The California Legal Update

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Vol. 21 October 24, 2016 No. 11

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THIS EDITION'S WORDS OF WISDOM:

"*Courage is not the absence of fear, but rather the judgment that something else is more important than fear*." (Ambrose Redmoon)

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***Cases*:**

CASES:

***Dirk or Dagger, per P.C. §§ 21310 & 16470*:**

People v. Castillolopez **(June 2, 2016) 63 Cal.4th 322**

Rule: The blade of a folding knife must be open, exposed, and locked into position, to qualify as a dirk or dagger. To be "locked into position," there must be something more than mere friction or pressure holding the blade open during normal use.

Facts: San Diego Police Officer Bryce Charpentier contacted defendant during a lawful traffic stop on July 29, 2012. During a lawful patdown of defendant's person (neither the stop nor the patdown being contested issues), the officer recovered a Swiss Army knife from defendant's jacket pocket. The knife's larger blade, although capable of being folded into the handle, was open and exposed. Defendant was arrested for the felony offense of possession of a dirk or dagger, per P.C. § 21310. At trial, experts testified that the knife blade was capable of being folded into the handle, but only by applying pressure to the blade. Although there was no locking device holding the blade in its open position, friction or spring tension kept the blade from closing, requiring a certain amount of pressure or force to close it. Both experts described the knife as being more of a tool (e.g., "a multi-tool or survival tool") than a defensive weapon. The experts agreed that the effectiveness of defendant's Swiss Army knife "as far as stabbing is limited because should it hit something hard like bone, there is a risk of it collapsing on the user." Despite this testimony, defendant was convicted by a jury and sentenced to prison. On appeal, the Fourth District Court of Appeal reversed defendant's conviction, holding that the evidence was insufficient to show that the blade of defendant's Swiss Army knife was "locked into position," as by statute.

Held: The California Supreme Court unanimously affirmed the Court of Appeal's reversal of defendant's conviction. The issue on appeal, as it was in the trial court, was what the statutes mean when they say that the open and exposed blade of a folding knife in issue must be "*locked into position*." P.C. § 21310 (formerly, P.C. § 12020(a)(4)) makes it a criminal offense to carry "concealed upon the person any dirk or dagger." The original statute (i.e.; 1917) on this did not define the term, "*dirk or dagger*," nor did it limit it to dirks and daggers "concealed on the person." The "concealed on the person" element was added in 1923. However, whether a folding knife or pocketknife qualified as a dirk or dagger under the statute was never the subject of any legislation. So, without legislative guidance, the courts took it upon themselves to limit the prohibition on dirks or daggers to knives with a blade that "locked" into an open position, thus making it a "stabbing" instrument. But "*locked*" was not defined. Finally in 1997, after several abortive attempts, the Legislature itself amended the statute to provide that a folding knife or pocketknife would qualify as a dirk or dagger "capable of ready use as a stabbing weapon" only if the blade of the knife was "exposed and locked into position." (P.C. § 12020(c)

(24)) This section was later reenacted without substantive change as P.C. § 16470, as part of the Deadly Weapons Recodification Act of 2010. But nowhere does the Legislature tackle the issue of what "locked into position" means. The Swiss Army knife at issue here had a blade that would fix into the open position, requiring the holder of the knife to exert some pressure to the back of the blade to close it. There was no locking mechanism, however, that would hold the blade open. The Attorney General, on appeal, argued that this was legally sufficient to constitute "locked into position," as required by statute. The Supreme Court (agreeing with the Appellate Court) disagreed. Referring to dictionary definitions, the Court noted that the ordinary meaning of the word "*lock*" includes to "*make fast*." As this term is applied in particular to mechanical devices, it means "to make fast by or as if by the interlacing or interlocking of parts." The dictionary definition of "*fast*" includes "*firmly fixed*: immovable or moved only with the greatest difficulty." Using these definitions, the Court found that for a pocketknife blade to be "locked into position," it must be "firmly fixed . . . as if by interlacing or interlocking of parts." It *may* actually require (although not specifically deciding whether it does) that the knife in question have some locking mechanism to hold the blade open, "thereby render(ing) the blade immovable." "(T)he critical question is whether it has made the device 'fast'—that is, 'immovable or moved only with the greatest difficulty." The Court found, therefore that although a blade might be held open by means of friction, a blade that can be closed simply by applying pressure to the back of the blade has not been "made fast," and therefore is not "locked into position" as the term is ordinarily understood. In the instant case, the exposed blade of defendant's Swiss Army knife was not fixed or immobile and could be closed simply by applying pressure to the back of the blade. This is not "locked into position" within the meaning of P.C. § 16470. The knife, therefore, was not a prohibited "dirk or dagger."

Note: As pointed out by the Court, almost all folding knives employ some sort of spring or friction to prevent the knife from swinging shut on its own. Without such a feature, the knife is inevitably going to fold down onto the user's fingers, making it dangerous to use at all. Because dirks or daggers are limited to "stabbing" instruments, you couldn't use a folding knife that didn't have something to keep the blade open without also injuring yourself. Mere friction, or minimal pressure, that keeps the blade open during normal use, is not enough. Some physical mechanism to actually lock the blade open, even while stabbing someone or something, is on the other end of this spectrum. While the Court here declined to decide exactly where the line is between these two extremes, the implication is that the Court leans towards the later.

***Assault on a Peace Officer with Force Likely to Produce Great Bodily Injury; per P.C. § 245(c)*:**

People v. White **(Oct. 27, 2015) 241 Cal.App.4th 881**

Rule: Assault, per P.C. § 245, is not a specific intent crime. Whether or not the person committing an assault had an intent to injure, or whether such an injury even occurs, is irrelevant. The test is what a reasonable person would have believed would be the direct, natural, and probable result of his actions when he commits the assaultive act.

Facts: Defendant was a prisoner at a Division of Juvenile Justice facility. On December 3, 2013, he got into a fistfight with another inmate. Correctional Counselor Elmore was forced to use pepper spray to break up the fight. Defendant was allowed to wash off in a shower which had a multi-paneled partition constructed of wire-reinforced glass separating him from a control desk, with the desk being six feet from the window. Several window panes were missing from the window. Counselor Elmore and Parole Agent Zavala were seated at the desk, visible to a still-angry defendant, when he broke off a metal showerhead and threw it at the window. Although the showerhead bounced back off the window, it broke a windowpane, spraying glass particles on Elmore and the desk top. Elmore got a sliver in her eye, necessitating medical attention. But defendant wasn't done. He then stepped to within two feet of the window and threw the showerhead at it again, this time penetrating the window. The showerhead landed near the desk. Glass particles showered Agent Zavala, cutting her lip. Charged in adult court with two counts of assault on a peace officer with force likely to produce great bodily injury, per P.C. § 245(c), defendant was convicted by a jury. Sentenced to prison for five years and four months, defendant appealed, arguing that he was not aware of facts that would lead a reasonable person to realize that a battery would probably and directly result from his conduct.

Held: The Second District Court of Appeal (Div. 6) affirmed. On appeal, defendant argued that the evidence was insufficient to support a finding that he knew that throwing a showerhead at the window would probably and directly result in application of force to another person. The Court ruled, however, that what he actually knew was irrelevant. To support defendant's conviction, the jury had to find only that defendant (1) willfully committed an act which by its nature would probably and directly result in injury to another, and (2) that he was aware of facts that would lead a reasonable person to realize that a battery would directly, naturally, and probably result from his conduct. P.C. § 245(c) "is directed at the force used, and it is immaterial whether the force actually results in any injury. The focus is on force likely to produce great bodily injury." Defendant also argued that a reasonable person would assume the window was unbreakable because it was made of wire-reinforced glass. Per defendant, if he had wanted to harm the victims, he could have thrown the showerhead through one of the windowpanes that had no glass. To this, the Court noted that neither defendant's poor aim, nor the fact that the window had a safety feature, are defenses. To constitute an assault, it is not required that there be proof of a specific intent to injure the victims or a substantial certainty that an application of physical force would result. Defendant lastly argued that he could not be convicted based on facts he did not personally know, i.e., that reinforced glass could be broken, or that he expected Elmore and Zavala to be hit by the showerhead or flying glass fragments. The Court, however, ruled that this also is not the test. "The test is whether a *reasonable person* would reasonably believe that a metal object, if thrown with great force, would directly and probably injure a person on the other side of a window," reinforced or not (italics added). So it's not what defendant believed, but what a reasonable person would have believed would be the direct, natural, and probable result of his actions. Also, assault is not a "specific intent" crime. "'[T]he crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent.' (Citation) There is

no requirement that the defendant be subjectively aware of the risk that a battery might occur." Defendant's conviction, therefore, was affirmed.

Note: My primary reason for briefing this relatively simple case is to (re)emphasize the fact that assaults of any type are not "*specific intent*" crimes. In other words, it is not necessary to prove that the defendant intended his actions to cause a "harmful or offensive touching" of another, or even that such a "touching" occurred at all. The test, as so clearly pointed out by the Court, is what a reasonable person under the circumstances should have expected as a result of his actions. The issue here, as to what a reasonable person should have expected by throwing an object such as a showerhead at a window, even though the window may have appeared to be shatterproof or reinforced, could have been decided either way by the jury. The jury chose to convict. The appellate court wasn't about to second guess that determination.

***Drunk in Public and Civil Commitments, per P.C. § 647(g)*:**

In re Jorge D. **(Apr. 6, 2016) 246 Cal.App.4th 363**

Rule: An arresting officer's failure to justify not taking a drunk-in-public arrestee to a detoxification facility, as required by P.C. § 647(g), will invalidate the arrest itself.

Facts: In response to a radio call concerning suspicious persons hanging around a specific address, Officer Robert Perez contacted four people in, or standing around, a car. Defendant, a minor, was one of those people; the others all being adults. In contacting him, Officer Perez noted that defendant showed signs of being intoxicated; i.e., he could not speak clearly, his speech was "mumbled, argumentative, and somewhat incoherent," and he had "bloodshot, watery eyes." Determining that defendant was drunk in public, being a danger to himself and unable to safely walk home, Officer Perez arrested him for a violation of P.C. § 647(f); drunk in public. The officer therefore drove defendant home and left him in the custody of his mother (who later testified that she'd seen him drunk before, and this was not "drunk." Anyone see the problem here?). Officer Perez apparently never considered taking defendant to a detoxification facility as opposed to home. A petition was filed in juvenile court alleging that defendant was delinquent for having been drunk in public. (It was also alleged that defendant had violated P.C. § 308(b), an infraction, for a Bic cigarette lighter found on his person in a search incident to arrest. But, with the elimination of this offense as a result of a June 9, 2016, amendment to P.C. § 308, making it henceforth legal for minors to possess tobacco products and paraphernalia, the issue is now moot.) The court sustained the petition, declaring defendant to be a ward of the court, and placed him on probation. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 3) reversed. Defendant argued on appeal, as he did (unsuccessfully) before the juvenile court, that his conviction cannot stand absent proof that Office Perez complied with the requirements of subdivision (g) of P.C. § 647. Section 647(g)

provides in part: "When a person has violated (P.C. § 647(f); drunk in public), a peace officer, *if he or she is reasonably able to do so*, *shall* place the person, or cause him or her to be placed, in civil protective custody . . . (in) a facility, designated pursuant to (W&I Code §) 5170, . . . for the 72-hour treatment and evaluation of inebriates. . . . A person who has been placed in civil protective custody shall not thereafter be subject to any criminal prosecution *or juvenile court proceeding* based on the facts giving rise to this placement." (Italics added) Although there are exceptions (e.g., "(1) Any person who is under the influence of any drug, or under the combined influence of intoxicating liquor and any drug. [¶] (2) Any person who a peace officer has probable cause to believe has committed any felony, or who has committed any misdemeanor in addition to (section 647(f)). [¶] (3) Any person who a peace officer in good faith believes will attempt escape or will be unreasonably difficult for medical personnel to control."), none of them apply here (but see Note, below). By its terms, subdivision (g) applies to juveniles as well as adults ("*or juvenile court proceeding*"). Also by its terms (i.e., "*shall*"), the requirements of subdivision (g) –for the officer to consider whether a detoxification facility placement is reasonable under the circumstances—are mandatory. The only issue here is what the legal effects might be of Office Perez's failure to consider the reasonableness of a detoxification facility placement. The factors an arresting officer must consider in determining the reasonableness of a detox center placement include the distance to the nearest detoxification facility, the availability of bed space at the detoxification facility, the arrestee's disposition and willingness to cooperate, and police department resources to transfer the arrestee to the facility. When the arrestee is a juvenile, as in the present case, the officer should also consider whether it better serves the minor to take the minor home and deliver him or her to the custody of a parent or legal guardian. In making this determination, an officer may consider the circumstances of the encounter, whether the minor has committed other offenses, the minor's intoxication level, the minor's criminal history, and any other encounters the officer may have had with the minor. An officer may also consider the parent or legal guardian's receptiveness and ability to address the intoxication issue. The problem in this case is that Officer Perez testified that he was not even aware of the requirements under subdivision (g), and therefore did not consider any of these factors when choosing to take defendant home as opposed to depositing him into a detoxification facility. Prior case authority (i.e., *People v. Ambellas* (1978) 85 Cal.App.3rd Supp. 24.) has held that the proper remedy for failing to abide by the mandatory requirements of subdivision (g) in a P.C. § 647(f) case is dismissal of the case itself. In this case, it cannot be considered reasonable for Officer Perez to *not* have taken defendant to a detoxification facility when he was not even aware of the subdivision (g) requirements. Although the Attorney General argued that the "*shall*" in subdivision (g) was "*directive*" only, as opposed to mandatory, it was conceded that if *Ambellas* is to be followed, then this case should be dismissed. The Court found *Ambellas* applicable, and that because Officer Perez failed to take into consideration any of the subdivision (g) factors, the order of the juvenile court must be reversed.

Note: I note that the statutory exceptions to the applicability of subdivision (g) include when there is probable cause to believe that the arrestee has committed any other offense. Defendant here was arrested also for possession of tobacco paraphernalia (a cigarette lighter), an infraction. While this exception under (g) refers specifically to felonies or misdemeanors, P.C. § 19.7 says

that "all provisions of law relating to misdemeanors shall apply to infractions including, but not limited to, powers of peace officers (and) jurisdiction of courts, . . ." The Appellate Court in this case eventually held that a cigarette lighter does not qualify as paraphernalia, for purposes of P.C. § 308 (an issue made moot with the recent amendment to section 308, as noted above). But that does not mean that at least under the "good faith" doctrine, defendant wasn't also lawfully under arrest for that violation. But this issue (if it is one) was not discussed. Also, and perhaps more importantly, while subdivision (g) provides that once an arrestee is taken to a detoxification facility he is no longer subject to criminal prosecution, it seems to me to be a big leap to also say that failure to consider the reasonableness of the subdivision (g) alternative, whether mandatory or not, somehow invalidates the arrest itself. But that's the rule of this case. So we're stuck with it. Officers, therefore, must document, and be ready to testify to, why a 647(f) (drunk in public) arrestee was not taken to a detoxification facility as opposed to jail (or home, for a juvenile), at the cost of the arrest itself if the officer fails to do so.

***Residential Burglaries and Circumstantial Evidence*:**

People v. Goode **(Dec. 30, 2015) 243 Cal.App.4th 484**

Rule: Substantial evidence supports a defendant's conviction for residential burglary where the victim hears his outer metal storm door open and it is logical to assume that the defendant would then reach past the outer boundary of the residence (i.e., the storm door) in an attempt to open the front door.

Facts: At about 2:30 a.m. on April 2, 2014, David Aros was asleep on the living room couch in his Marysville home when he awakened to a sound that he thought came from the metal storm door on the outside of his front door. Although he couldn't be sure if he had really heard the storm door because he had been asleep, it sounded like the unique sound the storm door makes when being opened or closed. But then seconds later, he heard a window on the side of the house "jiggling," as if someone was trying to open it. At that point he realized he was not just hearing things, and was "positive" that the sound that woke him up was the storm door. Looking out a back window, he saw defendant. The police were called and at some point (not described) defendant was arrested. Mr. Aros told police that he was not sure if defendant had tried to open the front door. Defendant was charged in state court with first degree residential burglary (for opening and reaching past the storm door) and attempted residential burglary (for jiggling the window). Convicted of both, defendant appealed.

Held: The Third District Court of Appeal affirmed (except to reduce defendant's sentence by eight months; the time added on for the attempted burglary conviction). On appeal, defendant argued that there was insufficient evidence to sustain his conviction for first degree burglary because the victim, Mr. Aros, wasn't sure that the storm door had ever been opened. Entering a home with the intent to commit a larceny or any felony is a residential burglary. Even the slightest entry by any part of the suspect's body or by an instrument is sufficient to complete the crime of burglary. "For an entry to occur, a part of the body or an instrument must penetrate the

outer boundary of the building." In this case, defendant conceded that the storm door, like a screen on a window, constituted the outer boundary of the victim's home. Entering beyond the plane of the storm door, therefore, with the requisite intent, is a completed burglary. Defendant's assertion that the victim was not sure if his storm door had been opened was not supported by the record. In fact, the victim testified that although not originally sure, once he heard defendant trying to enter through the window, he became positive that the sound that had woken him was in fact his storm door opening or shutting. Defendant also argued that there was no evidence that once he had the storm door open, he reached in to try to open the front door. While Mr. Aeros did tell the police that he didn't know if defendant had tried to open the front door, and there was no direct evidence that he did, the jury could reasonably infer, circumstantially, that a person who is trying to make entry into a residence (as evidenced by his opening the storm door and then seconds later seeking entry through a window) would try the front door after opening the outer storm door. For these reasons, there was "substantial evidence" (which is the test for upholding a conviction on appeal) in the record that defendant opened the metal storm door and then reached past it in an attempt to open the front door. The defendant, therefore, was properly convicted of a completed residential burglary.

Note: The Court did rule, however, that defendant could not be sentenced separately for both the completed burglary and the attempted burglary. Pursuant to P.C. § 654, and looking at the "intent and objective of the actor," the rule is that while a defendant may be tried and convicted of two factually related charges, he may not be sentenced separately for both offenses where those offenses are both incident to one objective. Here, the burglary and the attempted burglary, occurring within seconds of each other, had the same intended objective; i.e., to commit larceny within the victim's home. For this reason, the Court reduced defendant's prison sentence by the eight months the trial court had imposed for the attempted burglary. But otherwise, his conviction was upheld.

***Attempted Burglaries*:**

People v. Zaun **(Mar. 25, 2016) 245 Cal.App.4th 1171**

Rule: Evidence of other completed crimes with a similar modus operandi is relevant to prove a suspect's specific intent in an attempted burglary.

Facts: During the month of November, 2013 defendant and three others committed three residential burglaries. Their "M.O." (i.e., "modus operandi") was to knock at the front door and then, if (but only if) no one answered, force their way in and steal whatever they could take. In two instances, however, homeowners answered the door. Whichever of the suspects was at the door would then ask for a fictitious person and, upon being told that no such person lived there, leave. Upon being arrested (the circumstances of which were not described), the four suspects were charged with three counts of residential burglary, two counts of attempted residential burglary, and one count of possession of stolen property. Defendant was convicted of all counts and appealed. (What happened with the other co-defendants was not described.)

Held: The Third District Court of Appeal affirmed. Defendant's argument on appeal was that the evidence was insufficient to support his conviction of attempted burglary because the necessary intent to enter the homes was never formed. P.C. § 459 provides that "(e)very person who enters any house … with intent to commit grand or petit larceny or any felony is guilty of burglary." And then P.C. § 21a provides: "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." Defendant conceded that the second element was met. But as to the first; i.e., the specific intent to commit a burglary, defendant argued, while employing a little "sophistry" (i.e., a "clever manipulation of words"), that he and his associates were only casing houses and that the presence of someone in each home "was not an intervening circumstance that frustrated an attempt, but (rather) the failure of a condition precedent to forming the intent." In other words, defendant contended that the intent to commit a burglary was never formed unless and until it was found that no one was home. As wild as it sounds, the jury could very well have bought that argument. But, having convicted defendant, it obviously didn't. To the contrary, the jury could rightly use the evidence of defendant's three completed burglaries to find the necessary specific intent as to the attempts as well. In the three completed burglaries, the approach was largely the same; i.e., knock on doors to see if the houses were occupied, and then force entry for the purpose of committing a theft if no one responded. This evidence supported the conclusion that defendant and his associates had the intent to enter each of the homes and commit theft when they went to the front door, only abandoning that intent when someone answered the door. The jury, having convicted defendant, apparently reached this conclusion. With such a conclusion being supported by "substantial evidence," it is not up to an appellate court to second-guess the jury. Defendant was therefore properly convicted of both counts of attempted burglary.

Note: Very simple case, but one that carries with it an important evidentiary point. Evidence of other crimes may sometimes be used to show the defendant's specific intent—which, by its very nature, can only be proved circumstantially—in committing a crime where his intent is a necessary element of the crime. Clearly, when defendant and his buddies walked up to a random house and knocked, only breaking into that house when it was found that no one was home, it is illogical to argue that they weren't acting on a preconceived plan to burglarize houses where no one was home, leaving those with someone present unmolested. That "preconceived plan" is what we might call the specific intent. The completed burglaries in other cases is relevant evidence tending to prove the necessary specific intent for an attempt.

***Attempts, per P.C. § 654*:**
***Gang Enhancements, per P.C. § 186.22(b)(1)*:**
***Evading a Peace Officer per V.C. § 2800(a)*:**

People v. Weddington **(Apr. 18, 2016) 246 Cal.App.4th 468**

Rule: (1) To be an attempted crime, the defendants' overt acts leading towards the commission of a crime must be something beyond mere preparation, but need not be the ultimate step toward

the consummation of the target offense. (2) Expert testimony in support of a gang enhancement, per P.C. § 186.22(b)(1), must be supported by evidence that the crime at issue was gang related. (3) All persons in a vehicle fleeing from the scene of a burglary may be liable for felony evading as an aider and abettor, the dangerous fleeing being a foreseeable, natural and probable consequence of the crime.

Facts: On the morning of September 7, 2011, the three co-defendants—Travion Weddington, Willie Nunnery, and Taliah Bashir—were observed four times within an hour by Elizabeth Barba and Jose Fernandez, either parked or driving by in a red Chrysler Sebring in front of their home on Gerald Avenue in Granada Hills. The last time, co-defendant Bashir, the sole female in the car and who was driving, parked and got out of the car, walked up to the Barba/Fernandez residence, and pounded on the door for about 30 seconds. Because Fernandez had left earlier, leaving Barba alone with her children, this frightened Barba. With the kids, she hid in a back bedroom until the pounding stopped. When it did, Barba looked out again and saw Bashir getting back into the Sebring where the other two defendants waited, and drive away. Shortly thereafter, Los Angeles Police Officer John Parker observed defendants parked in the same red Sebring in the alley behind Barba's house. Officer Parker watched as co-defendant Weddington got out of the car and walked to the trunk of the Sebring. But then seeing Parker's marked patrol car, Weddington immediately got back into the car and the trio sped off with Officer Parker close behind. Getting onto a freeway, defendants soon pulled off the freeway with Officer Parker in pursuit, using his emergency lights. The suspects stopped, allowing Officer Parker to make contact. With Bashir found to be driving on a suspended license, the car was impounded and searched, resulting in the recovery of what was later described as common burglary tools; e.g., screwdrivers, crowbar, gloves, etc.. The GPS on Weddington's phone indicated that they were from South Los Angeles; miles from Barba's Granada Hills home. (It is unknown if the defendants were arrested or released.) Two and a half weeks later (September 26), the three defendants, again in the red Sebring, were the target of an LAPD multiunit team surveillance involving a helicopter and numerous officers on the ground in unmarked vehicles, using the information provided by the airship to follow the Sebring. Following defendants around Northridge (both Granada Hills and Northridge are in the San Fernando Valley area of Los Angeles), they were watched as they stopped at three different residences, each time following a routine similar to what they did at the Barba residence, but with the added feature of Bashir looking over side gates at two of the residences. Finally, defendants stopped in front of the home of Kin Fong on Labrador Street. The routine was the same as above, including Bashir looking over a side gate. This time, however, after Bashir knocked on the front door and got no response, Weddington and Nunnery also got out of the car and went into the backyard. They were observed entering the house through a window. After about 10 to 15 minutes, both men exited through the front door carrying weighted down bags and pillowcases. As the defendants started to drive away, a marked patrol car attempted to conduct a traffic stop. This resulted in a high speed chase with the defendants blowing several red lights in heavy traffic as they tossed stolen property out of all four windows. The chase ended with Bashir crashing the Sebring. All three defendants fled on foot, but were caught and arrested. The defendant were charged in state court with four counts of attempted first degree residential burglary (P.C. §§ 664/459; the Barba

residence and the three homes stopped at just prior to their arrest), a completed first degree residential burglary (P.C. § 459; the Fong residence), one count of conspiracy to commit residential burglary (P.C. § 182(a)(1)), one felony count of evading a peace officer in willful disregard for safety (V.C. § 2800.2(a)), and one count of possession of burglary tools (P.C. § 466), with gang enhancements (P.C. § 186.22(b)(1)) attached to each felony. In a bifurcated bench trial, the prosecution presented evidence in support of the gang enhancement allegations that defendants were all members of the Clover subset of the Seven Trey Gangster Hustler Crip criminal street gang (STGH), an offshoot of the original Crips gang. They all had numerous STGH tattoos. A prosecution gang expert testified that gang tattoos were earned by "putting in work" for the gang; that is, committing crimes for the gang's benefit. According to the expert, the burglary and attempted burglaries represented a signature crime of STGH, known as "*floccin*'," in which Crip gang members leave their territory in the southern part of Los Angeles to commit daytime burglaries of residences in the San Fernando Valley suburbs. The term "*floccin*'" is derived from so-called "*knock-knock burglaries*," in which one of the perpetrators knocks on the door of a target residence to determine if anyone is home. Defendants were convicted of all the above-referenced charges, with the gang allegations were found to be true. They all filed a joint appeal.

Held: In a split, 2-to-1 decision, the Second District Court of Appeal (Div. 1) affirmed.

(1) *Attempted Residential Burglaries*: Among the issues on appeal was the sufficiency of the evidence to prove that the four residences approached by Bashir, but never entered, were attempted residential burglaries. Defendants argued that their conduct never progressed beyond the planning and preparation stage. A majority of the Court (with one dissent) disagreed. The rules are well established, if not always easy to apply. A criminal attempt occurs whenever there is a specific intent to commit the crime (i.e., the "target offense") and a direct but ineffectual act done toward its commission. The overt act element of an attempt requires conduct that goes beyond "mere preparation," and shows that the suspect is putting his or her plan into action. The act that goes beyond mere preparation need not constitute an element of the target crime and it need not be the ultimate step toward its consummation. Instead, it is sufficient if the conduct is the first or some subsequent act directed towards that end after the preparations are made. As noted by the California Supreme Court: "(T)he plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement" of an attempt. Also, as is particularly relevant to this case, a person who attempts to commit burglary is guilty of attempted burglary even if, after taking a direct step towards committing the crime, he or she abandons further efforts to complete the crime. In this case, the evidence amply supported the jury's finding that defendants had completed their planning and preparation to commit burglaries when they traveled from the southern part of Los Angeles to the San Fernando Valley with tools in the car to aid in the commission of those burglaries. Defendants' unusual conduct, which included driving slowly through the targeted neighborhoods, parking in front of certain residences for several minutes, knocking on the front doors of those houses for one to two minutes, and peering over gates into backyards, was not the behavior of an innocent visitor to a neighborhood. The completed burglary of the Fong residence, together with defendants' strikingly similar methods of operation for every one of the

targeted residences, clearly demonstrated their intent to burglarize homes in the area. A voluntary withdrawal—even if occasioned by a change of heart—is not a defense to the charge of attempted burglary. Once the bell has rung (i.e., When the suspect crosses that line where an attempted burglary has been committed), you don't un-ring it by changing your mind.

(2) *The Gang Enhancements*: Defendants argued that the gang enhancements must be reversed because the only evidence supporting them was the conclusory opinion of the prosecution's gang expert. The Court disagreed. In order to prove the elements of the criminal street gang enhancement, as described in P.C. § 186.22(b)(1), the prosecution may, as in this case, present expert testimony on criminal street gangs. As noted by the defendants, it is a rule that expert testimony that is unsupported by any evidence that the crime was gang related is insufficient to support a gang enhancement. In this case, however, there was ample evidence upon which the trial court was entitled to rely that supported its findings on the gang enhancement. There are two prongs to a gang enhancement under 186.22(b)(1). First, the underlying felony must be "gang related." Second, the defendant must commit the gang-related felony with the specific intent to promote, further, or assist in any criminal conduct by gang members. The first prong may be established by proof that the offense was committed (1) for the benefit of a gang; (2) at the direction of a gang; *or* (3) in association with a gang. The first prong is worded in the disjunctive. Therefore, a gang enhancement may be imposed without evidence of any benefit to the gang so long as the crime was committed in association with, or at the direction of another, gang member; i.e., that two or more gang members committed the crime together. In this case, the record amply supports the trial court's finding that defendants committed the underlying offenses as gang members acting in association, thus satisfying the first prong (i.e., "gang related") of the statute. The fact that these three gang members came together to commit these crimes also satisfies the second prong of section 186.22(b)(1); that the "defendant commit(ted) the gang-related felony 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.'" The California Supreme Court has held that; "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." In this case, the expert's opinion was supported by evidence concerning the manner in which these crimes were carried out and the defendants' active gang membership.

(3) *Evading a Peace Officer*: All three defendants were convicted of evading, per V.C. § 2800.2(a). However, only Bashir was driving. Co-defendants Weddington and Nunnery therefore argued that they were improperly convicted of this offense. Again, the Court disagreed. To establish a violation of V.C. § 2800.2(a), the prosecution is required to prove that while driving a vehicle in a willful or wanton disregard for the safety of persons or property, the defendants fled or attempted to elude a police officer pursuing in a vehicle. "Wantonness" includes the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of the consequences. The word "*willful*" in this context means "*intentional*." The intention referred to here relates to the disregard of safety of persons or property, not merely to the act done in disregard thereof. Subdivision (b) of section 2800.2 further provides that "a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to

elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under V.C. § 12810 occur, or damage to property occurs. In this case, the prosecution presented alternative theories to establish the charge of evasion against Weddington and Nunnery, both based upon the theory that they were aiders and abettors: The evasion was a "*natural and probable consequence*" of a burglary aided and abetted by Weddington and Nunnery, or a "*natural and probable consequence*" of a burglary that appellants conspired to commit. Under the "*natural and probable consequence*" doctrine, a person who knowingly aids and abets criminal conduct is guilty of not only the intended crime (i.e., the target offense; the burglary), but also of any other crime the perpetrator actually commits (i.e., a non-target offense; the evading) that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable that the non-target offense would occur. The natural and probable consequences doctrine applies with equal force to cases involving the vicarious liability of co-conspirators for a crime committed in furtherance of the conspiracy. In this case, the Court found "abundant evidence" that co-defendants Nunnery and Weddington expected Bashir to drive the getaway vehicle in whatever manner was necessary to elude the police and avoid apprehension, regardless of any danger to persons or property. Everyone was tossing stolen property from the car as they were being chased. And, despite the lack of evidence that Nunnery and Weddington were directing or controlling the manner in which Bashir was driving, the evidence established that both men took advantage of the crash that resulted from Bashir's reckless driving by exiting the vehicle and fleeing on foot. Given the substantial evidence that execution of the common design included the use of a getaway car to avoid apprehension, Weddington and Nunnery certainly could (or should) have foreseen Bashir's reckless driving in evading the police. All three defendants, therefore, were rightly convicted of the charge of evading.

Note: This case is particularly instructive on the issue of what it takes to commit an attempted crime, such as burglary. Too many trial court judges, in my experience, not to mention the dissenting justice in this case, have difficulty with the concept that a defendant does not have to commit the last act possible before committing the target offense before he or she can be held liable for an attempt to commit that crime. In other words, the line between (1) mere planning and preparation, and (2) the actual commission of the target offense, is sometimes hard to see. This case provides a lot of great, citable authority for where that line may be found, available to any prosecutor who has to argue this issue in court. Also, liability of an aider and abettor for foreseeable crimes that are the "natural and probable consequence" of a target offense is a concept that I think is often overlooked. This case is instructive on this issue as well.