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.

Case No. S175351

FourthAppellate District Division Two, Case No. D054740
Riverside County Superior Court, Case No. RIF113459
The Honorable Richard Couzens, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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ISSUE PRESENTED

Was the defendant entitled to sua sponte instruction on accident as a defense to robbery and, if so, was the court's failure to so instruct prejudicial?

INTRODUCTION

In its opening brief on the merits, respondent explained that the Penal Code section 26 provision regarding incapacity on account of accident has no application in this case as it was uncontested that appellant was engaged in felonious criminal conduct and therefore harbored an evil design. In his answer, appellant disagrees. He argues that the application of Penal Code section 26 hinges not on an actor's greater evil design, but rather on that actor's purpose as to the fulfillment of each element of each particular charged crime. (AABM[1] 19-21.) Appellant proposes that, as a matter of law, a criminal actor engaged in a broad criminal plan encompassing any number of crimes may be deemed free of "evil design" as to any singular crime, irrespective of his greater evil plan. As will be shown below, appellant's proposal is not supported by the history, purpose or spirit of the law and should be rejected.

In its opening brief, respondent further explained that, as the Penal Code section 26 accident incapacity is not a defense, the trial court was not required to give a sua sponte instruction as to accident. In his answer, appellant responds that the jury instructions neglected to adequately explain the mental state required for the use-of-force element of robbery, and that the trial court was required to instruct the jury sua sponte that appellant's accidental use of force against his victim was insufficient to constitute use of force for purposes of establishing robbery. (AABM 36.) Appellant's

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[1] Appellant's Answer Brief on the Merits.

suggestion fails because it confuses the term "accident," which has rich history and defined legal meaning, with the common term "inadvertence." As will be shown, a defendant charged with robbery is free to request that the trial court expand on the plain meaning of the term "force" as it relates to robbery by instructing the jury as to the effect of inadvertent physical contact with the robber's victim. But the same robber, upon admitting to the jury that he intended to commit robbery, is not entitled to have the jury instructed sua sponte that notwithstanding his admittedly evil intent to steal, his application of force, used to carry out his evil intent to steal, was committed by "accident" such that he must be adjudicated a person incapable of committing crime pursuant to Penal Code section 26.

Finally, even if error had occurred, and even if the error constituted a breach of appellant's federally protected due process rights, as appellant asserts, the error was harmless beyond a reasonable doubt because appellant's trial testimony firmly established that he was aware of the victim's presence before he ran her over with her stolen car and killed her. He did not attempt to stop. As discussed in respondent's opening brief on the merits, percipient witness testimony reasonably established that appellant was aware of the victim's presence well before he ran her over.

ARGUMENT

I. THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY AS TO THE PENAL CODE SECTION 26 ACCIDENT INCAPACITY

A. As Anderson Admitted Pursuing An Evil Design When He Struck And Killed The Victim, He Was Not Entitled To The Protection Afforded By Penal Code Section 26

Quoting Penal Code section 26, appellant acknowledges that the section exempts from criminal liability a defendant who committed the charged act by accident "'when it appears that there was no evil design.'"

(AABM 15, citing Pen. Code, § 26, subd. (5).) Notwithstanding the plain language of the statute, which appellant claims is archaic and "susceptible to broader interpretation," appellant argues that the section must be viewed and applied in a vacuum. That is, it must be applied looking independently at each charged crime, and its elements, as opposed to being applied to the actor himself. (AABM 19-21.) He proposes that an actor, admittedly pursuing a criminal plan the circumference of which encompasses many crimes, may be deemed free of "evil design" as to a specific crime within his broader evil plan, so long as the actor testifies that he "accidentally" committed any particular element of any specific crime committed while engaging in the broader criminal plan. Appellant's suggestion is not supported by the plain language of Penal Code section 26 or the history of the legal principle that the section encompasses.

Just as he did at trial, appellant admits here that he was actively engaged in intentional felonious criminal conduct when he ran over and killed the victim while fleeing with the victim's stolen car. (See AABM 12-14; 5 RT 856.) At trial, appellant's own testimony showed that he was engaged in stealing the victim's car at the time he struck her. As he said, "At the time you think when you're in a stolen car you get a little paranoid." (5 RT 871, see 876, 881.) Indeed, appellant testified that, as he sat in the stolen car waiting to escape, he observed a passing "cop car" (5 RT 881) and feared being caught. (5 RT 883.) So, when the gate opened, appellant "sped up" to "swerve" around it (5 RT 885) even though he "[c]ould not see" what lay on the other side." (5 RT 883.) Appellant acknowledged that he accelerated the car blindly "[b]ecause [he] was in a stolen car and [he] didn't want to wait" for another escape opportunity. (5 RT 887.) When asked by the prosecutor, "[w]hen you're coming though the gate using your common sense, you knew there was a chance someone was on the other side of the gate?", appellant responded, "No, I didn't think about that. [¶] I

was thinking about getting away." (5 RT 904.) Accordingly, appellant's trial testimony established that he was acting pursuant to an evil design and that his sole motive was to achieve his evil end of escaping with the stolen car.

Nevertheless, appellant argues that the jury should have been instructed that it was entitled to treat him, under Penal Code section 26, as a "[p]erson[] [in]capable of committing crime" just because he testified that the killing was inadvertent. (5 RT 859.) That is, appellant asserts that the evil design he harbored *immediately before* and during his act of running the stolen car over his victim is immaterial even if admittedly evil. Admitting that "moment's earlier" he did "indeed harbor an evil design" when he unlawfully used his burglary tools to break into the victim's car and steal it, appellant maintains that "the evil design of section 26 [] refers to [a defendant's] state of mind in committing the act causing the collision, *not in committing some anterior or other crime.*" (AABM 20, emphasis added.) But he ignores that he was still engaged in the criminal theft of the victims' car at the time he ran her over.

Moreover, as discussed in respondent's merits brief, appellant's suggestion is inconsistent with the origin, history and spirit of Penal Code section 26. The section 26 principle of "accidental incapacity" was described nearly three centuries ago by English common law historian Sir Mathew Hale: When an actor intentionally engages is felonious conduct and unintended consequences occur, those consequences cannot be considered accidental. (Hale, *Historia Placitorum Coronae* (1736) pp. 38-39 ["So it is if be doing an unlawful act, though not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him; this is felony and homicide and not per infortunium; for the act was voluntary, though the event not intended; and therefore the act itself being unlawful, he is criminally guilty of the consequence, that follows"].)

So too here, appellant's voluntary acts cannot be considered to have occurred by accident or misadventure.

California courts have employed an interpretation of section 26 that is consistent with the words of Hale. (See *People v. Stuart* (1956) 47 Cal.2d 167, 171 ["No evidence whatever was introduced that would justify an inference that defendant knew or should have known that the bottle labeled sodium citrate contained sodium nitrite. On the contrary, the undisputed evidence shows conclusively that defendant was morally entirely innocent"]; *People v. Acosta* (1955) 45 Cal.2d 538, 543 [evidence supported a determination that defendant's act was not the product of evil design "but was the mere unintended, confused result of the peculiar situation in which defendant found himself"]; *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 ["Misfortune when applied to a criminal act is analogous [to] the word 'misadventure' and bears the connotation of accident while doing a lawful act"].)

Appellant argues that an actor's general "evil design" is irrelevant to the application of Penal Code section 26. He asserts that "accident is simply a negation of the required intent for the charged crime[.]" (AABM 20.) Therefore, according to appellant, even if an actor admits that he or she was pursuing a broad criminal plan, involving multiple specific crimes, the section 26 accidental incapacity principle must be reviewed in isolation as to each crime (or as he argues here, as to each element of each crime). If the intent element of a charged crime cannot be proven as to an individual crime, then, according to appellant, the actor must be deemed free from any "evil design" and treated as lacking capacity under section 26. (See AABM 20.) Appellant cites *People v. Jones* (1991) 234 Cal.App.3d 1003 in support of this argument. He asserts that, notwithstanding the fact that the defendant there was engaged in a plethora of "criminal conduct" when he shot a police officer, the Court of Appeal ruled that the trial court

committed error in failing to instruct the jury as to Penal Code section 26. (AABM 24.)

But appellant's reliance on *Jones* is unpersuasive. There, the defendant, a parolee who violated his parole by way of his leaving Sacramento County, was a passenger in an acquaintance's unregistered car driven in San Bernardino County. (*People v. Jones*, *supra*, 234 Cal.App.3d at pp. 1306-1307.) When the driver mentioned to the defendant that they were being followed by a police car, the defendant told the driver to keep driving. (*Id.* at p. 1307.) Upon being pulled over and contacted by the police officer, the defendant produced a driver's license. (*Id.* at p. 1308.) The officer believed that the license "had someone else's picture on it" and requested a second piece of identification. At that point, the passenger's side door opened, a gun swung out, and the defendant shot the officer. (*Ibid.*) In an out-of-court statement the defendant maintained, "I was trying to get out of the car because I had a warrant violation, and the damn cop starts shooting me, not the other fellow." (*Id.* at p. 1309.) Based on the defendant's testimony, the Court of Appeal held that a reasonable juror could have concluded that defendant had no criminal intent in acting as he had when the shotgun discharged. The court therefore ruled, "the trial court was obligated to instruct the jury sua sponte on the defense of accident and misfortune." (*Id.* at p. 1314.)

A number of problems exist with *Jones*. First, as the opinion does not discuss the testimony of the defendant, in its entirety, it is impossible to determine if the defendant's testimony cast him as morally entirely innocent, a victim of misfortune. (See *People v. Jones*, *supra*, 234 Cal.App.3d at pp. 1307-1310, 1314.) The sole piece of potentially exculpatory evidence noted in the opinion is the defendant's out of court statement, "I was trying to get out of the car because I had a warrant violation, and the damn cop starts shooting me, not the other fellow[.]" (*Id.*

at p. 1309.) Significantly, the opinion fails to offer any analysis as to its conclusion that "the trial court was obligated to instruct the jury sua sponte on the defense of accident and misfortune[.]" (*Id.* at p. 1314.) Rather, the Court of Appeal concluded, without examining the relevant law, that "because a reasonable juror could have concluded, were defendant believed, that defendant had no criminal intent in acting as he had when the shotgun discharged" the trial court was obligated to instruct the jury sua sponte on the defense of accident and misfortune. (*Ibid.*) As such, even if *Jones* had interpreted Penal Code section 26 as appellant suggests, affording an evil actor engaged in a broad sinister plan the ability to attack the individual crimes constituting that actor's broader plan, for the reasons argued above and in respondent's opening brief on the merits, *Jones* would be incorrect as to its interpretation of Penal Code section 26.

In light of *Jones*, appellant posits two hypothetical scenarios. First, he supposes a fraudster is driving to the bank in order to deposit funds after defrauding someone when he becomes involved in a car crash. Second, he supposes a motorist is driving with marijuana in his trunk when he collides with another car, killing the driver. In both situations, appellant argues that the two drivers' previous crimes could not deprive them to the protections afforded by Penal Code section 26 as to the consequences of the traffic collisions. (AAB 23.) Respondent concurs with this result, but disagrees with appellant's reasoning.

The purpose of appellant's two hypothetical examples is to illustrate his proposition that "if the act causing the collision occurs through accident rather than through an intentional act, defendant is not responsible for the consequences of that act." (AABM 23.) Appellant's reasoning is defective for several reasons. First, his legal proposition is tautological as it defines an accidental collision as just that, accidental. Second, the two hypothetical examples provided to illustrate the legal proposition are inapposite because

there exists no causal connection between the hypothetical actors' evil designs and the harm caused by the collisions. Indeed, for each driver to have possessed an evil design at the moment of his or her crash, there must have existed a causal connection between the crash and the crime. For example, if each hypothetical actors' driving, just as appellant's driving here, had been motivated by his or her desire to escape, a causal connection would exist between the crash and the crime.

As this Court explained in *People v. Gomez* (2008) 43 Cal.4th 249, even though an actor may complete a theft, "at any time during the period from caption through asportation" if the thief "uses force or fear in resisting attempts to regain the property," the theft crime will elevate to robbery. (*Id.* at pp. 258-259.) Accordingly, there exists a causal relationship between the defendant's theft of the property and his or her actions designed to retain that property from recapture.

Such a causal relationship is similar to the casual relationship studied by Sir Mathew Hale three centuries ago when examining the principle of accident. If an actor is "doing an unlawful act, though not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him; this is felony and homicide and not per infortunium; for the act was voluntary, though the event not intended; and therefore the act itself being unlawful, he is criminally guilty of the consequence, that follows." (Hale, *Historia Placitorum Coronae*, *supra*, at pp. 38-39.) The reasoning employed by Hale dictates that appellant's hypothetical drivers should not be denied the protection presented by Penal Code section 26 as the consequences of each driver's driving was unrelated to the commission of that driver's completed crime. There was no causal relationship.

However, unlike the two hypothetical drivers, appellant's driving constituted a continuous part of his criminal endeavor. According to his own testimony, he broke into the victim's car in order to steal it and was

eagerly awaiting an escape opportunity. According to his own testimony, appellant accelerated the victim's car through the gate at first chance, in reckless disregard of what lay on the other side. Appellant's testimony established that the purpose for his action was to reach a place of safety. Simply put, there was a direct and immediate causal relationship linking appellant's criminal endeavor and his act of running over the victim.

For purposes of illustrating the inapplicability of Penal Code section 26 to the admittedly evil actor, consider a hypothetical actor who commits a sex crime against a child while wearing a frighteningly graphic devil suit. Subsequently, upon being charged with a Penal Code section 288, subdivision (b)(1) violation, (requiring that the prosecution prove "use of force, violence, duress, menace, or fear"), the defendant testifies that, although he touched the child inappropriately and did so to fulfill his perverse sexual desires, he meant for the devil suit to be fun for the child and did not mean for it to cause the child fear or duress such that any fear or duress experienced by the child was purely accidental. All of the actions of this hypothetical actor were entirely intentional. The proposition that the actor's ability to rebut the fear or duress element of the charged crime, as based on his "accident" theory, must allow the actor to be considered a "[p]erson[] [in]capable of committing crime[,]" pursuant to Penal Code section 26, is offensive to the law. (Pen. Code, § 26.)

Appellant further cites this Court's opinion in *People v. Acosta* (1955) 45 Cal.2d 538. He claims that *Acosta*, while not directly addressing the issue, impliedly supports the position that "for purposes of the defense of accident, the court does not look to defendant's criminal intent or conduct that gave rise to the immediate predicament, but solely to his intent with respect to the act that is the basis of the charged crime." (AABM 27.) Respondent disagrees. *Acosta* supports the conclusion that "accident incapacity" is available exclusively to those who are entirely innocent.

In *Acosta*, as discussed in respondent's opening brief, the driver of a cab and the defendant, a passenger, became embroiled in a scuffle. (*People v. Acosta*, *supra*, 45 Cal.2d at pp. 539-540.) The driver jumped out of the cab and the defendant's effort at regaining control of the cab failed as it smashed into another car, killing the occupants. (*Id.* at pp. 5410-541.) As appellant notes, the Court "found it unnecessary to resolve whether defendant was at fault of instigating the assault, thereby causing the driver to leave the taxi, which is what created the peril." (AABM 26.) Indeed, given Acosta's defense that the peril was entirely the fault of an unscrupulous cabdriver, the question of fault permitted only two conclusions, either the defendant caused the problem such that he was *not* morally entirely innocent or the cabdriver caused the problem, in which case the defendant *was* morally entirely innocent. *Acosta* supports the position that, for purposes of application of the Penal Code section 26 accident incapacity, a defendant's conduct giving rise to his or her immediate predicament must be considered for purposes of determining if that defendant possessed an evil design or was morally entirely innocent such that he or she was incapable of committing crime.

Next, appellant asserts that the "escape rule," which holds that "a robbery or theft continues until the defendant has taken the loot to a place of temporary safety" (AABM 27, citing *People v. Gomez*, *supra*, 43 Cal.4th at p. 255), should not be applied for purposes of determining whether appellant possessed an "evil design" when he drove the victim's car over the victim. (AABM 29.) Appellant contends that the evil mental state he exhibited when breaking into the victim's car should not be deemed to still exist at that moment in time in which he actually struck and killed the victim. (AABM 28.) Appellant's assertion is unrealistic: He was leaving the parking lot in order to take the car from its owner. Moreover, the escape rule does not examine the quality of the robber's mental state as it

might exist through the different steps required to commit a robbery. Rather, it entails the causal relationship that exists between an actor's theft and his act of getting away with the loot. The escape rule logically supports the conclusion that appellant ran over the victim during the commission of the crime of robbery.

In *People v. Gomez*, *supra*, 43 Cal.4th 249, this Court affirmed that a taking is not over at the moment of caption as it continues through asportation, and that a robbery can be accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away. (*Id.* at p. 256, citing *People v. Anderson* (1966) 64 Cal.2d 633.) "Therefore, to determine the duration of a robbery, the focus must be on its final element, asportation." (*People v. Gomez*, *supra*, at p. 256.) Appellant's suggestion that the intent he harbored when he began the theft of the victim's car constitutes a "prior" criminal intent irrelevant to the question of whether he possessed an evil design at that moment in time in which he drove the victim's car over the victim (AABM 27) ignores reality as well as the principle that "[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." (*Id.* at p. 255; see *People v. Estes* (1983) 147 Cal.3d 23, 28.) Indeed, "[t]he crime is not divisible into a series of separate acts. Defendant's guilt is not to be weighed at each step of the robbery as it unfolds" (*People v. Estes*, *supra*, at p. 28.) Here, appellant was well into, but had not yet completed, the "continuing offense" of robbery, when he ran over the victim, killing her. (*Ibid.*) Appellant's evil design, relevant to the application of Penal Code section 26 "accident incapacity" should not be "artificially pars[ed]" depending on which element of the crime he was presently accomplishing. (See *People v. Gomez*, *supra*, at p. 254.)

Appellant's proposition that he did not possess an "evil design" when he ran over the victim further ignores the jury's determination that at the very moment appellant ran the victim's stolen car over the victim, he *did have an evil mindset*, as he possessed the mens rea necessarily required for the jury to reach its guilty verdict as to robbery. (2 CT 300 [CALCRIM 1600, Robbery].) The "statutorily defined mens rea of robbery" is the "intent to steal[.]" (*People v. Tufunga* (1999) 21 Cal.4th 935, 939 [discussing the claim of right of defense to robbery].) Simply stated, appellant's argument that he did not possess an "evil design" when he killed the victim is not supported by his trial testimony admissions or by the jury's verdict. Given these two points, the proposition that appellant was, as a matter of law, "[in]capable of committing crime" (Pen. Code, § 26) lacks merit.

To further support his position that his "evil state of mind in other respects" is immaterial to the application of Penal Code section 26, appellant cites Penal Code section 20, which requires the "union, or joint operation of act and intent" as to crimes. (AABM 21-22, citing Penal Code section 20.) Appellant claims that the protection embodied by his interpretation of section 26, (accident negates intent) "is merely an application of Penal Code section 20," which "requires the 'union, or joint operation' of act an intent." (AABM 21-22.) Respondent disagrees that these two legal principals serve the same purpose.

Appellant's attempt to link Penal Code sections 20 and 26 exposes a defect in his argument. Section 20 encompasses the principle that "in the absence of criminal intent, either in fact or in law, no one could be guilty of the commission of a criminal act." (*People v. Howell* (1924) 69 Cal.App. 239, 245, citing Penal Code section 20.) Accordingly, section 20 affords a criminal defendant the very protection which appellant demands from section 26. A criminal actor, pursuing a broad criminal design,

encompassing many crimes, may attack and defeat any individual crime utilizing section 20 (evidence negating criminal intent as to a particular act) without regard to that actor's greater evil design. Simply put, no matter how evil the actor, section 20 demands that the intent element of each crime be proven by the prosecution independently. On the other hand, section 26, seeks to protect the morally entirely innocent, who acts only by accident, as a "[p]erson[] [in]capable of committing crime." (Pen. Code, § 26.)

Appellant's suggestion that a Penal Code section 26 "accident" is simply a negation of the required intent of the charged crime (AABM 20) is unsound because it unfairly proposes an interpretation of section 26 that would make it redundant with section 20. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 114 ["Wherever reasonable, interpretations which produce internal harmony, avoid redundancy, and accord significance to each word and phrase are preferred. [Citation.]"]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230-231; *Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212 [statutes must be harmonized with each other whenever possible].) Based on the lengthy history and origin of section 26, as discussed above and in respondent's opening brief on the merits, section 26 - which plainly provides a list of those "[p]ersons [in]capable of committing crimes"- is more reasonably interpreted as affording protection to the morally entirely innocent and not to the admittedly morally corrupt whose actions happen to cause a consequence which that corrupt actor would not prefer. As is discussed below, if appellant wished for a pinpoint instruction, utilizing specific facts to amplify the "use of force" element of robbery he was required to request it. He did not. Appellant's request that this Court redefine and dramatically expand Penal Code section 26 must be declined.

B. If Anderson Wished For A Pinpoint Instruct Further Defining The Force Element Of Robbery, He Was Required To Request It

Appellant does not contest that he possessed the traditional mental element, i.e. intent to steal, required for robbery. Notwithstanding, he argues that "accident is a defense insofar as it negates the intent [to use force] element of the charged crime, regardless of defendant's 'evil' state of mind in other respects." (AABM 21.) As discussed above, given appellant's admittedly guilty mind (or, as he characterizes it, his "evil state of mind in other respects"), the trial court was not permitted, sua sponte or otherwise, to instruct the jury that appellant was a "person[] incapable of committing crime." (Pen. Code, § 26.)

However, while a culprit admittedly committing theft may not simultaneously be cast as a person incapable of committing crime as defined by Penal Code section 26, appellant was free to request that the trial court further instruct the jury as to the element of robbery requiring a taking "by . . . force."

With regard to the robbery charge, the jury was instructed that, in order to find appellant guilty, it was required to first find that he "used force or fear to take the property[.]" (2 CT 300.) In his closing argument, appellant's trial counsel specifically argued that appellant's collision with the victim was inadvertent:

"And as [the victim] appeared suddenly in front of [appellant] 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." (6 RT 1075.) Although appellant was not entitled

to have the jury instructed as to accident within the meaning of Penal Code section 26, nothing prevented him from requesting from the trial court a pinpoint instruction discussing the relationship between the "force" element and evidence of the defendant's claimed inadvertent physical contact with the victim. A trial court does not have a sua sponte duty to give a pinpoint instruction. (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

In any event, even such a pinpoint instruction would have been properly rejected by the trial court. As this Court has previously determined, jurors are capable of understanding the meaning of the term "force" *without* an expanding instruction. For example, in *People v. Anderson* (1966) 64 Cal.2d 633, the defendant informed a pawn shop clerk that he wished to purchase a rifle and ammunition. The clerk freely handed the items to the defendant. (*Id.* at p. 635.) The defendant immediately loaded the weapon, aimed it at the clerk, and told the clerk that he intended to kill him. (*Id.* at p. 636.) At trial the defendant contended that he had not obtained possession of the rifle by force and was therefore entitled to have the jury provided with, inter alia, an amplified instruction defining the "requisite force" element of robbery. (*Id.* at pp. 638-639.) Just as here, the defendant did not "challenge the content of the robbery instructions given, nor did he request any additional instructions at the trial." (*Ibid.*)

This Court disagreed that the defendant was entitled to an expanding instruction. The Court stated that "the law is settled that when terms have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning are not required." (*People v. Anderson*, *supra*, 64 Cal.2d at p. 639.) The Court further provided that the term "force" as used in the definition of the crime of robbery "ha[s] no technical meaning peculiar to the law and *must be presumed to be within the understanding of jurors*." (*Id.* at p. 640, emphasis added.) Further, the standard CALCRIM 1600 instruction for

robbery has been found to "adequately explain" the crime of robbery, including the principle that "that the defendant must apply the force for the purpose of accomplishing the taking." (See *People v. Bolden* (2002) 29 Cal.4th 515, 556 [citing CALJIC No. 9.40, the predecessor to CALCRIM 1600].) The *Anderson* and *Bolden* opinions rebut appellant's assertion that jurors are incapable of comprehending "the mental state required for the use-of-force element of robbery[.]" (AABM 36.) Indeed, an actor's use of "force" is defined: "To compel through pressure or necessity" and "to inflict: to impose." (Webster's II New College Dict. (1995) p. 437, col. 1.) So too here, the jurors should be presumed to have understood the plain meaning of the term "force."

As discussed, appellant's trial counsel argued to the jury that appellant's inadvertent collision into the victim had not been an act of force, but rather had been a "clearly unintentional" occurrence. (6 RT 1075.) Not only is it "presumed" that the meaning of the term "force" was within the understanding of the jurors, (*People v. Anderson*, *supra*, 64 Cal.2d at p. 640), it is also "presumed" that the jurors discharged their duty faithfully and followed the court's instructions. (*Zafiro v. United States* (1993) 506 U.S. 534, 540 [122 L.Ed.2d 317, 113 S.Ct. 933]; *People v. Martinez* (2010) 47 Cal.4th 911, 957.) As stated, if appellant wished to have the jury instructed as to the dictionary meaning of the term "force," for purposes of assuring that the jury understood its plain meaning, he was required to request it. He did not.

Appellant further claims that the felony murder instruction, which provided that a guilty verdict could be reached even if the victim's death occurred by accident, created confusion as to the robbery instruction because "accident was a defense to robbery even though it was not a defense to felony murder." (AABM 35; 2 CT 290 [CALCRIM 540A].) Initially, as discussed above, the Penal Code section 26 "accident

incapacity" theory was not applicable to the robbery charge given appellant's evil design. In addition, appellant's argument fails because the felony murder instruction specifically admonished the jury that before reaching a guilty verdict as to felony murder, it was first required to find that appellant committed robbery. (2 CT 290.) As to the robbery determination, the felony murder instruction provided, "[t]o decide whether the defendant committed or attempted to commit robbery, please refer to the separate instructions that I will give you on that crime." (2 CT 290.) It is presumed that the jury followed the trial court's instruction. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 957.)

II. EVEN IF INSTRUCTIONAL ERROR OCCURRED, IT WAS HARMLESS

Even if the trial court was required to instruct the jury sua sponte as to the Penal Code section 26 "accident incapacity," or as to any other relevant use of accident evidence, its failure to do so was harmless. Appellant's reliance on *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, for purposes of supporting his argument that he was denied the opportunity to negate an element of the robbery charge such that his federal right to due process was violated, is misplaced. (AABM 42-43.) As appellant notes, *Sayetsitty* indicates that when a state legislature permits a defense, a defendant is entitled to have the jury consider that defense in order to determine whether the prosecution has proved all elements of the charged offense. (AABM 43.) As discussed, here, Penal Code section 26 is not a "defense." Rather, it is simply a list of those persons the Legislature, some 138 years ago, determined "[in]capable of committing crimes." (Pen. Code, § 26.)

However, even if the trial court committed instructional error constituting a violation of appellant's federal due process rights, so as to

trigger the stringent *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824] standard of review, the error still was harmless.

Appellant's argument, that it can not be determined beyond a reasonable doubt that he used force or fear to take the property (AABM 45-49), ignores a fundamental detail - even casting aside the circumstances leading up to the collision, the evidence reasonably supports the conclusion that appellant was aware of the victim *before* he ran her down. (5 RT 880 [Appellant's testimony: "I just seen her -- seen her there and she had her phone in her hand"], accord 5 RT 858.) Appellant "noticed [the victim] looking at [him]." (5 RT 880.) On direct examination, appellant's testimony further established that enough time existed between his recognition of the victim's presence and the collision for him to take evasive action. (5 RT 858-859 ["I wanted to miss her. I didn't think I had enough time to stop so I swerved to the left"].) Moreover, appellant's testimony established that he was aware of his application of force *as he applied it*. Appellant testified that he "felt like" he ran something over and conceded that the victim "wasn't standing anymore" after he rolled over her. (5 RT 908.) In addition to his visual observations, appellant admitted that he "heard something hit the car." (5 RT 988.)

As discussed above, to force is commonly defined as "to inflict" or "impose." (Webster's II New College Dict. (1995) p. 437, col. 1.) Appellant's trial testimony establishes beyond a reasonable doubt that that *when he was imposing the victim's stolen car upon the victim's body, he was aware of it*. Had appellant, upon becoming aware of the victim, immediately stopped the car, his inadvertency argument might be more persuasive. But he did not. Rather, upon becoming aware of the victim's presence, he made efforts to escape from her. Moreover, appellant capitalized on this application of force by fleeing with the car, attentive to the fact that his application of force had effectively neutralized the victim.

(See 5 RT 908.) Appellant's argument cannot escape the fact that he knew he struck the victim and that he took advantage of that force to escape with the car.

CONCLUSION

For the reasons stated in its opening brief on the merits, and in this reply, respondent respectfully requests this Court reverse the Court of Appeal's judgment below and affirm the jury's verdict.

Dated: February 24, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief on the Merits uses a 13 point Times New Roman font and contains 5,980 words.

Dated: February 24, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

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 February 24, 2010, I served the attached respondent's reply brief on the merits 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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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 24, 2010, at San Diego, California.

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Declarant

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