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In the Supreme Court of the State of California

SUPREME COURT
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THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROBIN BAILEY,

Defendant and Appellant.

Case No. S187020

Sixth Appellate District, Case No. H034382
Santa Clara County Superior Court, Case No.
Timothy Buckley, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Appellant was charged by information with one count of attempt to escape and escape from prison in violation of Penal Code section 4530, subdivision (b) (hereafter 4530(b)). (CT 20.) At trial, he declined an instruction on attempted escape as inconsistent with the defense, and the instruction on attempt, consequently, was not given. (RT 92, 294-295, 298, 325, 346.) The Court of Appeal found insufficient evidence proving the completed escape found by the jury, but that court refused to modify the judgment to attempted escape, in the teeth of ample evidence of attempted escape in the trial proof.

Appellant's brief on the merits (ABOM) asserts the Court of Appeal correctly viewed an omitted jury instruction on specific intent, purportedly a required element of attempted prison escape, as a Sixth Amendment bar against the modification of the conviction to attempted escape. (ABOM 1-2, 6.) He asserts that the omission of a specific intent instruction (1) divested the court of power to modify the judgment to an attempt (ABOM 7) and (2) is not harmless error (ABOM 20). Neither argument is correct.

ARGUMENT

I. THE COURT SHOULD MODIFY THE CONVICTION TO A CONVICTION OF ATTEMPT TO ESCAPE PRISON

A. Appellant Fails to Rebut Respondent's Arguments under Penal Code Sections 1181, Subdivision (6), 1260 And 1159

Appellant does not address respondent's arguments relative to the power of modification of a judgment under Penal Code sections 1181(6), 1260 and 1159. (See RBOM 10-19.) Nor does he consider *People v. Martinez* (1999) 20 Cal.4th 225, where a kidnapping conviction was modified to attempted kidnapping, reflecting modification is appropriate where insubstantial movement would naturally and probably result in the

completed crime had the incident continued without interruption. (RBOM 13.) Those points therefore will not be repeated here.

Appellant does argue that attempted escape is not a lesser included offense of escape because section 4530(b) makes those crimes an "alternative way of violating the same statute" and "provides the same punishment for both of them." (ABOM 7.) His brief eludes his own argument. He states that "[b]y defining the offense as 'commits an escape or attempts an escape" [section 4530(b)] *subsumes the attempt within the substantive offense itself.*" (ABOM 7-8, emphasis added.) That constitutes agreement by the parties on at least one point: For reasons sufficient to itself, the Legislature subsumed attempted prison escape in prison escape, by operation of law. Appellant's argument—attempted escape is not necessarily included in escape because attempted escape is subsumed in escape—is a non sequitur.

That attempt to escape and escape are like-punished crimes in one section of the Penal Code does not advance appellant's claim. The test of a necessarily included offense, obviously, is neither whether crimes appear in different provisions of one code (or provisions of different codes),[1] nor whether crimes have different punishments.[2] That one statute contains multiple crimes with equal punishment neither establishes nor precludes

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[1] See, e.g., Penal Code section 189, which defines first and second degree murder.

[2] It is a legislative prerogative to punish a less serious offense with a like or even a greater punishment than a more serious offense. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 832-841 [rejecting an equal protection challenge to the Legislature's punishment of section 243.1, battery on a custodial officer without injury as a felony, while making section 243, subdivision (c)(1), battery on a custodial officer with injury punishable as an alternative felony-misdemeanor].)

one offense being necessarily included in another offense—either under the elements or the accusatory pleading tests.

As support for his argument that a lesser included offense cannot exist within a single statute that defines and punishes equally what he interchangably calls multiple "methods" or "theories," appellant points to *In re Brandon T.* (2011) 191 Cal.App.4th 1491. (ABOM 9.) There, insufficient evidence of assault by means likely to result in great bodily injury under Penal Code section 245, subdivision (a)(1) resulted in a modification to simple assault under Penal Code section 240 with the agreement of both parties. (*Brandon T.*, *supra*, 191 Cal.App.4th at pp. 1494, 1498.) He also points to *People v. Curtin* (1994) 22 Cal.App.4th 528. (ABM 10-12.) There, the jury was instructed on larceny by trick and device, but on review the Court of Appeal found an element of the offense missing. (*Id.* at p. 531.) The court compared "larceny by trick and device" and "obtaining property by false pretenses," both under Penal Code section 484 as being alike, but having "different criminal acquisitive techniques." (*Id.* at p. 53.) Reversing the judgment, *Curtin* held that "if the elements of theft by trick were not proven, the conviction cannot be affirmed on the ground the evidence showed defendant's guilt of false pretenses, which has additional required substantive elements, as well as a special corroboration requirement, upon which the jury was not instructed. [Citation.]" (*Ibid.*)

Neither decision concerned the charge of attempt to commit the crime. Neither decision involved section 4530 or an escape statute. In neither case was the doctrine of lesser included offenses an issue. Cases are not authority for propositions not considered. (*People v. Jennings* (2010) 50 Cal.4th 616, 684.)

B. Appellant's Argument that Attempted Prison Escape Requires Specific Intent to Escape Is Both Extraneous And Incorrect

Appellant asserts that attempted escape is a specific intent crime under section 4530(b). (ABOM 12-15.) While we strongly disagree on the merits, this Court need not decide that issue.

The argument that attempted escape requires specific intent is relevant here, if at all, to the doctrine of lesser included offenses under the *elements test, not the accusatory pleading test.* "Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) Here, attempt to escape is an offense necessarily included in the escape because the information explicitly charged appellant with both attempt to escape from prison and escape from prison. Under the particular language of the *charge*, appellant could not commit the charged crime of prison escape without committing attempted prison escape. (See *id.* at p. 1228 [a charge of being a felon in possession of a firearm was a lesser included offense of the charges of carrying a concealed firearm and carrying a loaded firearm in a public place under the accusatory pleading test (but not the elements test) when the information alleged in all counts that defendant was a convicted felon].)

As noted in respondent's opening brief, the charge in the information never changed in the course of the trial proceedings. (RBOM 14-15, citing *People v. George* (1980) 109 Cal.App.3d 814, 819.) Appellant does not claim the information ever changed. He does not discuss *George*. Nor does his brief actually dispute the respondent brief's application of the accusatory pleading test to this case.

In any event, peculiar consequences follow from appellant's specific intent argument. For double jeopardy purposes, greater and lesser included offenses are deemed the "same offense." Two offenses are different for double jeopardy purposes when "each requires proof of an additional fact that the other does not." (*Jeffers v. United States* (1977) 432 U.S. 137, 150-151.) Assume, for sake of argument, appellant's view that a prisoner with general intent who exceeds the institution's boundaries commits prison escape, but has not attempted to escape unless the prisoner additionally formulated a specific intent to escape, which, allegedly, does not *necessarily* inhere in the mind of a prisoner who completed the crime. If so, a *conviction* on a charge of prison escape affords no constitutional double jeopardy protection to the accused from a further trial on attempted escape. The accused was not placed in jeopardy on the element of specific intent to escape at the trial, even though the jury necessarily found the prisoner actually completed the escape.

In the real world, statutory bars relating to joinder and multiple punishments doubtless would prevent retrial on the new charge of attempted prison escape. Still, double jeopardy analysis heaps analytic shame on appellant's specific intent argument. Because the result is clearly wrong, appellant's argument cannot be right.

This thought experiment points up a significant aspect of the case. The asserted differences between "specific" and "general" intent in relation to prison escape are semantical rather than substantive—or so the Legislature concluded in section 4530(b). A prisoner who intentionally cuts his way out of a cell and crosses fences and roofs of the institution is, by any measure of the word, escaping. The act will remove him from the limits of custody if continued. Should the prisoner be apprehended or decide to abandon the effort before the last breach, how far the prisoner originally had planned to go is simply not the issue. In section 4530(b),

departure, not just destination, offends the law. The prisoner has manifested an intent to do the act that naturally and probably constitutes escape if unabated. For purposes of section 4530(b), that is enough.

The Court of Appeal concluded there was "ample evidence of attempt." It therefore was authorized to modify the conviction from escape under Penal Code section 4530, subdivision (b) to attempted escape in the exercise of its review power. (Pen. Code, §§ 1159, 1181, subd. 6, 1260; *People v. Martinez*, *supra*, 20 Cal.4th at p. 241.)

II. THE PROSECUTOR DID NOT TAKE THE POSITION THAT APPELLANT DID NOT ATTEMPT TO ESCAPE; ANY ERROR IN THE COURT'S FAILURE TO INSTRUCT ON SPECIFIC INTENT WAS HARMLESS

Appellant correctly observes that the prosecutor believed the evidence established a completed escape. (ABOM 21.) However, his assertion does not follow that the prosecutor "chose" not to try appellant on attempted prison escape. (ABOM 20-21.) Simply put, after the agreed instructions were read to the jury and the prosecutor presented closing argument, defense counsel announced to the court the view that the instructions incorrectly defined the boundary element of escape, and counsel dissuaded the trial court from giving an instruction on attempted escape that would have mooted the asserted problem. (RT 340-346.) "In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction." (*People v. Beames* (2007) 40 Cal.4th 907, 927.)

Assuming that an attempted escape instruction should have been given and that the invited error doctrine is inapplicable, any erroneous omission of a specific intent instruction does not preclude a modification of the conviction to attempted escape under the charged statute. The failure to instruct on an element of a charged offense is subject to a finding of harmlessness under *Chapman v. California* (1967) 386 U.S. 18, 23. (*Neder*

v. United States (1999) 527 U.S. 1, 9-10.) The reviewing court "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.'" (*Neder*, *supra*, 527 U.S. at p. 19.)

Here, however, the assumed error is an instructional omission of a lesser included offense. As we argued in the opening brief (RBOM 27), assuming that the trial court should have instructed on attempted escape over defendant's objection and that defendant could take advantage of the error, the failure to instruct is harmless under the applicable state law test. (See *People v. Breverman* (1998) 19 Cal.4th 142, 165.)

In the instant case, the instructional error was harmless. First, as we argued in the opening brief and under argument I, we believe the jury did find that appellant acted with the specific intent to escape when it found that he escaped. Second, if the jury had been instructed that they had to find beyond a reasonable doubt that appellant had the specific intent to attempt to escape, the jury would still have found appellant guilty of violating Penal Code section 4530, subdivision (b), based on an attempt.

As this Court has long recognized, "[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt." (*People v. Anderson* (1934) 1 Cal.2d 687, 690 [attempted robbery]; see also *People v. Memro* (1985) 38 Cal.3d 658, 698 [attempted lewd conduct]; *People v. Dillon* (1983) 34 Cal.3d 441, 455 [attempted robbery]; *People v. Morales* (1992) 5 Cal.App.4th 917, 926 [attempted murder].) Appellant's intent can legitimately be inferred from the acts together with the surrounding circumstances. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1469.)

The evidence that Bailey harbored the specific intent to escape from custody was overwhelming. He obtained a hacksaw and wire cutters. He

sawed through his cell windows over a period of two days. (RT 87-88.) He made his bedcovers into the shape of a body to avoid appearing to be absent from the cell. (RT 180.) He wore non-prison pants and blocked out the name of the department of corrections on his clothing so it would not appear, things he would not need or even want to do if his intent were to remain within the prison walls and return to his bunk after harassing inmate Queen. (RT 49-51, 53-54, 57-59, 62, 81.) He removed the windowpanes and bars and climbed out of the cell window. (RT 63-64, 77, 133-134, 178-180.) He freed himself from his restraints. He then climbed over roofs and cut through four fences. (RT 64-65, 149.) These facts would lead a reasonable person, at a minimum, to "believe a crime is about to be consummated absent an intervening force"—and thus that "the attempt is underway." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 455.) There was nothing more for appellant to do to escape, except, in the Court of Appeal's words, "go beyond the facility that housed him."

Appellant's admissions to correctional staff reinforced the fact that he specifically intended to escape. Correctional Sergeant Ismyanto Soekardi testified as follows:

> Q. Did you ask him anything?
>
> A. I asked him some questions.
>
> Q. What did you ask him?
>
> A. I asked him if he escaped from his cell and he gave this whole story that I wrote in my report pertaining to him escaping, and then I asked him if he had broken into the carpenter shop. He said he did not do that.
>
> Q. But he told you that he had, in fact, escaped from his cell?
>
> A. Yes.

(RT 87.)

Q. Did he tell you where he went after he escaped out of his cell?

A. His plan he said was to cut through the bars, cut through the fence behind G Wing, make his way towards North Facility where the double fence was, try to cut through there, and then supposedly there was supposed to be someone waiting for him to pick him up. [¶] But because of the time frame that he took so long to cut out of the G Wing fence that he hid at the family visiting building and then he just made a different plan. And that's when he found a way to the Central roof. He cut a fence where I believe it's the chapel area, scaled the wall to get onto the fence, made his way to the east end of the Central Facility where the maintenance yard is.

(RT 88-89.)

Appellant would not have said that he was trying to escape through the North Facility unless he intended that his statement be taken as evidence of his intent. He would not have removed the prison name from his jacket if his intent was to return to his cell block and slip back into his bunk without his disappearance ever being noticed.

The jury was not misled on any issue vital to the defense. The defense was predicated entirely on appellant's own testimony that he did everything that the prosecutor proved that he did, and was interrupted in the Central facility maintenance yard before he had an opportunity to encounter inmate Charles Queen who lived in the "East" dorm, after which appellant would return to his cell. (RT 271, 274, 276-277, 281.) However, it is of no significance that appellant claimed a plan to return to his cell when an attempt to escape was already shown by his words and deeds.

As the prosecutor argued to the jury, appellant's testimony as to his future intent at the time he was apprehended does not comport with appellant's letter to his daughter recounting the events of the evening stating, "Just think we would have all been together right now" and the letter to his son, "I tried to escape Tuesday night" but "misjudged the

strength of the wire" "so I roamed all over the prison all night searching for different way out" and was "moments away from freedom." (RT 336-337.)

The evidence unquestionably established that appellant was trying to escape from the California Training Facility and that his efforts were thwarted. No rational jury applying Penal Code section 4530, subdivision (b) would not find that he "attempted to escape." A rational jury convicted appellant of a completed escape from prison. Had it been instructed that specific intent to escape is an element of attempted prison escape, it would still have found a violation of Penal Code section 4530 by "escape or attempt to escape," the offense with which appellant was charged.

CONCLUSION

The judgment of the Court of Appeal should be reversed with directions to modify the conviction to attempted prison escape and to remand for resentencing.[3]

Dated: August 4, 2011

Respectfully submitted,

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[3] Appellant argues that reversal of the Court of Appeal's judgment requires a remand for that court to consider his claim of trial court error in "threatening" a sua sponte instruction on attempted escape. (ABOM 26.) Should the conviction be modified to attempted escape from prison, the additional claim would appear to be moot. The trial court on resentencing can correct certain fines as the parties agreed in the Court of Appeal. (See Ct. of Appeal RB 15.)

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 2,898 words.

Dated: August 4, 2011

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Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Robin Bailey**
No.: **S187020; H034382**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 4, 2011, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 4, 2011, at San Francisco, California.

Nelly Guerrero
Declarant

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Signature

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