

COPY

SUPREME COURT COPY

**SUPREME COURT
FILED**

FEB 1 - 2010

Frederick K. Ohrlieh Clerk

SUPREME COURT OF CALIFORNIA

Deputy

PEOPLE OF THE STATE)	No. S175351
OF CALIFORNIA,)	
)	(Fourth Appellate District,
Plaintiff and Respondent,)	Div. 1, No. D054740)
)	
v.)	(Riverside County
)	Superior Court No. RIF113459
PAUL D. ANDERSON,)	(Hon. Richard Couzens, Judge))
)	
Defendant and Appellant.)	
)	

APPELLANT'S ANSWER BRIEF ON THE MERITS

Richard A. Levy (SBN 126824)
21535 Hawthorne Blvd., Suite 200
Torrance, CA 90503-6612
(310) 944-3311

Appointed counsel for
Paul Anderson

SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE) No. S175351
OF CALIFORNIA,)
) (Fourth Appellate District,
Plaintiff and Respondent,) Div. 1, No. D054740)
)
v.) (Riverside County
) Superior Court No. RIF113459
PAUL D. ANDERSON,) (Hon. Richard Couzens, Judge))
)
Defendant and Appellant.)
_____)

APPELLANT'S ANSWER BRIEF ON THE MERITS

Richard A. Levy (SBN 126824)
21535 Hawthorne Blvd., Suite 200
Torrance, CA 90503-6612
(310) 944-3311

Appointed counsel for
Paul Anderson

TABLE OF CONTENTS

Table of Authorities.....	iv
STATEMENT OF THE CASE.....	1
I. Procedural history	1
II. Statement of facts	3
A. Anderson’s theft of the car and the collision as he drove out of the apartment complex	3
B. Anderson’s subsequent actions and statement	10
C. Defense case	12
ARGUMENT	15
I. The trial court erred as to count 2 for robbery in failing to instruct sua sponte on the defense of accident	15
A. The court erred	15
B. Response to the People’s arguments.....	19
1. The fact that Anderson had been engaged in criminal conduct does not preclude the defense of accident	19
2. The instruction was required sua sponte	33
II. The error was prejudicial on count 2 for robbery and hence on count 1 for murder because the jury may have relied solely on the theory of robbery felony murder	40
A. Standard for evaluating prejudice	40
B. The error was prejudicial on count 2 for robbery	45
C. The error was also prejudicial on count 1 because the jury	

may have relied solely on the theory of felony murder based upon robbery 50

III. In the event this Court finds no sua sponte obligation to instruct on accident, the case should be remanded to the Court of Appeal for resolution of the remaining issue of ineffective assistance of counsel in failing to request such an instruction..... 54

CONCLUSION..... 55

TABLE OF AUTHORITIES

Cases

<u>Bradley v. Duncan</u> (9th Cir. 2002)	
315 F.3d 1091	41
<u>Everette v. Roth</u> (7th Cir. 1994)	
37 F.3d 257	42
<u>In re Christian S.</u> (1994)	
7 Cal.4th 768.....	29, 30
<u>Mathews v. United States</u> (1988)	
485 U.S. 58.....	43
<u>Middleton v. McNeil</u> (2004)	
541 U.S. 433.....	44
<u>People v. Abilez</u> (2007)	
41 Cal.4th 472.....	33
<u>People v. Acosta</u> (1955)	
45 Cal.2d 538	25, 26, 27, 38
<u>People v. Attema</u> (1925)	
75 Cal.App. 642.....	31
<u>People v. Baker</u> (1954)	
42 Cal.2d 550	34, 35
<u>People v. Bolden</u> (2002)	
29 Cal.4th 515.....	16, 19
<u>People v. Boss</u> (1930)	
210 Cal. 245	28
<u>People v. Boulware</u> (1940)	
41 Cal.App.2d 268	30, 31
<u>People v. Brucker</u> (1983)	
148 Cal.App.3d 230	32
<u>People v. Castillo</u> (1997)	
16 Cal.4th 1009.....	34
<u>People v. Cervantes</u> (2001)	
26 Cal.4th 860.....	22
<u>People v. Chun</u> (2009)	
45 Cal.4th 1172.....	50
<u>People v. Cooper</u> (1991)	
53 Cal.3d 1158	28, 29
<u>People v. Corning</u> (1983)	
146 Cal.App.3d 83	40
<u>People v. DePriest</u> (2007)	
42 Cal.4th 1.....	37

<u>People v. Dominguez</u> (2006)	
39 Cal.4th 1141	37
<u>People v. Estes</u> (1983)	
147 Cal.App.3d 23	17
<u>People v. Failla</u> (1966)	
64 Cal.2d 560	45
<u>People v. Gomez</u> (2008)	
43 Cal.4th 249.....	27
<u>People v. Gonzales</u> (1999)	
74 Cal.App.4th 382	15, 16, 32, 33, 40
<u>People v. Gorgol</u> (1953)	
122 Cal.App.2d 281	39
<u>People v. Green</u> (1980)	
27 Cal.3d 1	16, 19, 22, 23
<u>People v. Gutierrez</u> (2009)	
45 Cal.4th 789.....	36
<u>People v. Hall</u> (1986)	
41 Cal.3d 826	16
<u>People v. Heath</u> (1989)	
207 Cal.App.3d 892	38
<u>People v. Humphrey</u> (1996)	
13 Cal.4th 1073.....	42
<u>People v. James</u> (2000)	
81 Cal.App.4th 1343	46
<u>People v. Jenkins</u> (2006)	
140 Cal.App.4th 805	52
<u>People v. Jones</u> (1991)	
234 Cal.App.3d 1303	15, 16, 23, 24, 25, 27, 31, 33
<u>People v. Lara</u> (1996)	
44 Cal.App.4th 102.....	20, 21, 25, 27, 31, 32, 33, 48
<u>People v. Lawrence</u> (2000)	
24 Cal.4th 219.....	28, 29
<u>People v. Martinez</u> (1995)	
11 Cal.4th 434.....	21
<u>People v. Mayberry</u> (1975)	
15 Cal.3d 143	37
<u>People v. McCullough</u> (1979)	
100 Cal.App.3d 169	21
<u>People v. Mendoza</u> (1998)	
18 Cal.4th 1114	34

<u>People v. Meneses</u> (2008)	
165 Cal.App.4th 1648	38
<u>People v. Nelson</u> (1960)	
185 Cal.App.2d 578	49
<u>People v. Nguyen</u> (2000)	
24 Cal.4th 756.....	50
<u>People v. Penny</u> (1955)	
44 Cal.2d 861	48
<u>People v. Rodriguez</u> (1961)	
186 Cal.App.2d 433	22
<u>People v. Rogers</u> (2006)	
39 Cal.4th 826.....	35
<u>People v. Saille</u> (1991)	
54 Cal.3d 1103	35
<u>People v. Salas</u> (2006)	
37 Cal.4th 967.....	40
<u>People v. Sanchez</u> (2001)	
26 Cal.4th 834.....	22
<u>People v. Searle</u> (1917)	
33 Cal.App. 228.....	31
<u>People v. Tanner</u> (1979)	
95 Cal.App.3d 948	33
<u>People v. Thurmond</u> (1985)	
175 Cal.App.3d 865	32
<u>People v. Valdez</u> (2004)	
32 Cal.4th 73.....	42
<u>People v. Watson</u> (1981)	
30 Cal.3d 290	53
<u>People v. Whisenhunt</u> (2008)	
44 Cal.4th 174.....	45
<u>People v. Wilson</u> (2005)	
36 Cal.4th 309.....	38
<u>Stark v. Hickman</u> (9th Cir. 2006)	
455 F.3d 1070.....	46
<u>Taylor v. Kentucky</u> (1978)	
436 U.S. 478.....	46
<u>Tomlinson v. Kiramidjian</u> (1933)	
133 Cal.App. 418.....	48
<u>United States v. Sayetsitty</u> (9th Cir. 1997)	
107 F.3d 1405	43

Statutes

Pen. Code, § 20 22, 23
Pen. Code, § 26 15, 19, 20, 21, 22, 24, 29, 30, 32, 38, 48
Pen. Code, § 187 1
Pen. Code, § 192 53
Pen. Code, § 211 1, 16
Pen. Code, § 496 1
Pen. Code, § 654 2
Pen. Code, § 1259 45
Pen. Code, § 1469 45

Constitutional Provisions

Cal. Const., 6th Amend. 40, 42
Cal. Const., 14th Amend. 40, 42, 43

Other Authorities

CALCRIM No. 1000 37
CALCRIM No. 1600 36
CALCRIM No. 3404 15, 20, 32, 33, 48
CALCRIM No. 510 15

STATEMENT OF THE CASE

I.

Procedural history

In this special-circumstance murder case, defendant Paul Anderson was charged by information with three counts arising out of a single incident:

COUNT 1: Murder (Pen. Code, § 187) of Pamela Thompson, with the special circumstance of murder in the commission or attempted commission of robbery (Pen. Code, § 211) (Pen. Code, § 190.2, subd. (a)(17));

COUNT 2: Robbery of Thompson; and

COUNT 3: Receiving stolen property (Pen. Code, § 496, subd. (a)).

(CT (1) 148-49.)

The jury found it necessary to deliberate for about a day and a half and to interrupt its deliberations to ask two questions of law. (CT (1) 249-53.) Ultimately, however, the jury found Anderson guilty as charged on all three counts, and found the special circumstance to be true. (CT (1) 253-54; CT (2) 330-34; RT (6) 1107:11-1108:6.)

The court sentenced Anderson to imprisonment for life without possibility of parole plus three years, calculated as follows:

COUNT 1 (murder): The prescribed term of life

without possibility of parole for special-circumstance murder;

COUNT 2 (robbery): A stayed term (Pen. Code, § 654); and

COUNT 3 (receiving stolen property): A consecutive term of the upper term of three years.

(CT (2) 335-36; CT (2) 343-46; RT (6) 1120:9-27.)

The Court of Appeal reversed the conviction on count 1 (murder) and count 2 (robbery), but affirmed the conviction on count 3 (receiving stolen property). (See Opn. at 32.) This Court granted the Attorney General's petition for review, specifying the issues as follows:

The parties will address whether defendant was entitled to sua sponte instruction on accident as a defense to robbery, and if so, was the court's failure to so instruct prejudicial.

(Order filed October 14, 2009.)

II.
Statement of facts

This LWOP felony-murder case arose when defendant Anderson, who had just stolen a car in an apartment complex and was driving out the gate, struck and killed the owner of the car, who had run to the other side of the gate when she saw that her car was missing. The following facts are either undisputed or viewed in the light most favorable to the judgment, except where specifically noted.

A. Anderson's theft of the car and the collision as he drove out of the apartment complex.

Anderson, who was 31 at the time of the crimes in November 2003, was a methamphetamine addict. (RT (5) 829:13-21; (5) 835:6-11; (5) 886:19-20.) Although he had successfully obtained certification as an emergency medical technician after a two-year community college course, he repeatedly relapsed in his addiction, and had been in rehab four times. (RT (2) 380:21-22; (5) 827:28-828:15; (5) 830:8-831:4.) He had been separated from his wife since early 2001 because of her displeasure over his drug use, but he occasionally visited her and their two children, and they reconciled for short periods. (RT (5) 827:15-27; (5) 919:15-920:22; (5) 937:23-938:12.) He had no home; sometimes he lived on the streets, and sometimes he spent nights at the homes of friends who were also meth users. (RT (2) 296:27-297:8; (2) 298:26-299:2; (2) 315:20-25; (2) 333:28-334:4; (2) 383:7-15; (5)

836:1-11.)

He got money to buy drugs through low-level crimes. At least once before committing the charged crime, he had used a shaved key (which he had filed down himself) to steal a car. (RT (2) 258:4-10;; (4) 601:14-23; (5) 837:2-26.) He would also use a shaved key or a broken piece of a spark plug (to break the car window without making noise) in order to get into a car and steal the stereo or other valuables. (RT (2) 257:21-258:10; (4) 689:8-15; (4) 723:11-726:24; (5) 961:27-964:3.) He used stolen credit cards and tried to pass forged checks. (RT (4) 699:13-701:3; (4) 728:13-729:9; (5) 837:27-839:11; (5) 840:3-12.) He also shoplifted. (RT (5) 840:13-14.)

He did not own a car. (RT (2) 238:18-19; (5) 847:9-10.) He relied on others to drive him to look for drugs or to take him to a place to stay for the night. (RT (2) 297:15-19; (5) 847:16-24.) In November 2003 he was passing his time at the homes of Cherie Drysdale, a meth user who had been his girlfriend years before, and Ginger Lyle (Ginger Maynard), another meth user, whose home was a hub of criminal activity involving drugs, stolen credit cards, and forged checks. (RT (2) 237:13-238:3; (2) 296:1-297:8; (2) 298:26-299:2; (2) 377:18-25; (2) 386:28-387:3; (5) 846:27-847:5.)

On the afternoon of Friday, November 7, 2003, Cherie Drysdale drove Anderson to Ginger Lyle's home in Riverside to get some meth. (RT (2) 236:22-25; (2) 238:6-13; (2) 390:15-391:9; (5) 850:19-25.) Lyle did not have any for him, but he ended up staying at the house, while Drysdale (angry that Anderson did

not bring her any meth after he had kept her waiting in the car) drove off. (RT (2) 392:5-393:19; (5) 850:26-851:24.)

Lyle was romantically interested in Anderson, but her boyfriend, Robert Sanchez, was staying with her. (RT (2) 235:25-237:10.) Toward evening, she and Anderson surreptitiously agreed to rendezvous at a nearby park in order to make plans to go to a friend's house or motel for a tryst. (RT (2) 239:10-24; (2) 240:24-241:1; (2) 242:11-24.) Lyle thought they would walk to the friend's house or motel, for she did not have access to a car at the time, and she knew that Anderson did not have a car. (RT (2) 242:28-243:9.) At the park rendezvous, however, Anderson either did not see her or did not want to come over because she was sitting with a female friend. (RT (2) 247:16-28; (2) 249:16-250:6; (5) 854:12-24.) He kept walking, and ended up a few blocks away at a large apartment complex. (RT (1) 42:14-44:22; (2) 250:13-251:7; exhibit 136.) He decided to steal a car. (RT (5) 853:23-854:11; (5) 855:4-12.)¹

The complex had eight apartment buildings, each with its own carport. (RT (2) 44:15-22; exhibit 124; exhibit 125; exhibit 126; exhibit 132.) The complex was surrounded by a fence, and there were two gates for cars to enter and exit: the south gate (at 3170 Canyon Crest) and the north gate (at 3130 Canyon Crest). (RT (1) 42:14-45:6; exhibit 103; exhibit 134.) Anderson hopped

¹ The prosecutor invited the jury to infer or speculate that he wanted a car so that he and Lyle could drive to their tryst. (RT (6) 1047:2-4 (opening summation).)

the fence and began looking for a car that one of his shaved keys would fit. (RT (5) 855:9-19.) He found that one of his keys worked on the 1993 Nissan Sentra belonging to murder victim Pamela Thompson. (RT (1) 23:27-24:8; (5) 855:25-856:4.) The Nissan was parked in her assigned carport space. (RT (1) 49:11-14; (1) 51:4-27; (5) 855:25-856:4.)

Thompson, age 19, lived with her stepfather in an upstairs apartment at the complex. (RT (1) 22:1-18; (1) 40:20-41:28; (1) 45:21-28.) Her mother lived one or two miles away. (RT (1) 23:11-13.) Thompson worked as a phone operator, and got off work at about 8 p.m. (RT (1) 127:2-6; (1) 128:2-7.) On November 7, as she drove home after work, she talked with her boyfriend by phone and arranged to visit him after stopping at her apartment to change clothes. (RT (1) 127:21-27; (1) 141:6-142:5.) She arrived home around 9 p.m., parked in her usual space, and, after locking the car door, ran upstairs to change. (RT (1) 26:12-17; (1) 68:2-4; (1) 71:22-25; (1) 73:21-74:2.) She had taken her keys with her to her apartment, but had left her purse in the car. (RT (1) 25:5-7; (1) 77:5-17; (1) 100:25-28; (4) 799:2-25; (5) 980:5-20.)

Meanwhile, Anderson used one of his shaved keys to open the door of the Nissan and turn on the ignition, and he drove it off. (RT (5) 824:7-825:9; (5) 855:27-856:10.) He tried to go out one of the gates, expecting it to open automatically when he got close. (RT (5) 856:11-22.) In that complex, however, the gates would not open automatically: in order to prevent car thefts, the management had set the system up to require motorists to use a remote control even to exit. (RT (1) 56:1-18.) Thompson's remote

control was on her key ring with her keys for the car and apartment, which she had taken upstairs with her. (RT (1) 68:5-69:5; (1) 77:15-17.) Anderson therefore backed into a parking stall and waited for another motorist to open the gate. (RT (5) 856:23-857:5; (5) 877:25-878:2.) He was parked about 30 yards from the south (3170) gate. (RT (2) 156:8-15; (5) 875:7-876:10; (5) 878:22-879:8.) He kept the engine running in order to make his escape as soon as a car came in or out. (RT (5) 876:16-27.)

When Thompson came downstairs, she saw that her car was gone. (RT (1) 25:5-7; (1) 73:25-74:2.) She phoned her stepfather (who was visiting a neighbor in the same building) and asked him if he had moved the car. (RT (1) 72:17-73:28.) (Her stepfather was sometimes frustrated with her because she often did not use her "Club" steering-wheel lock when she parked the car; and sometimes, to teach her a lesson, he would surreptitiously move her car to a different parking space in the complex. (RT (1) 66:23-68:1.)) When he told her he hadn't moved it, she told him it was stolen. (RT (1) 73:25-74:7.) She phoned her mother from her cell phone and told her she was out in the complex looking for her car. (RT (1) 24:28-26:11.)

A couple in the apartment complex, who were just above where Anderson was waiting for the gate to open, heard what happened next through the open window. (RT (2) 154:14-156:15; (1) 158:20-24 (Rudy Espinoza); (1) 178:20-179:13 (Anya Gonzalez).) The engine of the Nissan was running, just below them, but the car was not moving. (RT (1) 198:17-23.) Then a woman (evidently Thompson), who was standing close by, began

yelling, as if in an argument, but they could not make out what she was saying, and they did not hear any other voice. (RT (1) 157:15-158:16; (1) 179:24-180:26; (1) 198:24-199:2.) (The neighbors must have been hearing Thompson, distraught, speaking to her mother on the cell phone. (See RT (1) 25:10-26:3 (mother testifies that Thompson sounded “frantic” was “speaking loudly” as she told her she was out looking for her car).)²

Then the car accelerated. (RT (1) 159:11-16; (1) 199:6-14.) Thompson yelled out, “stop,” three times. (RT (1) 184:17-185:22.) This time the voice was by the gate. (RT (1) 185:19-186.3.) Thompson’s mother, who was listening in on the open phone line, heard Thompson say into the phone: “Oh, my God. Here comes my car real fast.” (RT (1) 26:28-27:2.)³

Just a few seconds later, the upstairs couple heard a loud thump, followed by the screeching tires of a car speeding away. (RT (2) 161:10-163:24; (2) 168:28-169:27; (2) 173:12-174:16; (2) 186:4-188:1.) Thompson had been struck by the Nissan in the

² Thompson could not have been arguing with or confronting Anderson at this time, for it was only sometime thereafter – when she was standing outside the gate – that she told her mother, “[h]ere comes my car real fast,” and was struck immediately thereafter. (See RT (1) 26:6-11; (1) 26:28-27:8; (1) 80:2-81:5; exhibit 134.) Thus, the first moment she saw the car was just before she was struck outside the complex.

³ It was only Anya Gonzalez who testified to hearing “stop.” Her boyfriend in the apartment, Rudy Espinoza, did not hear this. (RT (2) 160:20-27.) Thompson’s mother also did not hear this. (RT (1) 27:9-10.)

street just outside the gate. (RT (1) 80:2-81:5; exhibit 64; exhibit 65; exhibit 134 (showing location of the blood spot at placard 1, in the street just beyond the curb).) She fell to the ground, and Anderson drove the Nissan over her. (RT (4) 771:28-773:7 (according to pathologist, if she was dragged at all, it was only for a short distance); (4) 793:14-17 (pathologist determines from injuries that Thompson “traveled under the undercarriage of the car”); see also (3) 558:9-577:27 (oil or grease was on victim’s body, and undercarriage of the car had corresponding smears); (4) 747:15-754:4 (same); see (1) 71:3-9 (Nissan tended to leak oil).)

Thompson’s stepfather, still inside the apartment complex, phoned her mother moments later in order to get the information to report the car stolen. (RT (1) 77:23-78:5.) Her mother, who was in panic that she was not hearing anything on the line from Thompson, switched to the other line to answer, and told the stepfather to run out and try to find her. (RT (1) 27:14-28:22; (1) 78:6-18.) He found her outside the gate, wheezing heavily. (RT (1) 81:6-24; (1) 83:10-11.) When she stopped breathing moments later he administered CPR. (RT (1) 84:5-85:1.) Paramedics, who had been summoned by a passing bicyclist, arrived and took her to the hospital. (RT (1) 30:8-15; (1) 32:21-33:6; (1) 85:6-17; (1) 104:4-105:7; (1) 109:17-21.)

Thompson never regained consciousness. (RT (1) 33:24-34:20.) Three days later, after tests showed that she was brain dead, she was removed from life support with the family’s authorization and was pronounced dead. (RT (1) 34:5-13; (1) 99:9-100:5; (4) 803:7-11.) She died from multiple blunt-force

trauma. (RT (4) 794:8-10.) The pathologist could not estimate the speed of the car, except that it was going below 45 miles per hour. (RT (4) 791:20-792:19; (4) 794:27-795:6.) (At a higher speed, the victim would have been thrown away from the car, so that it would not have driven over her. (RT (4) 792:20-793:13.)) (This constituted **count 1** for murder and **count 2** for robbery.)

B. Anderson's subsequent actions and statement.

Anderson abandoned the car on a residential street less than a mile away. (RT (3) 483:27-484:3; (3) 529:24-530:14; (4) 809:20-25; (5) 862:8-9; exhibit 102A.) (DNA analysis showed that he had touched both the steering wheel and the gear shift. (RT (5) 822:16-823:22.)) He took Thompson's Visa check card and driver license and walked back to Ginger Lyle's house, a half mile away. (RT (4) 809:11-15; (5) 862:17-22; exhibit 102A.)

He went into the bathroom, washed his face, and came out to where Lyle and her boyfriend Sanchez were, seeming normal. (RT (2) 264:18-266:17.) Later that evening, he, Lyle, and two visitors, Lorita Polston and Angela Bransford, left in Polston's car to try to find some meth. (RT (2) 266:26-269:28; (2) 334:22-335:16.) After a long search that took them to Fontana, Rialto, and Ontario, and after dropping Bransford off at home, they obtained some meth and returned to Lyle's house, where they smoked the meth. (RT (2) 270:27-271:28; (2) 277:6-278:11; (2) 337:10-28; (2) 342:18-346:26.) The next day, Anderson left with Polston, after leaving a flirtatious note for Lyle. (RT (2) 278:26-280:17; (2) 346:27-347:24.) Polston eventually dropped him off at

Drysdale's house. (RT (2) 350:16-22.)

Over the next few days he repeatedly tried to use Thompson's check card. He successfully used it on November 8 at a gas station near Drysdale's house in Redlands. (RT (3) 403:18-405:19; (3) 490:10-491:18; (4) 623:2-27; exhibit 142, first page.) In the early morning of November 11 he unsuccessfully tried to use the card with a cab driver and at a gas station in Rialto. (RT (3) 446:3-16; (3) 450:9-451:7; (3) 454:4-18; (3) 457:2-27; (3) 492:7-493:2; (4) 624:22-625:13; (4) 706:10-707:15; (4) 711:9-18; exhibit 142, third page.) (The family had evidently canceled the card by then, for the printout showed that the card was inactive or closed. (Exhibit 142.)) He also unsuccessfully tried to use the card at a mini-mart on November 13. (RT (3) 492:17-24; (4) 626:8-627:4; exhibit 142, fourth page.)

On November 14, after interviewing Lyle and Drysdale and noting the locations where Anderson had attempted to use the check card, sheriff's detectives tracked him down to the home of Lorita Polston, where he was hiding inside a bedroom. (RT (3) 494:3-495:19; (3) 498:12-20; (4) 628:19-633:10.) He peaceably surrendered after deputies called his name. (RT (3) 498:25-499:1; (4) 633:3-10.)

Anderson identified himself as one Michael Mitchell. (RT (3) 499:19-26.) In his pocket were Thompson's check card and driver license. (RT (3) 500:13-502:21.) (He also had a driver license for one *Wesley* Mitchell. (RT (3) 501:4-18.)) (The possession of the cards a week after the robbery and homicide constituted **count 3** for receipt of stolen property.)

He was arrested and interrogated. (RT (5) 815:8-816:13.) He acknowledged that he had used the check card at “a few gas stations,” but insisted that it was his companion (David Ramos) who had proffered the card to the cab driver. (RT (5) 817:10-26.) He said he had gotten the card from one of the visitors to Ginger Lyle’s house. (RT (5) 818:21-819:8.) He denied any personal involvement in the robbery or homicide, but said he had heard from others “that a guy named Justin had run over a girl.” (RT (5) 820:1-821:24.)

At trial he conceded that he was not yet “in a safe spot inside that complex.” (RT (5) 905:1-5; see also (5) 876:16-21 (he was “stuck in that apartment complex” and “need[ed] an escape”); (5) 989:26-990:1 (he struck Thompson while he was engaged in an “attempt to flee the apartment complex”).)

C. Defense case.

Anderson testified on his own behalf. The jury evidently did not credit the evidence that the taking of the car was a theft, not a robbery, and that the homicide was involuntary manslaughter rather than robbery felony murder. (In summation Anderson conceded he was guilty of involuntary manslaughter. (RT (6) 1061:19-21.))

Anderson said he wanted a car in order to visit his wife and children in Alta Loma. (RT (5) 849:5-850:18; (5) 853:2-854:2.) He took Thompson’s Nissan by using a shaved key, and was waiting near the gate for another car to open it, so that he could leave the complex. (RT (5) 855:11-857:7.) He did not hear or see Thompson

or anyone else within the complex. (RT (5) 857:8-10.) When a car came in and the gate opened, he ducked down in the car so that the driver of the incoming car would not see him, and then, when it passed him by, he accelerated toward the gate, which was now beginning to close. (RT (5) 857:11-858:2; (5) 884:11-885:2.) His headlights were off. (RT (5) 891:11-12.)

His window was closed, and he did not hear anyone yelling. (RT (5) 884:7-10; (5) 876:28-877:14; (5) 981:14-18.) In this, he was partially corroborated by both Rudy Espinoza (in the apartment upstairs) and Thompson's mother. Neither of them heard Thompson yell out, "stop, stop, stop," though Espinoza did hear her shouting earlier. (RT (1) 27:9-10; (2) 157:15-158:16; (2) 160:20-27.) This suggests that Thompson's voice was not very loud, and hence not loud enough to penetrate a closed car with the engine running.⁴

Anderson made a sharp left to swing out of the closing gate and, once outside the gate, corrected to the right. (RT (5) 922:25-923:26; (5) 950:10-19.) Suddenly he saw Thompson standing just outside the gate, 10 to 12 feet from him, with her hand out as if to signal "stop." (RT (5) 858:16-25; (5) 869:1-28; (5) 879:15-881:3; (5) 899:9-16.) He had not been able to see through the gate to see if someone was beyond, and it appeared to him that she had just jumped out into his path, so sudden was her appearance. (RT (5)

⁴ He had told a prosecution interrogator, however, that he thought Thompson "might have been saying 'stop.'" (RT (5) 982:15-22.)

858:11-19; (5) 903:24-904:19; (5) 933:9-14; (5) 977:5-18.)⁵

He realized he could not stop in time, and therefore swerved hard left. (RT (5) 858:26-859:27; (5) 896:2-897:1.) He felt an impact, and feared that the right side of his car might have struck her when he swerved, but he also thought he might have felt only the bump from going off the curb. (RT (5) 859:9-23; (5) 908:4-909:3; (5) 912:12-913:4.) He did not stop because he was frightened at possibly having struck a pedestrian who happened to be walking on the sidewalk (as he thought). (RT (5) 860:15-861:22.) He had not intended to run over her. (RT (5) 866:11-14.)⁶

Anderson did not contest count 3 for receiving stolen property. In summation, his counsel conceded he was guilty on this count. (RT (6) 1080:28-1081:2.)

⁵ In an interview with a prosecution interrogator in 2004, however, he said that while he was waiting for the gate to open he could see a police car pass by on the street just outside the gate (RT (5) 973:24-975:14), which implies that he was able to see through the gate. He testified, however, that he only saw the lights of a car pass by, and in his paranoid state thought it was a police car. (RT (5) 870:27-871:13; (5) 881:20-25; see (5) 869:1-21 (date of interrogation).) In the same interrogation he said that Thompson actually jumped in front of the car. (RT (5) 933:9-14.) As noted above, he also said he thought Thompson might have been saying "stop," but at trial he said that he just assumed this because her hand was held out. (RT (5) 982:15-22.)

⁶ Anderson's credibility, however, was impeached by the fact that he had suffered several theft-related convictions from 1993 to 2002. (RT (5) 978:22-979:14.)

ARGUMENT:

I.

**The trial court erred as to count 2 for robbery in failing to
instruct sua sponte on the defense of accident**

A. The court erred.

Accident is a defense to a crime. (Pen. Code, § 26, ¶ 5 (exempting from criminal liability “[p]ersons 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”).) The court must instruct sua sponte on this defense if defendant relies on it or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant’s theory. (People v. Gonzales (1999) 74 Cal.App.4th 382, 389-91; People v. Jones (1991) 234 Cal.App.3d 1303, 1313-14.) The pattern instruction is CALCRIM No. 3404.⁷

Thus, in Gonzales, supra, the defendant’s girlfriend testified that during a quarrel, she ran into the bathroom and locked the door. (Id. at pp. 385-86.) When defendant kicked the door open, “the door struck her in the head, causing a bump on

⁷ For purposes of homicide, the pattern instruction is CALCRIM No. 510. Here, however, Anderson raises accident as a defense to robbery, not directly as a defense to homicide, so that CALCRIM No. 3404 is the appropriate instruction. If he was not guilty of an *Estes* robbery, he was not guilty of first-degree murder under the prosecutor’s theory of felony murder.

her forehead.” (Id. at p. 386.) She testified that defendant also pulled her hair, punched her in the nose, and hit her head against the wall. (Ibid.) At the preliminary hearing, however, she had testified that her only injury was caused accidentally, when defendant entered the room as she was leaving it. (Ibid.) The Court of Appeal reversed, holding that the trial court should have instructed sua sponte on accident. (Id. at pp. 389-90, 392.)

The determination whether sufficient evidence supports an instruction must be made without reference to the credibility of that evidence. (E.g., People v. Marshall, supra, 13 Cal.4th 799, 847.) Thus, for example, in Jones, supra, 234 Cal.App.3d at p. 1314, there was sufficient evidence warranting an instruction on accident even though that evidence was based solely on the defendant’s testimony.

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 (2002) 29 Cal.4th 515, 556; see also People v. Green (1980) 27 Cal.3d 1, 54 (“the act of force or intimidation by which the taking is accomplished in robbery must be motivated by the intent to steal”), overruled on other grounds in People v. Hall (1986) 41 Cal.3d 826, 834, fn. 3); Pen. Code, § 211 (“Robbery is the felonious taking . . . *accomplished by means of force or fear*”) (emphasis added).) Thus, in an *Estes* robbery, defendant’s use of force must be intentionally or purposefully directed toward retaining the property that he has stolen; mere accidental use of

force is insufficient:

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” for robbery

(People v. Estes (1983) 147 Cal.App.3d 23, 28 (emphasis added).)

If the collision was accidental or did not rise to the level of criminal negligence, the use of force was not “in furtherance” (Estes) of retaining possession, and hence was not a robbery.

Here, it was undisputed that no one was present when Anderson took the car, so that he could be guilty of robbery (and hence felony murder) only if he used force against Thompson in trying to retain possession of the car (an *Estes* robbery), rather than accidentally. Anderson squarely based his defense on accident. Thus:

And as she [Thompson] appeared suddenly in front of him without any warning and as he swerved to try to avoid her, this impact, 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 – the use of force to obtain or retain that car. . . . This is not a robbery. This is a theft of a car and a terrible accident.

(RT (6) 1075:4-15 (defense summation); see also, e.g., (6) 1080:22

(“And this was an accident, an accident, an accident”.)

There was indeed considerable evidence supporting this defense. Anderson testified that he waited in a parking stall about 30 yards from the gate, expecting that a car would eventually come in or out so that the gate would be opened for his escape. (RT (2) 156:8-15; (5) 856:23-857:5; (5) 875:7-878:2.) As soon as the gate opened, he accelerated and drove out, making a sharp swing to the left so that he would miss the gate (which had already begun to close), and then correcting to the right. (RT (5) 922:25-923:26; (5) 950:10-19.) It was only at that point, he testified, that he saw Thompson standing just outside the gate, eight to 12 feet from him. (RT (5) 858:16-25; (5) 869:1-28; (5) 879:15-881:3; (5) 899:9-16.) Realizing that he could not stop in time, he swerved hard to the left, hoping to avoid her. (RT (5) 858:26-859:27; (5) 896:2-897:1.) He repeatedly testified that he did not intend to strike her, and there was no evidence that he intended to scare her by barreling out of the apartment complex. (See, e.g., RT (5) 866:11-16; (5) 867:26-868:12; (5) 892:26-893:14.)

There was also evidence that Anderson, within the gated complex, would not have been able to see that a pedestrian stood outside the gate. The gate was largely opaque, especially at night. (See exhibit 127.) An independent observer, Anya Gonzalez (in the upstairs apartment 30 yards away) testified that she could not see through the gate to determine what happened after the collision. (RT (2) 188:14-19; see (2) 156:8-15 (distance).) Anderson, too, 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.)

Accordingly, both alternative triggers of the requirement for sua sponte instructions were satisfied: Anderson relied on the defense, and there was substantial evidence to support it and it was not inconsistent with his defense. The court therefore erred in failing to instruct sua sponte on accident.

B. Response to the People's arguments.

1. **The fact that Anderson had been engaged in criminal conduct does not preclude the defense of accident.** The People argue that Anderson was not entitled to the defense of accident because he harbored an "evil design" (Pen. Code, § 26), in that he had been engaged in stealing the car. (Resp. B. at 7, 13.) Whether he was actively engaged in an evil design with respect to the charged crime, however, depends on whether he used force to retain possession, rather than accidentally. If the force was accidental, there was no *Estes* robbery, for there was no use of force for the purpose of retaining possession. (See People v. Bolden, *supra*; People v. Green, *supra*.) If there was no *Estes* robbery at that time, or with respect to the collision, then there was no evil design in committing the act that caused the collision.

Thus, to argue that there was an evil design because Anderson was committing a robbery, so that the defense of accident would be unavailable, assumes the very fact in dispute, namely, that there was a robbery. There was no robbery and hence no evil design if the use of force was accidental, rather than a deliberate attempt to retain possession.

It is true that moments earlier Anderson did indeed harbor an evil design, for he had unlawfully taken Thompson's car. The evil design of section 26, however, refers to Anderson's state of mind in committing the act causing the collision, not in committing some anterior or other crime. That is, the issue is whether he struck Anderson accidentally or intentionally, not whether he was up to no good in some other respect.

This follows from the fact that accident is simply a negation of the required intent for the charged crime, as the People themselves elsewhere recognize. (Resp. B. at 20-21.) As the pattern instruction explains:

The defendant is not guilty of [the crime] 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 [the crime] unless you are convinced beyond a reasonable doubt that he/she acted with the required intent.

(CALCRIM No. 3404, first paragraph (internal brackets and signals omitted); see also People v. Lara (1996) 44 Cal.App.4th 102, 110.) If accident is a defense insofar as it negates the required mental element for the crime, defendant's mental state

in some other respect is irrelevant. A free-floating guilty conscience or evil design with respect to some other matter has no bearing on whether defendant acted intentionally or accidentally with respect to the mental element relevant to the charged crime.

It is true that the picturesque language of section 26 is susceptible to a broader interpretation. As the People's historical analysis shows, however, this language is archaic, going back more than a century and a half. (Resp. B. at 8-9.) The courts have not taken such language literally. In Lara, supra, 44 Cal.App.4th 102, the Court of Appeal held that culpable negligence was not relevant to the defense of accident involving a general-intent crime, even though Penal Code section 26 uses that specific phrase without any limitation. (Lara at p. 110.) Lara is hardly unusual in this respect. When faced with archaic words or phrasing in a statute, the courts have not hesitated to disregard them or reinterpret them in a manner different from their modern literal meaning. (See, e.g., People v. Martinez (1995) 11 Cal.4th 434, 449 ("In the first place, we have already recognized that the successive phrases of section 288 are archaic and logically redundant to some degree"); People v. McCullough (1979) 100 Cal.App.3d 169, 176 ("steals" for purposes of kidnapping does not have its modern literal meaning).)

Thus, accident is a defense insofar as it negates the intent element of the charged crime, regardless of defendant's "evil" state of mind in other respects. This is merely an application of Penal Code section 20. That section requires the "union, or joint

operation” of act and intent. (Pen. Code, § 20; People v. Rodriguez (1961) 186 Cal.App.2d 433, 436.) As this Court has explained: “Under section 20, the defendant’s wrongful intent and his physical act must concur in the sense that the act must be motivated by the intent.” (People v. Green, supra, 27 Cal.3d at p. 53.) Accordingly, that however evil a person defendant might be, or however evil his designs might be in other respects, if the act at issue (here, the act causing the collision) was not “motivated by the intent” (Green) to strike Thompson, but rather was accidental, then accident was a defense.

Even the archaic language of Penal Code section 26 obliquely corroborates that the focus is on defendant’s state of mind in committing the specific act causing the damage or injury, not on the bare fact that he harbored a guilty or evil state of mind with respect to some crime that was committed at the same time or sometime earlier. Section 26 exempts:

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.

(Pen. Code, § 26 (emphasis added).) The word *through* implies causation of the act or omission itself. (Cf. People v. Sanchez (2001) 26 Cal.4th 834, 849 (“If a jury finds that a defendant proximately caused a death, either solely *through* his own conduct or *through* the actions of others”) (emphasis added); People v. Cervantes (2001) 26 Cal.4th 860, 872, fn. 15 (“If the defendant proximately causes a homicide *through* the acts of an

intermediary and does so with malice and premeditation, his crime will be murder in the first degree”).) Accordingly, 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.

Thus, suppose a fraudster is driving to the bank after defrauding someone of his money, and collides with another car, killing the driver. In light of section 20 and People v. Green, whether or not the fraudster is guilty of a crime arising out of the collision depends entirely on his intent or negligence in committing the act that causes the collision; it is irrelevant that just moments earlier he had an evil design to defraud someone, or that he was even then carrying his illegal gains to the bank. Similarly, suppose a motorist is carrying marijuana in his trunk when he collides with another car, killing the driver. The fact that he was committing a crime (transporting illegal drugs) at the very moment of the collision does not deprive him of the defense of accident, for the act causing the accident was not “motivated by” (Green at p. 53) the criminal intent.

The cases impliedly confirm that the fact that defendant had just committed a crime or was committing a crime at the very moment of the charged act does not deprive him of the defense of accident. Thus, in People v. Jones, supra, 234 Cal.App.3d 1303, 1306-07, defendant violated his parole by moving to another county without permission. One day the police pursued the car in which he was a passenger. (Id. at p. 1307.) Defendant, who was carrying an illegal sawed-off shotgun, urged

the driver not to stop. (Ibid.) When the driver finally pulled over, defendant gave the officer a fake identification (a driver license with someone else's photo). (Id. at pp. 1307-08.) When the officer asked for more identification, defendant took out the shotgun and brandished it at the officer. (Id. at p. 1308.) The gun discharged and wounded the officer as he tried to knock the barrel away. (Ibid.) Defendant was charged with attempted murder, possession of a firearm by a felon, and possession of a sawed-off shotgun. (Id. at p. 1309.)

The defense to the attempted-murder charge was that the gun discharged accidentally when the officer struck it. (Id. at p. 1314.) On appeal, defendant accordingly argued that the trial court erred in failing to instruct sua sponte on accident. (Id. at pp. 1313-14.) The Court of Appeal agreed that the omission was error, but it found the error harmless. (Id. at pp. 1314-16.) Thus, the court impliedly recognized that the defense of accident was available even though defendant was in the course of committing several crimes involving an "evil design": he was at that very moment in possession of an illegal weapon; he was in illegal possession of a gun because he was a felon; he brandished the shotgun at the officer; he gave the officer a false identification; and he was in violation of his parole because he was out of the county without permission. Notwithstanding this cascade of contemporaneous criminal conduct, accident was a defense. Jones thus impliedly confirms that the "evil design" of section 26 refers solely to the intent with which the charged act (there, firing the gun) was committed, not to other crimes that defendant

had committed or was in the process of committing at the very same time.

Similarly, in People v. Lara, *supra*, 44 Cal.App.4th 102, 105, defendant's girlfriend ordered him to leave her house. As he gathered his belongings to leave, he took some money from her purse. (*Ibid.*) When she demanded her money back, he struck her. (*Ibid.*) He was charged with battery with serious bodily injury. His defense was that he had struck her accidentally. (*Id.* at p. 106.) The Court of Appeal reversed the conviction because the instruction on accident erroneously and prejudicially referred to criminal negligence as well as to intent, and because another instruction also referred to criminal negligence. (*Id.* at pp. 107-10.) Thus, as in Jones, Lara impliedly recognized that accident was a legitimate defense, even though the striking of the girlfriend took place in the immediate aftermath of one crime (taking the girlfriend's money without permission) and in the course of another crime (trespassing, that is, remaining in the girlfriend's house even though she had ordered him to leave).

This Court's opinion, People v. Acosta (1955) 45 Cal.2d 538, is consistent, though it does not directly address the issue. There, the prosecution evidence showed that the defendant, a passenger in a taxi, assaulted the driver with a clipboard and his hand, but the driver managed to jump out of the taxi while it was still running. (*Id.* at p. 540.) Defendant got into the front seat and drove off. (*Ibid.*) He collided with another car, killing two occupants. (*Id.* at pp. 539-40.) He was convicted of unlawfully driving or taking an automobile and two counts of manslaughter.

(Id. at p. 539.)

Defendant denied striking the driver with a clipboard. (Ibid.) He explained that when the driver jumped out of the car, he had no choice but to steer the car from the rear seat in order to avoid a collision. (Id. at pp. 540, 543.) On appeal, he argued that the court erred in denying his request for an instruction on accident. (Id. at p. 543.) This Court agreed and reversed the conviction. (Id. at pp. 543-44.) Notably, the Court found it unnecessary to resolve whether defendant was at fault for instigating the assault, thereby causing the driver to leave the taxi, which is what created the peril. Instead, the Court relied solely on defendant's actions in maneuvering the car:

Even if the jury disbelieved defendant's testimony that he did not get into the front seat, they still could have found that what appeared to others to be a "driving" of the car was not with intent to drive or take it but was the mere unintended, confused result of the peculiar situation in which defendant found himself. For example, the jury could have found that defendant tried to stop the car and through ignorance or mistake put his foot on the accelerator instead of the brake. In the state of the evidence defendant was entitled to his requested instruction as to accident or misfortune.

(Id. at pp. 543-44.) Acosta thus impliedly supports Anderson's 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.

In summary, the People's reliance on Anderson's "evil design" in taking the car is erroneous because all that matters is his state of mind when he struck Thompson – namely, whether he struck her accidentally or intentionally. This is impliedly shown by Jones, Lara, and Acosta, and it is consistent with the language of section 20. Neither Anderson's prior criminal intent in committing the car theft nor any free-floating evil design at the time of the collision is relevant.

Anderson's analysis is not affected by the "escape rule." Under that rule, a robbery or theft continues until the defendant has taken the loot to a place of temporary safety. (E.g., People v. Gomez (2008) 43 Cal.4th 249, 255.) *First*, as explained above, what matters is the mental state involved in committing the act in question (here, the application of force in the collision outside the gate). The fact that defendant is fleeing to safety after committing some other crime has no bearing on his intent in committing the act causing the collision, though it may be relevant in some other way (for example, for purposes of manslaughter, in order to show that he drove recklessly because he was trying to escape).

Second, the doctrine that a robbery continues until the defendant has reached a place of temporary safety is a limited rule. It applies only to certain narrowly defined legal issues. As this Court explained:

The escape rule originated in the context of the felony-murder doctrine in the landmark case of People v. Boss (1930) 210 Cal. 245. [Citations.] We have also applied the escape rule to several other ancillary consequences of robbery. [Citations.] [¶] Never, however, have we applied the escape rule in contexts other than the construction of statutes concerning certain ancillary consequences of robbery.

(People v. Cooper (1991) 53 Cal.3d 1158, 1166-67.) Thus, in Cooper, this Court declined to apply the escape rule to impose aider-and-abettor liability on a defendant who, without prior knowledge of the robbery, drove the getaway car when the robbers escaped without the loot, even though the robbers had not yet reached a place of temporary safety. (Id. at pp. 1161, 1170; see id. at p. 1169 (“Accordingly, we decline to adopt the escape rule, applicable in the context of certain ancillary consequences of robbery, for purposes of determining aider and abettor liability”).)

Similarly, this Court has declined to apply the escape rule in construing the scope of the three-strikes statute. In People v. Lawrence (2000) 24 Cal.4th 219, 224-25, defendant stole a bottle of liquor from a market and, while fleeing with the bottle, assaulted a woman in order to effectuate his escape. This Court declined to apply the escape rule for the purpose of resolving whether consecutive sentences were required under the three-strikes statute. (Id. at pp. 228-29 (escape rule not applicable

because “defendant did not act with an accomplice in perpetrating the theft from the market, nor did the crime result in a felony murder”).)

In short, the bare fact that defendant is in the process of escaping from the scene of the crime at the time of the collision does not mean that his mental state at that time relates back to the time of the theft for all purposes. No case has applied the escape rule to disallow the defense of accident under section 26. To the contrary, as noted above, this Court has repeatedly declined to expand the escape rule to new areas. (See Cooper, supra; Lawrence, supra.) There is no apparent reason of policy to expand the escape rule to cover Penal Code section 26, given this Court’s decision not to expand it to other areas that involve equally culpable miscreants.⁸

The People discuss a case dealing with imperfect self-defense, not the defense of accident. (Resp. B. at 15-16, citing In re Christian S. (1994) 7 Cal.4th 768.) Christian S. applied the long-standing principle that the aggressor cannot claim self-defense where his victim or law enforcement is legally justified in responding. (Id. at p. 773, fn. 1 (“It is well established that the ordinary self-defense doctrine – applicable when a defendant

⁸ Although felony murder was a theory of murder in this case (CT (2) 290), so that the escape rule was relevant for that purpose, the question of felony murder did not arise until the predicate felony (robbery) had been proved.

reasonably believes that his safety is endangered – may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary’s attack or pursuit is legally justified”).) According to the People, “[t]he same policy reasons for denying self-defense to a criminal actor applies to denying Penal Code section 26 ‘accident’ incapacity to a criminal actor.” (Resp. B. at 16.)

Christian S. is far afield. The doctrine of self-defense involves whether an indisputably intentional act is justified or excused. The doctrine of accident involves whether the act is intentional. The public policy in favor of excluding certain *intentional* acts from the protection of self-defense has no evident relation to any public policy involving *unintentional* acts. In any event, an amorphous “public policy” cannot supersede the statutory principle that there must be a joint operation of intent and act, such that accident (which negates intent) constitutes a defense.

A closer analogy to accident is the defense of imminent peril. In People v. Boulware (1940) 41 Cal.App.2d 268, 269, defendant was driving under the influence of alcohol and collided with another car, causing injury. His defense to driving under the influence causing injury was imminent peril: he had to make a sharp swerve (causing the collision) because a truck was coming directly toward him. (Ibid.) On appeal, he argued that the trial court erred in refusing to instruct on imminent peril. (Ibid.) The Court of Appeal agreed and reversed for a new trial, even

assuming that he was indeed driving while intoxicated. (Id. at p. 270.) Thus, the fact that defendant was committing an unlawful act (driving under the influence) at the very time of the collision did not deprive him of the defense of imminent peril because the jury could have found that his intoxication did not play a significant part in the collision. So, too, in Anderson’s case, a properly instructed jury could have found that the fact that he had taken the car moments earlier was not sufficiently related to the direct cause of the collision to deprive him of an established defense. Boulware is thus consistent with Lara, supra, and Jones, supra, which impliedly recognized that the defense of accident was available even to a defendant who was committing another crime at the very moment of the charged act.

The People also rely on People v. Attema (1925) 75 Cal.App. 642 (Resp. B. at 16). There, defendant was charged with murder but convicted of manslaughter. (Id. at p. 647) He had brandished a gun that discharged, possibly during a struggle over the gun itself. (Id. at p. 647.) The court observed that “the mere fact that the shooting was accidental would not *necessarily* exculpate” defendant. (Id. at p. 655 (emphasis added).) This was simply a recognition that if defendant was negligent in handling the gun, he might still be guilty of manslaughter even though he did not harbor the intent to kill. (See People v. Searle (1917) 33 Cal.App. 228, 231, cited in Attema at p. 655.) The court did not hold that accident would not have been a defense to murder, or that it never could have resulted in an acquittal. To the contrary, it held that “appellant was entitled on the theory of accident to have the

question considered by the jury.” (Attema at p. 655.) Attema thus supports Anderson’s position.

Finally, the People rely on People v. Thurmond (1985) 175 Cal.App.3d 865. (Resp. B. at 16.) There, defendant shot his lover during a quarrel, but claimed the gun went off accidentally. (Id. at p. 867.) The Court of Appeal reversed the conviction because, inter alia, the jury was not “properly instructed as to the accident defense,” in that the trial court did not define “culpable negligence.” (Id. at pp. 872-73, citing People v. Brucker (1983) 148 Cal.App.3d 230, 239.) As People v. Lara, *supra*, made clear, culpable negligence is relevant only in cases in which defendant could be convicted based on negligence, such as involuntary manslaughter. (Lara, 44 Cal.App.4th at pp. 109-110.) It is not relevant to a general-intent crime or general-intent element, regardless of the language of Penal Code section 26 to the contrary. (Id. at p. 110.) Thus, Thurmond’s passing observation that a defendant must always negate evil design, intention, and culpable negligence (Thurmond at p. 873) cannot be extended beyond the type of case Thurmond dealt with. (Thurmond also erred in stating without citation to any authority that it is defendant’s burden to prove the absence of evil design, intention, and culpable negligence. (See Thurmond at p. 873.) It is only defendant’s burden to raise a reasonable doubt as to the applicable intent. (See CALCRIM No. 3404; People v. Gonzales, *supra*, 74 Cal.App.4th 382, 390.))

2. The instruction was required sua sponte. The cases uniformly recognize that where there is substantial evidence of accident, or defendant is relying on that defense, it is the court's sua sponte duty to instruct on it. (E.g., People v. Gonzales, supra, 74 Cal.App.4th at p. 390 ("Since there was substantial evidence that Michaela's injuries were caused by an accident and defense counsel relied on the defense of accident in his argument to the jury, the trial court erred in failing to instruct the jury sua sponte regarding that defense when initially instructing the jury"); People v. Lara, supra, 44 Cal.App.4th at pp. 108-09 (citing use note to CALJIC No. 4.45 without disapproval); People v. Jones, supra, 234 Cal.App.3d 1303, 1314 ("Thus, on the face of it, the trial court was obligated to instruct the jury sua sponte on the defense of accident and misfortune and it was error for the trial court to have failed to do so"); People v. Tanner (1979) 95 Cal.App.3d 948, 958 (recognizing principle but finding insufficient evidence to support the instruction in that case); see also CALCRIM No. 3404, Bench Notes, Instructional Duty).)

This obligation is based on this Court's general holding that "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." (People v. Abilez (2007) 41 Cal.4th 472, 517 (internal quotation marks, emendations, and citation omitted).)

The People find it unnecessary to acknowledge this long

and unanimous line of authority. (See Resp. B. at 17-25.)

Instead, the People go back to first principles and argue that because accident negates a mental state required for the crime, it was Anderson's obligation to request a pinpoint instruction. (Resp. B. at 17-25.)

It is unnecessary for this Court to determine whether many years of precedent should be thus overturned, for the issue is readily resolved on a narrower ground. As this Court has repeatedly held, even where there is no sua sponte obligation to instruct on a particular point, once the trial court undertakes to provide an instruction, it must instruct accurately and completely. (See People v. Castillo (1997) 16 Cal.4th 1009, 1015 (“Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly”); People v. Mendoza (1998) 18 Cal.4th 1114, 1134 (“We recently held that a trial court has no sua sponte duty to instruct on the relevance of intoxication, but if it does instruct, as the court here did, it has to do so correctly”); People v. Baker (1954) 42 Cal.2d 550, 575-576 (“when a partial instruction has been given we cannot but hold that the failure to give complete instructions was prejudicial error”).)

Here, the court's sole instruction on accident, which came in the middle of the instruction on robbery felony murder, declared that it was not a defense at all:

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

(CT (2) 290.) Nowhere did the court instruct that this principle

applied *only* to robbery felony murder, or that accident *was* a defense to robbery even though it was not a defense to robbery felony murder. A jury of laymen would be hard pressed to grasp the distinction on its own. It is intuitively obvious that if accident is not a defense to felony murder, it is not a defense to the target crime that qualifies defendant for felony murder. Yet, as lawyers and judges know, that obvious, seemingly inescapable inference is false. Accident *is* a defense to robbery even though it is not a defense to robbery felony murder. The court therefore failed in its obligation “to give complete instructions.” (Baker, supra.) Its partial instruction was, for a lay jury, inaccurate, because the unmistakable implication of that partial instruction was that accident was not a defense to robbery, as well as to robbery felony murder. Having undertaken to broach the topic of accident, the court was obliged to go further and accurately and completely cover the principle, whether or not it would have been obliged to instruct *sua sponte* on accident in the first place.

In any event, the People’s argument that an instruction on accident is a pinpoint instruction that must be specifically requested is erroneous. The People’s main authority deals with an instruction on voluntary intoxication to negate the specific intent to kill. (People v. Saille (1991) 54 Cal.3d 1103, 1117-19.) (See Resp. B. at 21-22.) Similarly, provocation negates the mental state of premeditation and deliberation. (People v. Rogers (2006) 39 Cal.4th 826, 827-28. (See Resp. B. at 22-23.) A defense that explains why defendant was not the perpetrator at all, such

as third-party culpability, is similar, in that it obviously negates the essential element of identity. (See People v. Gutierrez (2009) 45 Cal.4th 789, 824.) (See Resp. B. at 23.)

Here, however, the mental state required for the use-of-force element of robbery is not apparent. Anderson's jury was instructed in terms of CALCRIM No. 1600: "The defendant used force or fear to take the property or to prevent the person from resisting." (CT (2) 300.) As the Court of Appeal observed in this case, this is an "implicit general intent requirement." (Opn. at 18; see also Opn. at 16 ("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").) (The specific intent for robbery, namely, the intent to deprive the owner of possession, is not at issue on this point.)

Now, a lay juror would readily recognize, even without instructional guidance, that someone who was too drunk to form the intent to kill would not be guilty of a crime requiring intent to kill, or that someone who acted suddenly, out of provocation, did not premeditate and deliberate, or that if a third party was the killer, then defendant was not the killer and hence could not be guilty. The same, however, cannot be said for the implied general intent requirement of the willful use of force. Jurors who were not specifically instructed on accident would not realize from the pattern instruction that accident was a defense. Accident was therefore a defense, openly connected with the case, that required

sua sponte instructions.

In that respect, accident is like other defenses to general-intent crimes, where the applicability to the crime is not apparent without instructional guidance, and on which the court must therefore instruct sua sponte. Thus, for example, rape is a general-intent crime. (E.g., People v. DePriest (2007) 42 Cal.4th 1, 48.) Yet, a defendant is entitled to sua sponte instructions on the defense of reasonable, good-faith belief in consent, provided he relies on this defense or produces substantial evidence to support it. (E.g., People v. Dominguez (2006) 39 Cal.4th 1141, 1148-49.) This is so even though a juror with legal training might recognize that defendant's belief in consent impliedly negates the element of force or fear. (See People v. Mayberry (1975) 15 Cal.3d 143, 155; CALCRIM No. 1000, element 4.)

More broadly, the Court of Appeal has recognized that settled law requires sua sponte instructions on the defense of mistake of fact notwithstanding the People's familiar claim that this defense merely negates an element of the crime:

The People say there is never a sua sponte duty to instruct on mistake of law or fact because such mistakes do not constitute a defense at all but, at most, a refutation of an element of the offense (intent) which may be the subject of a pinpoint instruction if requested. The People's argument, as the People acknowledge, is contrary to intermediate appellate court precedent, which recognizes sua sponte instructional duties for

mistake defenses.

(People v. Meneses (2008) 165 Cal.App.4th 1648, 1661, fn. 2.)

(Mistake of fact appears in Penal Code section 26, the same statute that provides for the defense of accident.)

Similarly, duress negates the general intent to commit the act constituting the crime. (People v. Heath (1989) 207 Cal.App.3d 892, 901.) Yet, even though this defense thus negates an element, the court must instruct sua sponte on duress where there is substantial evidence or defendant is relying on that defense. (E.g., People v. Wilson (2005) 36 Cal.4th 309, 331.) (Duress, like accident and mistake of fact, is one of the defenses specified in Penal Code section 26.)

The People rely heavily on a dissenting opinion in People v. Acosta, supra, 45 Cal.2d 538. (Resp. B. at 23-24.) The majority, however, rejected the dissent's argument. The dissent argued that an instruction on accident was unnecessary because other instructions adequately informed the jury of the requirement of intent. (Id. at pp. 544-45 (Spence, J., dissenting).) The majority held otherwise, specifically *rejecting* the People's argument (which the dissent adopted) that "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." (Id. at p. 544.)

Finally, the People rely on People v. Gorgol (1953) 122 Cal.App.2d 281. (Resp. B. at 13.) That case construed

“misfortune,” not “accident.” (Id. at p. 308.) Further, although the opinion is somewhat cryptic, it appears that the trial court did instruct on accident; defendant’s complaint was that it did not also instruct on misfortune:

“Misfortune” when applied to a criminal act is analogous with the word “misadventure” and bears the connotation of accident while doing a lawful act. (See definitions in 27 Words and Phrases, 346.) Actually, except for the lack of the single word “misfortune,” the court fully instructed the jury favorably to the defendant on all matter which defendant contends the word “misfortune” meant in this case.

(Ibid.) Gorgol therefore sheds no light on Anderson’s case. In any event, the defense of accident was in fact irrelevant to any contested issue, for even if the gun had discharged accidentally, defendant nonetheless would have been guilty of the charged crime of assault with a deadly weapon. (Ibid. (“So far as the assault is concerned, under [defendant’s] own statement that he threatened to put the cab driver asleep by hitting him with the gun, the assault was complete before the gun went off”); see id. at pp. 285-86.)

II.

The error was prejudicial on count 2 for robbery and hence on count 1 for murder because the jury may have relied solely on the theory of robbery felony murder

A. Standard for evaluating prejudice.

The Court of Appeal has not determined whether the failure to instruct on accident is federal constitutional error and hence evaluated under the *Chapman* reasonable-doubt standard. (See People v. Gonzales, *supra*, 74 Cal.App.4th 382, 391 (expressly declining to resolve the issue); but see People v. Corning (1983) 146 Cal.App.3d 83, 89 (applying state-law *Watson* standard without discussion or analysis); cf. People v. Salas (2006) 37 Cal.4th 967, 984 (“We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense”).) The *Chapman* standard applies for three largely independent reasons.

***First*, omission of the instruction, in conjunction with the court’s instruction that accident was not a defense to robbery felony murder, in effect deprived Anderson of a meaningful opportunity to present a complete defense under the Sixth and Fourteenth Amendments.** “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citation], the Constitution guarantees criminal defendants a meaningful opportunity to present a complete

defense.” (Crane v. Kentucky (1986) 476 U.S. 683, 690.) Even if the defense is allowed to present evidence supporting its defense, this federal constitutional right is violated if the court’s instructions preclude the jury from considering that defense. As the Ninth Circuit has explained:

[T]he state court’s failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. This is so because the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.

(Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1099 (internal citations and quotation marks omitted).)

Here, as explained in section 1, the only instruction on accident was the one given in the middle of the instruction on robbery felony murder:

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

(CT (2) 290.) A lay juror would likely (if not inevitably) assume, in the absence of other instructions, that if accident was not a defense to robbery felony murder, it was also not a defense to the underlying robbery. This is a common-sense, logical, and intuitively compelling inference that only a trained lawyer would not fall for.

It did Anderson little good to argue to the jury that this was “an accident, an accident, an accident” (RT (6) 1080:22 (defense

summation)), if the jury was instructed, or thought it was instructed, that accident was *not* a defense. After all, the court also instructed that “[i]f you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” (CT (2) 263.) Jurors are presumed to understand and abide by that instruction. (E.g., People v. Valdez (2004) 32 Cal.4th 73, 114, fn. 14.) Thus, in light of the sole instruction on the topic, jurors likely assumed that accident was not a defense, notwithstanding defense counsel’s argument. Accordingly, the failure to instruct on accident as a defense to robbery simpliciter violated Anderson’s right to a meaningful opportunity to present a complete defense in violation of the Sixth and Fourteenth Amendments. The *Chapman* standard therefore applies. (Cf. Everette v. Roth (7th Cir. 1994) 37 F.3d 257, 261 (failure to instruct on self-defense violated Fifth and Sixth Amendments).)

This Court’s opinion, People v. Humphrey (1996) 13 Cal.4th 1073, is distinguishable, for in that case the court did instruct that the jury could consider battered-woman’s syndrome, though it erroneously restricted the purposes for which the jury could consider that defense. (See *id.* at pp. 1076, 1089.) Here, the accident instruction (CT (2) 290) likely had the effect of precluding the jury from considering accident for any purpose at all.

Second, failure to instruct on a defense that negates an element of the crime violates due process. The federal court of appeals has concluded that failure to instruct on a defense (there,

voluntary intoxication) that would negate an element of the charged crime violates the right to due process (Fourteenth Amendment):

We recognize that Joe has no Due Process right to a defense of voluntary intoxication if the legislature chooses to exclude it. [Citation.] When the defense is permitted by law, however, the defendant is entitled to have the jury consider it in order to determine whether the government has proved all elements of the offense. . . . Thus a defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense.

(United States v. Sayetsitty (9th Cir. 1997) 107 F.3d 1405, 1413-14.) This conclusion is sound in light of the U.S. Supreme Court's observation that "[a]s 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." (Mathews v. United States (1988) 485 U.S. 58, 63.)

Although Mathews was a direct federal appeal that did not explicitly address the right to due process, there is no apparent reason to treat so critical an issue as instructions on the defense theory of the case as an entitlement under federal procedure but not a matter of fundamental fairness under the Fourteenth Amendment, as Sayetsitty recognized. Accordingly, omission of the instruction on the defense of accident violated Anderson's right to due process and is therefore evaluated under the

Chapman standard.

Third, the error so infected the trial as to rise to a violation of due process. Although “not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation,” an instructional error may “so infect[] the entire trial that the resulting conviction violates due process.” (Middleton v. McNeil (2004) 541 U.S. 433, 437 (internal quotation marks and citation omitted).) The error is evaluated in the context of the instructions as a whole, not in isolation. (Ibid.) Here, as explained above, the instructions as a whole likely implied to a lay juror that accident was not a defense to robbery, for the only instruction on accident was that it was not a defense to robbery felony murder (CT (2) 290), and a reasonable juror untrained in the law likely would assume that if it was not a defense to robbery felony murder, it was not a defense to robbery, either.

Accident was the main defense to the robbery and hence to the murder. (See RT (6) 1080:22 (defense summation: “And this was an accident, an accident, an accident”).) Depriving the jury of the right to consider this defense, which was legally legitimate and (as explained below) factually compelling, left Anderson without any significant defense on counts 1 and 2, for there was no dispute that he was the driver, that he had taken the car, and that Thompson was killed in the collision. The error therefore made the trial fundamentally unfair and violated Anderson’s federal constitutional right to due process.

The federal constitutional component is preserved for review. There was no need for an objection, and hence no need to federalize the objection, because if an instruction is required sua sponte, failure to request it does not forfeit the error. (See, e.g., People v. Whisenhunt (2008) 44 Cal.4th 174, 216-17; People v. Failla (1966) 64 Cal.2d 560, 565 see generally Pen. Code, § 1259; Pen. Code, § 1469 (error affecting defendant's substantial rights is preserved even without objection at trial).) Further, the trial court specifically acknowledged that all objections would be deemed federalized. (RT (1) 5:18-21 (“Defense has requested an order allowing the federalization of any objections, and I will grant that request. So when objections are made it will be deemed to consider all federal and constitutional rights”); see CT (1) 190-92 (motion).) It would be anomalous to apply this principle to explicit objections and not to objections deemed made by operation of law pursuant to section 1259.

B. The error was prejudicial on count 2 for robbery.

The question of the standard of prejudice is moot because, as the Court of Appeal observed, the error was prejudicial under both *Chapman* and *Watson*. (Opn. at 21.)

The Court of Appeal identified the grounds of prejudice. First, jurors likely assumed from the instruction on robbery felony murder that accident was not a defense to robbery. (See Opn. at 22 (“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”) (internal emendations and quotation marks omitted; emphasis in original).) The fact that defense counsel argued that the collision was an accident does not make the error harmless; as noted above, jurors were presumed to follow the court’s admonition to disregard statements of counsel that conflicted with the court’s own instructions. (CT (2) 263.) In any event, argument of counsel cannot substitute for instructions by the court. (E.g., Taylor v. Kentucky (1978) 436 U.S. 478, 488-89; People v. James (2000) 81 Cal.App.4th 1343, 1365, fn. 10 (“We do not consider comments by counsel during closing argument to determine whether the error in the instruction was cured”); Stark v. Hickman (9th Cir. 2006) 455 F.3d 1070, 1080.)

Next, as the Court of Appeal observed, “[t]here was strong evidence Anderson did not, and could not, see Thompson standing in the dark behind the gate as he drove her around the closing gate.” (Opn. at 23.) The gate was largely opaque, especially at night. (See exhibit 127.) An independent observer, Anya Gonzalez (in the upstairs apartment 30 yards away) testified that she could not see through the gate to determine what happened after the collision. (RT (2) 188:14-19; see (2) 156:8-15 (distance).) Anderson, too, 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.) Thompson evidently did not see the car until just before the collision. As she stood outside the gate, talking to her

mother on the cell phone, she suddenly said “[h]ere comes my car real fast,” and she was struck immediately thereafter. (See RT (1) 26:6-11; (1) 26:28-27:8; (1) 80:2-81:5; exhibit 134.) If Thompson could not see the car behind the gate even though she was looking for it, it is likely that Anderson could not see Thompson, who of course was much smaller than a car.

Anderson testified that he accelerated in order to leave the complex before the gate closed. (RT (5) 857:11-858:2; (5) 884:11-885:2.) His focus was therefore on the gate, not the possibility that someone was standing outside the gate. Further, he testified that his headlights were off and the window closed, so that he did not hear anyone yelling. (RT (5) 884:7-10; (5) 876:28-877:14; (5) 891:11-12; (5) 981:14-18.)⁹

⁹ There were some discrepancies between Anderson’s testimony and his statement to the police (see fn. 5, ante), and Anderson’s credibility was impeached by his history of theft-related crimes (see fn. 6, ante). He explained the discrepancies at trial, however (see fn. 5, ante), and his testimony that he could not see through the gate and did not hear anyone was overwhelmingly supported by independent evidence. This evidence includes the police videographer’s own videotape and testimony (see exhibit 156 (videotape showing how dark it was); RT (3) 549:6-551:3 (videographer confirms that the tape accurately reflected the lighting conditions or misleadingly showed the scene as *lighter* than it actually was because the camera had a light).) In addition, neither Rudy Espinoza (in the apartment upstairs) nor Thompson’s mother heard Thompson yell out, “stop, stop, stop,” though Espinoza had heard her shouting earlier. (RT (1) 27:9-10; (2) 157:15-158:16; (2) 160:20-27.) Anya Gonzalez thought she heard someone yell, “stop, stop, stop,” but this was immediately followed by the collision (RT (2) 198:24-200:8), so that Anderson

(. . . continued)

Next, as the Court of Appeal also observed, “it is doubtful Anderson had any compelling reason to purposefully strike and run over Thompson with the car.” (Opn. at 23.) This is shown by the fact that he abandoned the car just a mile away. (RT (3) 483:27-484:3; (3) 529:24-530:14; (4) 809:20-25; (5) 862:8-9; exhibit 102A.) He testified he abandoned it out of fear after the collision. (RT (5) 862:8-16.) Now, he had taken the car for a purpose, whether to visit his family (as he said) or to have a rendezvous with a woman (as the prosecutor asked the jury to surmise). (See RT (5) 849:5-850:18; (5) 853:2-854:2 (Anderson’s testimony); (6) 1047:2-4 (opening summation).) The fact that he abandoned it just after the collision therefore shows that the collision was not intentional, for otherwise he would have carried on with his plan and used the car for whatever purpose he had taken it.

It is also hard to see what he thought he could gain by

would not have had sufficient time to react even if he had heard it through the closed car window and over the sound of the engine.

Whether Anderson was driving with culpable negligence was irrelevant, for the culpable-negligence prong of Penal Code section 26 does not apply to an element of general intent but only to a crime that can be committed by negligence. (People v. Lara, supra, 44 Cal.App.4th 102, 110; CALCRIM No. 3404, Bench Notes, Instructional Duty, ¶ 4.) In any event, whether Anderson acted with culpable (criminal) negligence rather than simple negligence was a question for the jury. (See, e.g., Tomlinson v. Kiramidjian (1933) 133 Cal.App. 418, 422; see generally People v. Penny (1955) 44 Cal.2d 861, 879-80 (distinguishing simple negligence from criminal negligence).)

deliberately running Thompson down. He must have known that the police would search more thoroughly for a murderer than for a car thief. He also must have known that Thompson could not have outrun the car if he had just kept driving. Thus, he had no motive to strike her. His evident intent was to avoid her, just as he testified. (RT (5) 858:26-859:27; (5) 896:2-897:1.)

In short, as the Court of Appeal concluded, “[t]here was substantial, *if not overwhelming*, evidence to support Anderson’s defense theory of accident.” (Opn. at 23 (emphasis added).)

The prosecutor exacerbated the prejudice by obscuring the distinction between the purposeful use of force and the inadvertent use of force. Thus:

I even asked the defendant – it’s a common sense thing – you drive a car into a person, that’s force. I even asked him, and he admitted it was force that he had used in the escape from the crime.

(RT (6) 1082:28-1083:3 (rebuttal summation).) Of course, this was misleading. There was no dispute that a car crashing into a pedestrian constitutes force; the issue, however, was whether the application of force was deliberate rather than accidental. Without an instruction on accident, jurors likely relied on the prosecutor’s argument that the distinction was irrelevant. (Cf. People v. Nelson (1960) 185 Cal.App.2d 578, 582 (“True, this line of reasoning is, from the legal standpoint, fallacious, but how can we say that the jury composed of laymen did not follow it when it was one of the lines of reasoning contended for by the district attorney”).)

For all of these reasons, the error was prejudicial on count 2 for robbery.

C. The error was also prejudicial on count 1 because the jury may have relied solely on the theory of felony murder based upon robbery.

This Court recently held that where one theory of guilt is tainted by an instructional error, the conviction must be reversed unless the reviewing court “conclude[s], beyond a reasonable doubt, that the jury based its verdict on a legally valid theory.” (People v. Chun (2009) 45 Cal.4th 1172, 1203.) Here, the jury was given two theories of first-degree murder: premeditation and robbery felony murder. (CT (2) 289 (instruction); RT (6) 1052:11-1054:9 (prosecutor’s opening summation).) In finding the special circumstance to be true (CT (2) 330), the jury indisputably rested its finding of murder on the tainted ground of robbery felony murder. The jury therefore had no need to consider premeditation, and accordingly probably did not. (Cf. People v. Nguyen (2000) 24 Cal.4th 756, 765 (instructional error required reversal because “the jury may have based its verdict on this count solely upon the evidence that property was taken from the business, *without considering* whether any defendant attempted to take property from the person of Jiminez”) (emphasis added).) Indeed, the prosecutor exhorted the jury to reach its decision on the basis of felony murder precisely because, in the prosecutor’s view, this was the “easier” theory of guilt. (RT (6) 1053:16-17 (opening summation: “Felony murder. This is the second theory

and an easier theory. . . . [I]f you fell back on that, that one you don't even have to fight with yourself about").) Jurors fully understood that there were two distinct theories, for they interrupted their deliberations to confirm their understanding with the court. (CT (1) 252 (jury question: "There is 2 theor[ie]s to consider to find defendant guilty of first degree murder. Is one of those theories felony murder?").) Thus, although it is conceivable that the jury relied on both theories (felony murder *and* premeditation), it cannot be said beyond a reasonable doubt that it did so. Accordingly, the failure to instruct on accident was prejudicial as to count 1 for murder.

Even apart from the fact that the jury explicitly relied on the theory of robbery felony murder, the evidence supporting premeditation was exceptionally slim, so that for this reason, too, it cannot be said beyond a reasonable doubt that the jury also relied on that theory. If Anderson had been so willing to kill in order to keep the car, it is hard to see why he would quickly abandon it. (See RT (3) 476:4-478:13 (location of abandoned car); (3) 484:8-486:18; see also (5) 862:8-16 (Anderson testifies that out of fear he abandoned the car immediately after leaving Thompson's complex.) As explained in subsection (B) above, it is equally hard to see what he could possibly gain by deliberately running Thompson down. Even the prosecutor, purporting to argue for premeditation, managed only to muster an argument for implied-malice murder, that is, conscious disregard of the

risk.¹⁰

Reversal of the first-degree murder conviction does not amount to exoneration from any criminal culpability. Finally, the fact that the robbery and murder convictions must be reversed does not mean that a defendant in Anderson's position would avoid any liability for the collision. Rather, he would be in the same position as if he had struck a bystander rather than the owner or possessor of the car. (It is only because the pedestrian outside the gate was the owner of the car that the incident could be charged as an *Estes* robbery and hence as robbery felony murder. (See generally 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"); People v. Nguyen, *supra*, 24

¹⁰ The prosecutor lectured:

The first-degree under the first theory is premeditated, willful and deliberate. And that example of going through the yellow light, trying to beat it, taking a risk, appreciating the risk, and doing it anyway, that's premeditated, deliberate, willful conduct. If you have any doubt, look at that instruction again. It's very clear. It can be a cold, calculated decision that occurs like that as long as you are aware of those risks. This man, without a doubt, was aware of the risk. He lived day to day. He took chances every time he broke into a car someone is not going to come out with a gun.

(RT (6) 1052:16-26.)

Cal.4th 756, 764.)) A jury therefore could find that he was driving in conscious disregard of life or, at least, recklessly, so that he would be guilty of implied-malice murder or vehicular manslaughter. (See generally People v. Watson (1981) 30 Cal.3d 290, 294; Pen. Code, § 192, subd. (c)).

III.

In the event this Court finds no sua sponte obligation to instruct on accident, the case should be remanded to the Court of Appeal for resolution of the remaining issue of ineffective assistance of counsel in failing to request such an instruction

If this Court “decides fewer than all the issues presented by the case, [it] may remand the cause to a Court of Appeal for decision on any remaining issues.” (Cal. Rules of Court, rule 8.528(c). Here, the Court of Appeal found it unnecessary to determine whether trial counsel was ineffective under the Sixth Amendment and state law in failing to request an instruction on accident, for it found that the failure to instruct sua sponte on accident was error. Accordingly, should this Court determine that an instruction on accident was required only if requested, the case should be remanded so that the Court of Appeal may address Anderson’s ineffective-assistance argument in the first instance. (This alternative argument was raised in the opening brief in the Court of Appeal. (See AOB at 76-78.))

CONCLUSION

For the foregoing reasons, defendant and appellant respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: February 1, 2010. Respectfully submitted,

Richard A. Levy
Appointed counsel for
Paul Anderson

CERTIFICATION OF WORD COUNT

I certify that the word count of this computer-produced document, calculated pursuant to rule 8.360(b) of the Rules of Court, does not exceed 14,000 words, and that the actual count is: **13,693** 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 ANSWERING BRIEF ON THE MERITS

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

Attorney General of California
Attn: J. Flaherty, Esq.
P.O. Box 85266
San Diego, CA 92186-5266

The Defendant/Appellant

and placing such envelopes with postage thereon fully prepaid in the United States mail at Torrance, California. **Executed on February 1, 2010**, at Torrance, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

