶] Where, as here, the defendant is charged with a general [or specific] intent crime, instruction on 'criminal negligence' [or 'culpable negligence'] is erroneous." (*People v. Lara, supra*, 44 Cal.App.4th at p. 110, italics added.) Accordingly, because robbery is *not* a criminal negligence crime, section 26's exception to the accident defense when the evidence shows the defendant acted with "culpable negligence" *cannot* apply in this case. (*Lara*, at pp. 108-110; CALCRIM No. 3404 (Fall 2008 ed.), Bench Notes, p. 877.)

Courts have described the required mental state regarding the use of force or fear in various ways. The California Supreme Court stated: "[T]he *act of force* or intimidation by which the taking is accomplished in robbery *must be motivated by the intent to steal*" (*People v. Green* (1980) 27 Cal.3d 1, 54, italics added, overruled on another ground in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) *Green* alternatively stated: "[T]he defendant's wrongful intent and his physical act must concur in the sense that the act must be motivated by the intent." (*Green*, at p. 53.) In *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, we stated: "Circumstances otherwise constituting a mere theft will establish a robbery where the perpetrator peacefully acquires the victim's property, but then *uses force to retain or escape with it*." (*Id.* at p. 222, italics added.) Likewise, the California Supreme Court noted: "[M]ere theft becomes 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. [Citations.]" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8, italics added.) Another court stated: "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." (*People v. Estes* (1983) 147 Cal.App.3d 23, 28, italics added.) The California Supreme Court stated: "[T]he central element of the crime of robbery [is] the *force or fear applied to the individual victim . . . to deprive him of his property*." (*People v. Ramos* (1982) 30 Cal.3d 553, 589, italics added.) Citing *Ramos*, that court recently stated: "That deprivation of property occurs whether a

perpetrator *relies on force or fear to gain possession or to maintain possession* against a victim who encounters him for the first time as he carries away the loot." (*People v. Gomez, supra*, 43 Cal.4th at p. 265, italics added.) A more apt description of the force or fear requirement for robbery was set forth in *People v. Flynn* (2000) 77 Cal.App.4th 766: "[T]he *willful use of [force or] fear to retain property* immediately after it has been taken from the owner constitutes robbery." (*Id.* at p. 772, italics added.)

Regardless of the phraseology used by various courts in describing the defendant's mental state for the use of force or fear required for robbery, we conclude section 211's requirement of the use of force or fear in accomplishing the taking of the property or in retaining the property during asportation or escape in effect requires *a purposeful or willful act* involving a *general intent to use force or fear* to initially take property or thereafter retain the stolen property during asportation or escape. Absent that purposeful or willful use of force, a robbery is not committed. Accordingly, if a defendant only *accidentally* strikes or otherwise accidentally applies force or fear against a victim, that force or fear is insufficient to meet section 211's implicit general intent requirement for the use of force or fear to accomplish the taking of the victim's property.

Under the above interpretation of section 211 regarding the required general intent for use of force or fear in committing a robbery, a section 26 defense of accident would necessarily apply when a defendant only accidentally strikes his or her victim during asportation of stolen property. In a case in which there is substantial evidence to support a defense theory of accident, the trial court has a duty to instruct sua sponte on that

defense. (*Gonzales, supra*, 74 Cal.App.4th at p. 389; *Breverman, supra*, 19 Cal.4th at p. 157.)

C

Anderson asserts that because there was substantial evidence to support his defense theory that he accidentally struck Thompson, the trial court erred by not instructing sua sponte on the defense of accident. Anderson testified at trial that he did not see Thompson (or anyone else) as he drove toward and around the closing gate. After he passed around the gate, he first saw Thompson standing only 8 to 10 feet away in front of the car. Believing he did not have sufficient time to stop the car, he swerved to the left in an attempt to avoid her. Although the car struck and ran over her, Anderson testified he did not intend to do so. In closing argument, Anderson's counsel argued Anderson saw Thompson only at the last second and tried to not hit her. He argued the collision was accidental and not an intentional use of force or fear to steal her car. Therefore, he argued that the force or fear element of robbery had not been proved. Based on our review of the record, we conclude there was substantial evidence to support the defense of accident to the charge of robbery and that defense was not inconsistent with Anderson's defense theory (and Anderson, in fact, relied on that defense theory). (*Gonzales, supra*, 74 Cal.App.4th at p. 389; *Breverman, supra*, 19 Cal.4th at p. 157.) Although the People apparently assert Anderson's testimony regarding the accidental nature of the collision should be disregarded as self-serving, "the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence

which, if believed by the jury, was sufficient to raise a reasonable doubt'

[Citations.]" (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.) Accordingly, the trial court could not disregard Anderson's purported self-serving testimony in determining whether there was substantial evidence to support an instruction on the defense of accident. We conclude the trial court had a duty to instruct sua sponte on the defense of accident to the charge of robbery. (*Gonzales*, at p. 389; *Breverman*, at p. 157.) By not so instructing, the court erred.

D

Because the trial court erred by not instructing sua sponte on the defense of accident, we must determine whether that error was prejudicial and requires reversal of his robbery conviction, and his felony murder conviction and the special circumstance finding based on that robbery. The parties do not cite, and we have not found, any United States Supreme Court or California Supreme Court case deciding the question of whether a failure to instruct sua sponte on a defense in a criminal case violates any provision of the United States Constitution (e.g., right to present a defense, right to a jury trial, right to due process, etc.), which would require application of the *Chapman v. California* (1967) 386 U.S. 18 test for prejudice (i.e., reversal required unless error was harmless beyond a reasonable doubt) instead of the *People v. Watson* (1956) 46 Cal.2d 818 test for prejudice (i.e., reversal not required unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred). In fact, the California Supreme Court recently noted it had yet to decide which standard of prejudice should be

applied when a trial court errs by not instructing sua sponte on a defense. (*People v. Salas, supra*, 37 Cal.4th at p. 984 ["We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense. [Citation.]".]) Nevertheless, in *People v. Corning* (1983) 146 Cal.App.3d 83, we applied the *Watson* standard of prejudice (without considering first whether the *Chapman* standard should apply) in concluding the trial court's failure to instruct on the defense of accident was harmless error. (*Corning*, at p. 89.) More recently, in *People v. Russell* (2006) 144 Cal.App.4th 1415, another appellate court stated: "Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in [*Watson*]." (*Id.* at p. 1431.)

We need not decide whether the *Chapman* or *Watson* standard for prejudicial error applies to the failure of a trial court to instruct sua sponte on the defense of accident because we conclude that under either standard the error here was prejudicial. (*People v. Simon* (1995) 9 Cal.4th 493, 506, fn.11 [no need to decide whether *Chapman* standard of prejudice applied because reversal was required under *Watson* standard]; *Gonzales, supra*, 74 Cal.App.4th at p. 391 [same].) Applying the *Watson* standard of prejudice, we conclude that, based on our review of the entire record, it is reasonably probable Anderson would have obtained a more favorable result had the trial court instructed on the defense of accident to the charge of robbery.

In reaching our conclusion, we believe the jurors were likely confused regarding the viability of Anderson's accident defense to the charge of robbery because the trial court did not instruct with CALCRIM No. 3404 on the defense of accident, but

nevertheless instructed with CALCRIM No. 540A on the offense of felony murder, stating that: "*A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.*" (Italics added.) Absent a specific instruction expressly stating the defense of accident may apply to the charge of robbery, the jury likely inferred that the principle set forth in CALCRIM No. 540A regarding felony murder also applied to robbery. The jury in this case likely believed that if an accidental killing cannot be a defense to felony murder, an accidental killing by use of force or fear in accomplishing a robbery likewise cannot be a defense to a robbery charge. As Anderson argues on appeal, "[a] lay juror would have to be exceptionally astute to recognize on his own that though accident was not a defense to the felony murder [charge], it *was* a defense to the underlying robbery on which the felony murder was based."

Neither Anderson's testimony nor his counsel's closing argument that his collision with Thompson was accidental (and therefore he did not use force or fear to take or retain her car as required for robbery) was a sufficient substitute for an instruction by the trial court on the defense of accident. (*Taylor v. Kennedy* (1978) 436 U.S. 478, 488-489 [arguments of counsel cannot substitute for instructions by the court]; *People v. Miller* (1996) 46 Cal.App.4th 412, 426, fn. 6, disapproved on another ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1240; *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, 1170.)

Based on the evidence and the length of the jury's deliberations, we further conclude this case was a "close" case. The jury deliberated for more than one day before reaching a verdict. The jury was presented with evidence showing Anderson was a methamphetamine addict who obtained money to maintain his drug habit by committing nonviolent offenses (e.g., breaking into cars to steal valuables inside). Furthermore, although Anderson broke into and stole Thompson's car, the prosecution's theory was that he apparently did so to drive Lyle to a location for their planned romantic rendezvous.

There was strong evidence Anderson did not, and could not, see Thompson standing in the dark behind the gate as he drove her car around the closing gate. The car's headlights were off and visibility through the gate was obscured, as Gonzalez testified. Anderson testified he did not see Thompson until the last second and then tried to avoid striking her by turning sharply to the left. Thompson's mother testified that her telephone conversation with her daughter ended abruptly after Thompson shouted, "[h]ere comes my car real fast." Furthermore, it is doubtful Anderson had any compelling reason to purposefully strike and run over Thompson with the car. There was substantial, if not overwhelming, evidence to support Anderson's defense theory of accident. "When a defense is one that negates proof of an element of the charged offense, the defendant need only raise a reasonable doubt of the existence of that fact. [Citation.]" (*Gonzales, supra*, 74 Cal.App.4th at p. 390.) Considering our review of the evidence presented at trial, closing arguments, and the instructions given--and not given--by the trial court, we conclude the jury likely would have found a reasonable doubt existed whether Anderson

used force or fear to take Thompson's car or to prevent her from retaking it during his escape or asportation. The fact the jury implicitly found that element was proved when it found Anderson guilty of robbery does not show the trial court's instructional error was harmless. Rather, we conclude it is reasonably probable the jury would have found Anderson not guilty (or, at least, been unable to reach a unanimous guilty verdict) on the robbery charge had the trial court instructed sua sponte on the defense of accident. (*People v. Watson, supra*, 46 Cal.3d at p. 836.) Accordingly, Anderson's robbery conviction (count 2) must be reversed. Furthermore, as Anderson asserts, his felony murder conviction (count 1) and the special circumstance finding, both of which were based on Anderson's commission of the robbery, must likewise be reversed.

III

Failure to Instruct Sua Sponte on the Defense of Mistake

Anderson contends the trial court erred by not instructing sua sponte on the defense of mistake to the robbery charge based on his purported mistake of fact that Thompson was merely a pedestrian rather than the car's owner or possessor. Because we reverse Anderson's robbery conviction, and his felony murder conviction and the special circumstance finding based on that robbery, we need not address the merits of this contention. However, because the People may elect to retry Anderson on those charged offenses and the special circumstance, we briefly discuss this contention to provide the trial court with guidance in the event of a retrial.

As Anderson correctly notes, a robbery may be committed only against a person who has actual or constructive possession of personal property. (§ 211; *People v. Gomez, supra*, 43 Cal.4th at pp. 254, 262; *People v. Nguyen* (2000) 24 Cal.4th 756, 763-764.) Accordingly, the force or fear used to accomplish the initial taking or retention during asportation of the property necessarily must be applied against a person who has actual or constructive possession of that property. If force or fear is used only against a mere bystander or other nonpossessor of the property, there can be no robbery, but only a theft and a possible assault or battery. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 811; *Sykes v. Superior Court* (1994) 30 Cal.App.4th 479, 481, 484; *People v. Cash* (2002) 28 Cal.4th 703, 735.) Anderson correctly argues that in this case *if* the woman he struck with the car was not Thompson (or another actual or constructive possessor of the car) and only a mere pedestrian or bystander, he could not have been found guilty of robbery.

However, we disagree with Anderson's attempt to expand the above principle by applying it to the defense of mistake of fact and in effect create an additional mental state element for robbery, i.e., that the defendant have *knowledge* the person against whom force or fear is used has actual or constructive possession of the property. Section 26 provides: "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Three--Persons who committed the act or made the omission charged under an ignorance or *mistake of fact, which disproves any criminal intent.*" (Italics added.) Anderson does not cite, and we are unaware of, any case holding robbery requires the defendant have knowledge that the person against whom force or

fear is used has actual or constructive possession of the property taken. On the contrary, there is case law holding otherwise. In *People v. Prieto* (1993) 15 Cal.App.4th 210, the court stated: "Knowledge of owner [or possessor] identity is not an element of robbery."³ (*People v. Prieto, supra*, 15 Cal.App.4th at p. 214.) Furthermore, we are unpersuaded by Anderson's argument that such a knowledge requirement is (or should be) an element of robbery. Therefore, because any purported mistake of fact by a defendant whether the person against whom force or fear is used had actual or constructive possession of the property taken would *not* "disprove[] any criminal intent" or required mental state for robbery, it cannot provide a defense to robbery. We reject Anderson's assertion that a "defendant's mistake of fact as to whether the person has a possessory interest is a defense" to robbery.

In the circumstances of this case, assuming *arguendo* there was substantial evidence to support a finding that Anderson believed Thompson was merely a pedestrian and had no possessory interest in the car, we conclude the trial court did not have any duty to instruct *sua sponte* on the defense of mistake of fact. Any such mistaken belief or lack of knowledge regarding the possessory interest of the person against whom force or fear is used does *not* constitute a defense to robbery. The cases cited by Anderson are

³ Anderson's attempt to narrowly interpret or distinguish *Prieto* is unpersuasive. In the context of a charged robbery, *Prieto*'s stated principle logically applies to an actual or constructive possessor of property who may not be the property's actual owner. Likewise, although Anderson argues we should not follow *Prieto*'s statement because it is dictum, we nevertheless agree with *Prieto*'s statement and conclude it accurately sets forth a sound legal principle regarding the crime of robbery.

inapposite and do not persuade us to reach a contrary conclusion. (See, e.g., *People v Russell, supra*, 144 Cal.App.4th 1415; *People v. Dominguez* (2006) 39 Cal.4th 1141.) Accordingly, the trial court did not err by not instructing sua sponte on the defense of mistake of fact.

IV

Instruction That Intent to Take Property Must Be Formed Before or During Use of Force or Fear

Anderson contends the trial court erred by instructing on robbery that the requisite intent to take may be formed *before* the defendant used force or fear. Because we reverse Anderson's robbery conviction and his felony murder and the special circumstance finding based on that robbery, we need not address the merits of this contention. However, because the People may elect to retry Anderson on those charged offenses and the special circumstance, we briefly discuss this contention to provide the trial court with guidance in the event of a retrial.

The court instructed with CALCRIM No. 1600 on robbery, which states in pertinent part:

"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." (Italics added.)

Anderson argues that instruction conflicted with the instruction that the defendant used force or fear to take the property or to prevent the person from resisting (i.e., the requirement that the use of force or fear be purposeful). We are not persuaded by his

argument that the court's instruction with CALCRIM No. 1600 is internally inconsistent and misled or confused the jury regarding the elements of robbery. Furthermore, the instruction Anderson challenges is a correct statement of the law. In *People v. Marshall* (1997) 15 Cal.4th 1, the California Supreme Court stated: "To support a robbery conviction, the evidence must show that the requisite *intent to steal arose either before or during* the commission of the *act of force* [or fear]. [Citation.]" (*Id.* at p. 34, italics added.) Likewise, that court previously stated: "[A] conviction of robbery cannot be sustained in the absence of evidence that the defendant conceived his intent to steal either before committing the act of force against the victim, or during the commission of that act; if the intent arose only after the use of force against the victim, the taking will at most constitute a theft. [Citation.]" (*People v. Morris* (1988) 46 Cal.3d 1, 19, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.) We conclude the trial court did not err by instructing with CALCRIM No. 1600 on robbery that the defendant's intent to take the property must have been formed before or during the time he used force or fear.

V

Convictions on Both Counts 2 and 3

Anderson contends he was wrongly convicted of both robbery (count 2) and receiving stolen property (count 3). He argues that because the stolen items he allegedly received (i.e., Thompson's purse with check card and driver's license) were taken at the same time he took Thompson's car, he cannot be convicted of both taking and receiving

those items. Because we reverse Anderson's robbery conviction (count 2) on other grounds, we need not necessarily address the merits of this contention. However, because the People may elect to retry Anderson on the robbery charge (count 2), we briefly discuss this contention to provide the trial court with guidance in the event of a retrial and potential conviction on that count.

The theft of several items at one time constitutes just one taking offense. (*People v. Dominguez, supra*, 38 Cal.App.4th at p. 420; *People v. Bauer* (1969) 1 Cal.3d 368, 378.) Furthermore, a principal in a theft of property may not be convicted of both the theft of and receiving the same property. (§ 496, subd. (a); *People v. Allen* (1999) 21 Cal.4th 846, 857.) Because robbery consists of a theft of property and use of force or fear in accomplishing that theft, the prohibition against dual convictions of theft of and receiving stolen property also applies to dual convictions of robbery and receiving stolen property that involve the same act of taking. (*People v. Stephens* (1990) 218 Cal.App.3d 575, 577, 587.)

As the People note, one exception to the general bar against dual convictions is where the act of receiving is completely divorced from the theft (e.g., where the thief disposes of the property and in a separate transaction receives it again). (*People v. Smith* (2007) 40 Cal.4th 483, 522, fn. 10; *People v. Strong* (1994) 30 Cal.App.4th 366, 371, fn. 5.) However, the evidence presented at Anderson's trial did *not* involve that exception. Rather, the evidence showed Anderson took the car and the contents (e.g., Thompson's purse with her check card and driver's license) at the same time. When he later

abandoned the car, he looked in Thompson's purse, took her check card and driver's license from the purse, and then walked to Lyle's home. During the next few days, Anderson repeatedly attempted to use the check card. Anderson's abandonment of the car after he purportedly reached a place of temporary safety did *not* sufficiently divorce his initial taking of the check card and driver's license at the time of the car theft from his subsequent attempts to use the check card for purposes of the *Smith* exception to the general rule against dual convictions. There was no "complete divorcement" between the initial taking and his subsequent use or receiving of the check card and driver's license. (*People v. Smith*, at p. 522, fn. 10; *People v. Strong*, at p. 371, fn. 5.) Rather than disposing of those items and then reacquiring them in a separate transaction, Anderson continuously retained possession of those items from the time of their initial taking until his subsequent attempts to use them. Because the exception to the general rule against dual convictions does not apply, we conclude the general rule applies to bar Anderson's conviction of both robbery (count 2) and receiving stolen property (count 3). (Cf. *People v. Stephens*, *supra*, 218 Cal.App.3d at pp. 586-587.) In the event the People elect to retry Anderson on count 2, he may not be convicted of both counts 2 and 3 (absent new evidence showing a complete divorcement regarding the stolen items received). In the event the People do not elect to retry Anderson on count 2, the trial court shall confirm his conviction on count 3.

VI

Correction of Minutes

Anderson contends the trial court's minutes should be corrected to specify that his robbery conviction (count 2) was of the second degree. However, because we reverse that conviction, we need not address the merits of this contention. Nevertheless, in the event Anderson is retried and convicted on count 2, the court's minutes need not expressly specify that such conviction is of the second degree because that conviction will be presumed to be of the second degree unless it is expressly stated to be of the first degree. (§ 1157; *In re Birdwell* (1996) 50 Cal.App.4th 926, 928-931.) Section 1157 provides: "Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree." Accordingly, unless the jury expressly finds Anderson guilty of first degree robbery, a robbery conviction is "deemed to be of the lesser [second] degree." (§ 1157.) Anderson does not cite, and we are unaware of, any case or other authority requiring a trial court's minutes to specify that a conviction of an offense is of the second or lesser degree where section 1157 applies to confirm that lesser degree.

DISPOSITION

The defendant's convictions on counts 1 and 2 and the special circumstance finding are reversed. In all other respects, the judgment is affirmed. The People shall have 60 days after remittitur to the trial court to inform the court whether they will retry the defendant on all or part of the counts and special circumstance alleged in the information. In the event the People do not timely elect to retry the defendant, the trial court shall confirm the defendant's original conviction on count 3 and resentence him.



McDONALD, Acting P. J.

WE CONCUR:



O'ROURKE, J.



IRION, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Anderson***

Case No.: S

Court of Appeal, Fourth Appellate District Div. I, Case No. **D054740**

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 August 11, 2009, I served the attached **PETITION FOR REVIEW** 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, State of California
Fourth Appellate District
Division One
Symphony Towers
750 B Street, Suite 300
San Diego, California 92101

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 August 11, 2009, at San Diego, California.

Linda Chavez
Declarant

Signature

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Anderson***

Case No.: S _____

Court of Appeal, Fourth Appellate District Div. I, Case No. **D054740**

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.

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Fourth Appellate District
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San Diego, California 92101

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 August 11, 2009, at San Diego, California.

Linda Chavez
Declarant

Signature

