

CC

SUPREME COURT COPY

CERTIFIED SPECIALIST - APPELLATE LAW
THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

RICHARD A. LEVY
LAWYER
21535 HAWTHORNE BOULEVARD
SUITE 200
TORRANCE, CALIFORNIA 90503-6612

TELEPHONE (310) 944-3311
FACSIMILE (310) 944-3313
LEVY@RICHARDALEVY.COM

September 22, 2010

Clerk of Supreme Court
350 McAllister St.
San Francisco, CA 94102-7303

SUPREME COURT
FILED

SEP 24 2010

Frederick K. Ohlrich Clerk

People v. Paul Anderson, S175351

Deputy

Dear Sir:

Pursuant to the Court's order of July 28, as extended on August 5, 2010, appellant Anderson respectfully submits the following supplemental letter brief.

The Court of Appeal correctly reasoned that Penal Code section 211 requires a general intent to use force or fear:

[W]e conclude section 211's requirement of the use of force or fear in accomplishing the taking of the property or in retaining the property during asportation or escape in effect requires *a purposeful or willful act* involving a *general intent to use force or fear* to initially take property or thereafter retain the stolen property during asportation or escape. Absent that purposeful or willful use of force, a robbery is not committed.

(Opn. at 18 (italics in original).)

As the Opinion explained, this interpretation is required by this

Court's cases, which emphasize that the force must be *motivated* by the intent to take or retain the property, or that the force must be applied *for the purpose of* that objective. (See Opn. at 17-18; see also ABM at 16-17.) Thus, "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.) The very case that established the doctrine of an *Estes* robbery specified that the force must be applied *in furtherance of* the robbery, which implies an intentional act. (People v. Estes (1983) 147 Cal.App.3d 23, 28 ("force was applied against the guard in furtherance of the robbery").)

The crime of robbery therefore requires the "purposeful or willful use of force." (Opn. at 18.)

This reasoning is consistent with this Court's leading opinion on the mental state required for the related crime of assault, People v. Colantuono (1994) 7 Cal.4th 206. That opinion explained that though assault is a general-intent crime, it nonetheless requires a showing of willfulness:

The mens rea is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery. Although the defendant

must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm.

(Id. at p. 214; see also id. at p. 217 (“it is clear that the question of intent for assault is determined by the character of the defendant’s willful conduct considered in conjunction with its direct and probable consequences”).)

Robbery is “an assaultive crime against the person.” (People v. Alvarez (1996) 14 Cal.4th 155, 188.) Thus, under Colantuono, though the forceful or assaultive component of robbery carries no specific intent, there is, as the Opinion aptly described it, “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.” (Opn. at 16.)

Pursuant to Colantuono, the pattern instruction on assault contains the element that “[t]he defendant did that act willfully.” (CALCRIM No. 915, second element; see also, e.g., CALCRIM No. 875, second element (assault with a deadly weapon).) A “willful” act, in turn, is a purposeful act. As the pattern instruction on assault explains:

Someone commits an act *willfully* when he or she does it willingly

or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

(CALCRIM No. 915; see also CALCRIM No. 250 (union of act and general intent: “A person acts with wrongful intent when he or she intentionally does a prohibited act”); cf. CALJIC No. 1.20 (“The word ‘willfully’ when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question”).)

In light of the forceful or assaultive component of robbery, the jury in a robbery case should be instructed on the same element as in Colantuono. Anderson’s jury, however, was not instructed on this element. Nowhere was the jury instructed on willfulness. Nowhere was it instructed on the union of act and general intent, which at least would have alerted the jury to the requirement of intentionality. (See CALCRIM No. 250, quoted above.) (The court instructed only on the union of act and specific intent. (CT (2) 272 (incorporating CALCRIM No. 251).))

In particular, the instruction on robbery was inadequate in this respect. It provided: “The defendant used force or fear to take the property or to prevent the person from resisting.” (CT (2) 300 (incorporating CALCRIM No. 1600).) This instruction did not make clear that the forceful act that would “probably and directly” (Colantuono) result in injury to the victim must be *willful*, that is,

“willingly or on purpose” (CALCRIM No. 915), toward defendant’s objective of retaining possession.

In Anderson’s case there was obviously force, namely, the impact of the car. And there was obviously an intent to retain possession, for Anderson did not relinquish the car. But that is not enough. The force must be willful, or, in the terms of the cases, motivated by the intent to retain the property, or be applied for the purpose of that objective, or be applied in furtherance of that objective. (See People v. Bolden, supra; People v. Green, supra; People v. Estes, supra.) The bare preposition, “to,” in the court’s instruction was too weak or equivocal to convey this meaning.

The preposition, “to,” is particularly insufficient in light of the immediately succeeding element: “5. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently or to remove it from the owner’s possession that the owner would be deprived of a major portion of the value or enjoyment of the property.” (CT 2) 300.) This focuses the jury’s attention on the specific intent to *permanently* deprive of possession, so that the secondary intent to use force to retain possession is obscured.

Even assuming arguendo that, as an abstract matter, the little preposition, “to,” effectively expressed the requirement of intentional use of force for a purpose, the instruction was not adequate in this case. The adequacy of jury instructions must be evaluated as a whole, not by

focusing only on a single instruction or a single clause, much less a single preposition. (E.g., People v. Carrington (2009) 47 Cal.4th 145, 192.) Here, the jury was specifically instructed that accident – that is, the unintentional application of force – was not a defense for purposes of robbery felony murder. (CT (2) 290 (“A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent”).) As the Court of Appeal observed:

The jury in this case likely believed that if an accidental killing cannot be a defense to felony murder, an accidental killing by use of force or fear in accomplishing a robbery likewise cannot be a defense to a robbery charge.

(Opn. at 22.) Thus, under the unusual facts of this case, the instructions as a whole were not adequate because a lay jury would not have grasped that accident *was* a defense to robbery (though not to robbery felony murder), or, put another way, that the jury must find that the forceful act was willful or purposeful rather than unintentional. The court’s instructions were affirmatively misleading because the jury must have interpreted the felony-murder instruction to mean that accident was not a defense to robbery, either. (See generally 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. Baker (1954) 42 Cal.2d 550, 575-76 (“when a partial instruction has been given we cannot but hold that the failure to give complete

instructions was prejudicial error”).)

Under this view, it is not necessary to consider whether an instruction on the defense of accident was required sua sponte. (See ABM at 33-39.) The error was in the failure to instruct on the element of willfulness, not the failure to instruct on a defense. For the same reason, this Court’s newly issued opinion, People v. Jennings (August 12, 2010, S081148) 50 Cal.4th 616, is not applicable. There, this Court held that in a malice-murder case the trial court was not obliged to instruct sua sponte on accident. (Slip opn. at pp. 68-71.) The Court explained that in such a case, accident was merely the negation of specific intent:

In the present case, the claim that Arthur was killed by accident through an overdose of sleeping pills amounts to a claim that defendant and Michelle lacked the intent to kill necessary for first degree premeditated murder and the torture-murder and murder-by-poison special circumstances. As such, instructing the jury pursuant to CALJIC No. 4.45 would have constituted a pinpoint instruction highlighting a defense theory that attempted to raise a doubt concerning an element (intent) of a crime that the prosecution must prove beyond a reasonable doubt. The burden therefore was upon defendant to request that the jury be instructed pursuant to CALJIC No. 4.45, and his failure to do so forfeited any claim of error in this regard.

(Slip opn. at p. 70.) Here, the issue is not failure to instruct on a defense that negates the mental-state element but rather failure to instruct on the element itself. In Jennings the jury *was* instructed on the required mental state, namely intent to kill. Here, as explained above, the jury was not instructed on the mental state of willfulness.

Jennings is also inapposite because that case involved the negation of the intent for murder, whereas in Anderson's case the defense of accident goes to the predicate crime of robbery; it is only if robbery is established that Anderson becomes guilty of murder. Finally, Jennings is inapposite because in that case the jury was not already given an instruction that negated the proposed defense; in Anderson's case, as explained above, the jury was admonished that accident was not a defense to robbery felony murder, from which the lay jurors would certainly conclude, in the absence of any other instruction on the point, that it was also not a defense to robbery.

Finally, the erroneous failure to instruct on the element of purposeful or willful use of force was prejudicial. Turning again to the analogy of assault, Colantuono emphasized that this was a question of fact for the jury. (See Colantuono, supra, 7 Cal.4th at p. 221 ("Since intent always remains an issue of fact, the jury must clearly understand its responsibility to resolve that question beyond a reasonable doubt, uninfluenced and unassisted by any other principle of law") (internal citation omitted).) There was ample and indeed overwhelming evidence that Anderson did not purposefully or willfully

Clerk of Supreme Court
Re: People v. Paul Anderson, S175351
September 22, 2010
Page 9

use force against the victim. (See ABM at 45-50; Opn. at 20-24.)

Respectfully submitted,

Richard A. Levy (SBN 126824)
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, is: **1835** 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 SUPPLEMENTAL LETTER BRIEF

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: James Flaherty, Esq.
P.O. Box 85266
San Diego, CA 92186-5266

and placing such envelopes with postage thereon fully prepaid in the United States mail at Torrance, California. **Executed on September 22, 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.
