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SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
SUPREME COURT FILED

PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

v.

PAUL D. ANDERSON,

Defendant and Appellant.

) No. _____
)
) Court of Appeal
) No. D054740
) (Fourth Dist., Div. 1)
)
) (Riverside County
) Superior Court No. RIF113459)
)
)
)

AUG 19 2009
Frederick K. Ohrich Clerk
Deputy

Appeal from the Superior Court of Riverside County
Hon. Richard Couzens, Judge

**APPELLANT'S ANSWER TO PETITION FOR REVIEW, INCLUDING
REQUEST FOR REVIEW OF ADDITIONAL ISSUES (CAL. RULES
OF COURT, RULE 8.500(a)(2))**

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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
independent case system

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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ANSWER TO PETITION FOR REVIEW

I.

Statement of facts

Appellant adopts the statement of facts set forth in the Opinion, as supplemented where necessary in the body of the argument.

II. Argument

The People argue that the Court of Appeal's holding is inconsistent with People v. Bolden (2002) 29 Cal.4th 515. (Resp. B. at 3-4.) According to the People, Bolden stands for the principle that an instruction on accident is a pinpoint instruction that must be requested by defendant. (Resp. B. at 4.) Bolden, however, did not involve the defense of accident and it did not involve the court's sua sponte obligation to instruct on this or any other defense. Rather, defendant argued that the court erred in refusing defendant's specifically requested instruction "that defendant's application of force must have been motivated by an intent to steal." (Id. at pp. 555-56.) This Court held that the proffered special instruction was misleading. (Id. at p. 556.) Bolden is therefore far afield from Anderson's case. Nothing in Bolden contradicts *this Court's repeated admonition* that the trial court must instruct sua sponte on any defense where there is substantial evidence in support thereof or where defendant is relying on it and it is not inconsistent with defendant's theory. (See, e.g., People v. Gutierrez (2009) 45 Cal.4th 789, 824 ("a trial court has a sua sponte duty to give instructions on the defendant's theory of the case, including instructions as to defenses that the defendant is relying on, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case") (internal quotation marks, ellipsis, and citations omitted); People

v. Salas (2006) 37 Cal.4th 967, 982 (“It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial – evidence sufficient for a reasonable jury to find in favor of the defendant – unless the defense is inconsistent with the defendant’s theory of the case”) (internal quotation marks omitted).)

The standard CALCRIM instructions explicitly apply this general principle to the defense of accident. (CALCRIM No. 3404.) Of course, accident is indeed a “defense.” (Pen. Code, § 26, ¶ 5; 1 B. Witkin, California Criminal Law (3d ed. 2000) Defenses, § 241, p. 612 (“The Penal Code recognizes the defense of accident, as an excuse for conduct otherwise criminal”).)

The People argue that the pattern instruction on robbery is complete and accurate. (Resp. B. at 5-6.) This overlooks the main flaw in the instructions as a whole. The only instruction on accident that was provided to the jury was that accident *was not a defense to felony murder*. (See CT (2) 290 (“A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent”).) A lay juror would have to be exceptionally astute to recognize on his own that even though accident was not a defense to felony murder based on robbery, it *was* a defense to the robbery itself and hence to the robbery felony murder. Jurors were thus left with the erroneous impression that accident was *not* a defense to robbery. Nothing in the pattern instruction on robbery would have corrected this misimpression. Accordingly, under the circumstances of this case,

an instruction on the defense of accident was particularly necessary. Without it, jurors inevitably assumed that accident was not a defense to robbery because it was not a defense to robbery felony murder.

In any event, this Court has squarely rejected the theory that the trial court need not instruct on accident where the instructions are otherwise complete. In People v. Acosta (1955) 45 Cal.2d 538, 539, defendant was convicted of the theft of an automobile. The prosecution evidence showed that defendant, who was being driven in a taxicab, assaulted the driver. (Id. at p. 540.) After a struggle the driver managed to roll out of the moving taxi. (Ibid.) Defendant got into the front seat, accelerated, and drove off, until he struck another car. (Ibid.) The defense was that defendant was just trying to bring the taxi to a safe stop after the driver got out. (Id. at p. 543.) The Supreme Court reversed the conviction, holding that the trial court erred in failing to instruct on accident. (Id. at pp. 543-44.) The Court easily disposed of the same argument that the People now make:

The People urge that in any event the refusal of the instruction was not prejudicial because the jury were fully instructed as to the intent necessary to constitute a criminal taking of a car in violation of section 503 of the Vehicle Code and would not have convicted defendant had they not found that defendant had such intent. However, defendant

was entitled to the instruction as to accident and misfortune in the terms or substance in which he requested it so that the jury's attention would be directed to the possible, reasonable view of the evidence urged by defendant.

(Id. at p. 544.)

Finally, Bolden is not on point because that case did not involve an *Estes* robbery in which the force is applied after the caption. (See generally People v. Estes (1983) 147 Cal.App.3d 23, 28.) Bolden is relevant only for impliedly reaffirming the principle that accident is indeed a defense, that is, that the use of force must be purposeful. (See Bolden at p. 556 (“the defendant must apply the force for the purpose of accomplishing the taking”).)

Next, the People argue that the defense of accident is inapplicable because “appellant acted with the criminal intent to steal.” (Resp. B. at 5-6.) The question, however, is whether at the time of the use of force – the act that transformed a completed theft into an *Estes* robbery – he acted with deliberate use of force or culpable negligence or, instead, with simple negligence or entirely accidentally.

The People cite evidence tending to show that Anderson acted negligently. (Resp. B. at 6.) The People’s analysis falls into three errors. *First*, the People utterly ignore the evidence on the other side, tending to show that this was indeed an accident. (In fact, the Court of Appeal suggested that the evidence of accident

was “overwhelming.” (Opn. at 23 (“There was substantial, if not overwhelming, evidence to support Anderson’s defense theory of accident”).) There was indeed overwhelming evidence of accident. Anderson had no need to run Thompson over in order to escape; she could not have outrun the car. Further, it was dark out, and there was considerable evidence that Anderson could not see through the gate to tell that a person was standing on the other side. (See RT (2) 188:14-19; exhibit 156 (crime scene video showing lighting conditions).) Anderson himself testified that he could not see through the gate well enough to discern a pedestrian, and it appeared to him that Thompson had just jumped out into his path, so sudden was her appearance. (RT (5) 858:11-19; (5) 903:24-904:19; (5) 933:9-14; (5) 977:5-18.) Indeed, given Thompson’s agitated (“frantic”) state (RT (1) 25:10-13), she may have deliberately stepped into the path of the oncoming car to stop it (see RT (5) 858:16-25; (5) 869:1-28; (5) 879:15-881:3; (5) 899:9-16), not realizing that Anderson did not see her until the last moment, when it was too late to avoid hitting her. Finally, as Anderson testified and as the undisputed evidence indeed showed, he was trying to get out before the gate closed in order to make his escape (RT (5) 885:15-886:3) and therefore was not trying to run down anyone.

Second, the People overlook the fact that mere negligence is not enough to defeat the defense of accident. This defense is unavailable only if there is heightened – criminal or culpable – negligence. (See CALCRIM No. 3404 (defense of accident is not available only if defendant acted with *criminal* negligence);

CALJIC No. 4.45 (same); see Pen. Code, § 26, ¶ 5 (referring to “culpable negligence”).) This Court has explained that:

there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.

(People v. Penny (1955) 44 Cal.2d 861, 879-80 (quoting treatise, which the court adopts as “the standard to be used in California”); see also, e.g., People v. Rodriguez (1960) 186 Cal.App.2d 433, 440 (“Criminal liability cannot be predicated on every careless act merely because its carelessness results in injury to another”); CALJIC No. 3.36 (criminal negligence “refers to a negligent act which is aggravated, reckless or flagrant”) (brackets omitted).)

Third, the question of negligence is for the jury, not for the reviewing court on the basis of the cold record. (See, e.g., People v. Villalobos (1962) 208 Cal.App.2d 321, 328 (“We are convinced that the question of whether or not appellant was guilty of acting without due caution and circumspection was a question for the jury to determine, as was also the question of whether the actions and conduct of appellant amounted to criminal negligence”);

Tomlinson v. Kiramidjian (1933) 133 Cal.App. 418, 422 (it was a “question for the jury . . . whether the turning to wave at the passengers of the passing automobile while traveling at an excessive rate of speed was gross negligence, and whether such gross negligence, if so found, was the proximate cause of the accident”).)

For all of these reasons, the Court of Appeal’s analysis and holding were correct and did not conflict with any opinion of this Court. Accordingly, this case presents no ground for review by this Court.

REQUEST FOR REVIEW OF ADDITIONAL ISSUES

Pursuant to rule 8.500(a)(2) and rule 8.504(c), appellant respectfully requests that if the Court grants the People's petition for review it also grant review of the following issues:

1. In a case involving an alleged *Estes* robbery, whether the court errs in failing to instruct sua sponte on the defense of mistake of fact as to whether the victim of the car collision was the possessor of the car rather than an intervening neighbor or uninvolved pedestrian. (See AOB issue 2.)

2. In a case involving an alleged *Estes* robbery, whether the court errs in instructing that it sufficed that defendant formed the intent to take the property prior to the time he used force or fear. (See AOB issue 3.)

(The question of the sufficiency of evidence of robbery (AOB issue 1) is already raised in appellant's separately filed petition for review.)

**ARGUMENT IN SUPPORT OF REVIEW OF ADDITIONAL
ISSUES**

I.

An important question of federal constitutional and state law is raised by the issue whether, in a case involving an alleged *Estes* robbery, the court errs in failing to instruct sua sponte on the defense of mistake of fact as to whether the victim of the car collision was the possessor of the car rather than an intervening neighbor or uninvolved pedestrian

A defendant who steals property without using force or fear is nonetheless guilty of robbery if, in the asportation, he uses force or fear to prevent the owner from regaining possession. (People v. Estes, supra, 147 Cal.App.3d at p. 28.) The force or fear, however, must be against the owner or possessor or his agent. (People v. Nguyen (2000) 24 Cal.4th 756, 764.) If a thief uses force or fear to ward off a Good Samaritan or other bystander who has intervened and given chase, the theft is not transformed into an *Estes* robbery, for the force or fear was not used against the possessor. (People v. Jenkins (2006) 140 Cal.App.4th 805, 811 (“the use of force or fear against a bystander or good Samaritan during flight after commission of a theft against another person” “results in the commission of a theft and an assault or battery, but no robbery”).)

Mistake of fact is generally a defense to any crime, provided that the mistake would disprove an element of the crime. (Pen. Code, § 26, ¶ 3 (exempting from criminal liability

“[p]ersons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent”); In re Jennings (2004) 34 Cal.4th 254, 277.) In such a case, defendant’s “guilt or innocence is determined as if the facts were as he perceived them.” (People v. Reed (1997) 53 Cal.App.4th 389, 396 (internal quotation marks and citation omitted).)

Anderson accordingly argued on appeal that the trial court erred in failing to instruct sua sponte on mistake of fact, in that if Anderson erroneously believed that the pedestrian outside the gate was someone other than the owner of the car (such as a Good Samaritan or uninvolved bystander), the use of force against that person would not transform the prior auto taking into an *Estes* robbery. (AOB issue 2.)

The Court of Appeal disagreed. (Opn. at 24-27.) The Opinion reasoned that this would inject a new element into the crime of robbery, namely, “a knowledge requirement.” (Opn. at 26; see also *ibid.* (“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”) (italics in original).)

The Opinion erred in failing to distinguish an element from a defense. It is true that knowledge is not an element of robbery; but this is entirely consistent with the fact that *lack* of knowledge may negate an element, namely the element of using force or fear against the owner (or possessor). For example, nothing in the statutory rape statute (Pen. Code, § 261.5) specifies as an

element defendant's actual knowledge of the victim's age. Yet, a good-faith, mistaken belief that the victim was over the age of consent is a recognized defense. (People v. Hernandez (1964) 61 Cal.2d 529, 535-36.) And the bigamy statute (Pen. Code, § 281) does not specify as an element defendant's actual knowledge that his first marriage was still valid, and yet a reasonable, good-faith belief that it was no longer valid is a recognized defense. (People v. Vogel (1956) 46 Cal.2d 798, 801.)

A recent opinion of this Court illustrates the same point. In In re Jennings, *supra*, 34 Cal.4th at pp. 259-60, the defendant (petitioner) served beer at his home to a 19-year-old coworker. After the coworker left the house and was driving home, he was injured in a car accident attributable in part to his drunkenness. (*Id.* at p. 260.) Defendant was charged with providing alcohol to a minor, causing injury. (*Ibid.*) The trial court excluded evidence that defendant believed the coworker to be 22. (*Ibid.*) This Court held that the Legislature did not intend knowledge of age to be an element of the crime. (*Id.* at p. 276.) Nonetheless, citing Hernandez, *supra*, and Vogel, *supra*, the Court held that reasonable, good-faith mistake of age constituted an affirmative defense. (*Id.* at pp. 278-81.) So, too, in this case, even though knowledge of the identity of the victim of force as the owner or possessor is not an element of an *Estes* robbery, mistake of fact remains a defense.

This Court's recent opinion, People v. Salas, *supra*, 37 Cal.4th 967, makes the same point. There, the Court considered whether, in a prosecution for selling unregistered securities,

defendant's belief that the securities were exempt from registration was relevant. (Id. at p. 971.) As in Jennings, the Court held that even though knowledge was not an element of the crime that the prosecutor had to prove, reasonable, good-faith belief was an affirmative defense:

We hold that lack of knowledge that a security is not exempt (or criminal negligence) is an affirmative defense, on which the trial court must instruct only if the defendant presents enough evidence to raise a reasonable doubt. Consequently, the prosecution will not have to prove that a defendant lacked a good faith belief in every one of the numerous grounds for exemption; it need only address the evidence the defense presented to raise a reasonable doubt as to the defendant's good faith.

(Salas at p. 982.)

Whether the Opinion's analysis is correct raises an important question of law for two reasons. *First*, the Opinion's analysis is at odds with In re Jennings and Salas, which distinguishes knowledge as an element from lack of knowledge as a defense. In both cases, knowledge is not an element of the crime, and yet lack of knowledge is available as an affirmative defense. Thus, the Opinion's premise that if lack of knowledge is a defense the fact of knowledge would have to be considered an element of the crime is unfounded. Given the multiplicity of circumstances and the variety of crimes in which lack of

knowledge may be a defense, review is warranted to clarify this principle.

Second, the error is important, warranting review, because failure to instruct sua sponte on this defense violated Anderson's right to present a defense and his right to trial by jury under the Sixth and Fourteenth Amendments and his right to due process under the Fourteenth Amendment. (See Mathews v. United States (1988) 485 U.S. 58, 63 ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor"); see also California v. Trombetta (1984) 467 U.S. 479, 485; Chambers v. Mississippi (1973) 410 U.S. 284.)

II.

An important question of federal constitutional and state law is raised by the issue whether, in a case involving an alleged *Estes* robbery, the court errs in instructing that it sufficed that defendant formed the intent to take the property prior to the time he used force or fear

It is error for the trial court to give conflicting instructions on any of the elements of a crime. (E.g., People v. Lee (1987) 43 Cal.3d 666, 671.) This is because the jury has no way of determining which version is correct. (Francis v. Franklin (1985) 471 U.S. 307, 322.)

The bare use of force or fear does not convert a theft into a robbery. Rather, “the defendant must apply the force for the purpose of accomplishing the taking.” (People v. Bolden, *supra*, 29 Cal.4th 515, 556; see also People v. Prieto (1993) 15 Cal.App.4th 210, 215 (“[t]he ‘force’ or ‘fear’ must be the *means* by which the taking was accomplished”) (italics in original); People v. Bordelon (2008) 162 Cal.App.4th 1311, 1320 (there was sufficient evidence of fear because “[d]efendant’s words and conduct – his pushing a customer aside, his escalating demands for the money – were *reasonably calculated* to intimidate” the victim) (emphasis added).)

Anderson argued on appeal that the court’s instructions on this point were conflicting. (AOB issue 3.) The instruction on the element of force or fear for robbery arguably implied that the use of force must be purposeful. (CT (2) 300 (element 4: “The

defendant used force or fear to take the property or to prevent the person from resisting”; element 5: “When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently”) (incorporating CALCRIM No. 1600).) A subsequent clause, however, contradicted this implication:

The defendant’s intent to take the property must have been formed before or during the time he used force or fear.

(CT (2) 300 (incorporating CALCRIM No. 1600).) The jury could have inferred that if Anderson had intended to permanently deprive Thompson of the car initially, and later used force – not for the purpose of retaining the car against Thompson’s effort to recover possession but rather because he was just panicked or was driving recklessly as he fled out the gate – he committed a robbery, *even though the force was not accompanied by an intent or purpose to retain possession*. It was enough, according to this clause that his “intent to take the property” was “formed before” the time he used force or fear. (CT (2) 300.) The instruction on robbery was thus internally conflicting as to the relationship between intent to steal and the use of force. One portion vaguely implied or hinted at the correct legal principle that the use of force must be purposefully directed toward the taking or retention of the property. The other portion dispensed with this requirement, indicating that it was enough if Anderson intended to steal when he seized the car and only sometime later used force, whether purposefully or not. This latter portion thus detached the required intent to steal from the purposefulness of

the use of force, contrary to settled law.

The error was prejudicial in the unusual circumstances of this case because the primary issue for the jury was precisely whether Anderson *purposefully* used force against Thompson in order to retain possession of the car, as opposed to unintentionally striking her as he attempted to flee.

The Court of Appeal disagreed. (Opn. at 27-28.) The Opinion reasoned that CALCRIM No. 1600 correctly stated the law. (Opn. at 28.) This is no doubt true in most circumstances. As explained above, however, in the unusual circumstances of this case, the instructions were internally inconsistent.

Whether the Opinion's analysis was correct raises an important question of law because the error violated Anderson's fundamental federal constitutional right to due process under the Fourteenth Amendment. (See Francis v. Franklin, *supra*, 471 U.S. 307; People v. Esquivel (1994) 28 Cal.App.4th 1386, 1399 ("Conflicting or inadequate instructions on intent are closely related to instructions that completely remove the issue of intent from the jury's consideration, and, as such, they constitute federal constitutional error") (internal quotation marks and citation omitted).)

CONCLUSION

For the foregoing reasons, defendant and appellant respectfully requests that the People's petition be denied, or that if it is granted, defendant's petition be granted as well.

Dated: August 17, 2009.

Respectfully submitted,

Richard A. Levy
Appointed counsel on appeal for
Paul Anderson

CERTIFICATION OF WORD COUNT

I certify that the word count of this document, exclusive of tables, does not exceed 8400 words as calculated by the word processor software with which the document was prepared, and that the actual count is: **3,811** words.

Richard A. Levy

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 21535 Hawthorne Blvd., Suite 200, Torrance, CA 90503-6612. On the date of execution set forth below, I served the foregoing document described as:

APPELLANT'S ANSWER TO PETITION FOR REVIEW, INCLUDING ADDITIONAL ISSUES

on all parties to this action and the trial court and Court of Appeal by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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The Defendant/Appellant
(See rule 8.360(d), Cal. Rules of
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