NOT YET SCHEDULED FOR ORAL ARGUMENT

23-CF-055

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

RODNEY ALLEYNE
Appellant,

v.

UNITED STATES,
Appellee.

On Appeal From The Superior Court
Of The District Of Columbia
Criminal Division

OPENING BRIEF FOR APPELLANT RODNEY ALLEYNE

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DISCLOSURE STATEMENT

Appellee in this Court is the United States. Counsel who appeared for the United States before the Superior Court was Assistant U.S. Attorney Charles Jones, and Caroline Huether.

Defendant in the Superior Court and Appellant in this Court is Rodney Alleyne. Counsel who appeared for Mr. Alleyne before the Superior Court was Jesse Winograd, Ferguson Evans (trial counsel) and finally Anthony Eugene Smith (sentencing counsel). Appellate counsel now appearing before this Court is Jason Clark.

RULE 28(A)(5) STATEMENT

This appeal is from a final order or judgment that disposes of all the parties' claims at issue.

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ISSUE PRESENTED

1. Does robbery require that the government prove the defendant intended to wholly and permanently deprive a victim of their property?

2. Was the instruction given to the jury, that they may find Mr. Alleyne had the "intent to steal" sufficient to convey to the jury they must find that Mr. Alleyne had the requisite intent to permanently deprive Mr. Guardado of his property? Or, put another way, did the instruction sufficiently inform the jury that Mr. Alleyne could not be found guilty if he took Mr. Guardado's wallet, intending to return it at some point?

3. Does the law require the government to prove Mr. Alleyne had the intent to permanently deprive Mr. Guardado of his property *at the moment* he reached into Mr. Guardado's pocket to sustain a conviction for robbery? Or is there sufficient evidence if, after taking the property, a defendant manifests the intent to permanently deprive a person of their property minutes or weeks later? Must the actus reus and mens rea of robbery coincide?

STATEMENT OF THE CASE

Rodney Alleyne was charged by indictment with five counts for an incident that occurred on May 13, 2020. A.3[1]

	Description	DC Code Section	Finding
1	Robbery (wallet)	§ 22-2801	Guilty
2	Simple Assault	§ 22-404	Guilty
3	Unlawful Entry of a Motor Vehicle	§ 22-1341	Guilty
4	Second Degree Theft (tool and jacket)	§ 22-3211, 3212(b)	Guilty
5	Leaving After Colliding – Property Damage	§ 50-2201.05c(a)(2)	Guilty

After a jury trial held over four days (Sep. 28, Sep. 29, Oct. 3, and Oct. 4, 2022) before the Honorable Jason Park, the jury found Mr. Alleyne guilty of all five counts.

At sentencing, Judge Park imposed a sentence of 42 months incarceration, 3 years supervised release, and $100 to the VVCA on Count 1 (Robbery). As to the remaining counts, Judge Park imposed a sentence of 60 days incarceration and $50 to the VVCA. All sentences imposed were to run concurrent with one another. A.7; *see also* Sentencing Tr. 15, Jan 13, 2023. Mr. Alleyne now appeals.

[1] Citations to the appendix are in the form, "A.[page number]".

STATEMENT OF THE FACTS

Mr. Alleyne's case was tried to a jury. The defense did not present any witnesses but did enter two pieces of evidence. *See* 10/3/22 Tr. 140-41 (the defense admitted Def. Ex. 1, a portion Mr. Guardado's grand jury statement used to impeach him, and Def. Ex. 3, a clip from the bus driver's recorded statement). The government's trial evidence is summarized as follows.

A. Mr. Henry Steven Romero Guardado

The government's first witness was the complainant Mr. Henry Steven Romero Guardado.[2] He testified that he was involved in a car accident with the defendant. Trial Tr. 31, Sep. 29, 2022 (hereinafter "9/29/22 Tr."). At the time of the accident, Mr. Guardado was driving home from work in his own vehicle, a dark red Mazda 3. 9/29/22 Tr. 31-32.

While driving, Mr. Guardado came to a stop at a red light near the intersection of Pennsylvania Ave. and Alabama Ave. SE. 9/29/22 Tr. 34, 85:20-22. At the stoplight, a gray Volkswagen Jetta stopped behind Mr. Guardado's vehicle. 9/29/22 Tr. 37:1 ("It was a gray Volkswagen Jetta"). When the light turned from red to green, the Jetta behind Mr. Guardado began to honk its horn. 9/29/22 Tr. 36:10-13, 85:23-86:1. Mr. Guardado said that he was perhaps a couple of seconds

[2] Mr. Henry Steven Romero Guardado is referred to in the record variously as Mr. Steven-Romero, Mr. Romero, or Mr. Guardado. For consistency, counsel has chosen to refer to him as Mr. Guardado.

late in accelerating after the light turned green. 9/29/22 Tr. 37:16-18. He explained that he has a manual transmission and so is a little slower in accelerating. 9/29/22 Tr. 37:16-18.

The Jetta behind, driven by Mr. Alleyne, then proceeded to pull up alongside Mr. Guardado and Mr. Alleyne began making hand gestures and trying to talk to him. 9/29/22 Tr. 36:10-13 (hand gestures), 37:4 (driver made the gestures); 37:7-8 (". . . trying to tell me things."), 86:17-25.

Mr. Guardado stated that the driver of the Jetta "advanced a bit, and threw a [soda or soft drink] can . . . ." 9/29/22 Tr. 38:4-8, 87:1-3. The can hit his front windshield. 9/29/22 Tr. 38:6 (hit window), 87:8-12 (explains can hit windshield because the Jetta was slightly ahead of his vehicle). On cross examination, Mr. Guardado was impeached with the absence of any mention of a can being thrown during his initial interview with the police on scene. 9/29/22 Tr. 89:24-90:3. On redirect, the government introduced a portion of Mr. Guardado's grand jury testimony in which he stated "[Mr. Alleyne] went out of my lane again and he threw a can of soda or juice at me." Trial Tr. 19:24-25, Oct. 3, 2022 (hereinafter "10/3/22 Tr."). Defense counsel did not object to the government's introduction of the grand jury statement.

1) Car Accident

After throwing the can, Mr. Guardado said Mr. Alleyne, in the Jetta, "pulled into my lane, pulled back out, pull back into it, and slammed on the brakes. And I made contact." 9/29/22 Tr. 38:4-8; 10/3/22 Tr. 15:6-10. Mr. Guardado recalled that "after the person left his lane and came into my lane, then went back into his lane and then came back again into my lane, he braked extremely suddenly." 9/29/22 Tr. 39:5-7, 87. Mr. Guardado stated that the Jetta "came out of his lane into my lane and braked at the same time, so I didn't have time to avoid his car." 9/29/22 Tr. 39:10-12. Mr. Guardado's vehicle struck the back of the Jetta. 9/29/22 Tr. 39. As a result of the collision Mr. Guardado's bumper was broken. 9/29/22 Tr. 39. Mr. Guardado stated that his car was damaged. 9/29/22 Tr. 65:12; *see also* Govt's Ex. 4 (photograph of vehicle after accident).

2) Exiting the Car

Mr. Guardado testified that Mr. Alleyne[3] got out of the car and appeared very upset. 9/29/22 Tr. 40, 90:14-15. Mr. Alleyne approached Mr. Guardado's car and pulled Mr. Guardado out. 9/29/22 Tr. 40 ("[H]e got me out of my car."), 90:24-91:2 (pulled out). Mr. Guardado described Mr. Alleyne's actions stating that Mr. Alleyne opened Mr. Guardado's car door and pulled him by the arm. 9/29/22

[3] Mr. Guardado never identified Mr. Alleyne as the driver of the Volkswagen Jetta vehicle. However, Mr. Alleyne's identity as the driver of the Volkswagen Jetta was not seriously disputed and he was identified as the driver by another witness, Delgado Moore. 10/3/22 Tr. 57.

Tr. 41. Mr. Guardado still had his seat belt on, so he removed it, and then exited the vehicle. 9/29/22 Tr. 41. Mr. Guardado claimed that he did not get out of the car on his own but was taken out of the car by Mr. Alleyne. 9/29/22 Tr. 93:8-9 ("I didn't get off [sic] the car. I was taken off [sic] the car.").

Mr. Alleyne continued speaking to Mr. Guardado, but Mr. Guardado could not understand everything that was being said due to his limited English. 9/29/22 Tr. 40. What he could make out, was that Mr. Alleyne was telling him that he needed to pay for the damage. 9/29/22 Tr. 40 ("What I was able to understand is that I need to pay for this; I need to pay him for this."), 41:7-9 ("Well, from what I was able to understand, there were a lot of curse words directed to me and that I needed to pay for this and 'son of a bitch.'"), 44:7-11 ("And he was yelling and saying a lot of different things like, 'You son of a bitch' and 'You're going to have to pay for this.'").

3) Removing the Wallet

While Mr. Alleyne continued yelling, he began searching Mr. Guardado's pockets. 9/29/22 Tr. 40:5-6. Mr. Guardado testified that Mr. Alleyne began to pat down his (Mr. Guardado's) pockets. 9/29/22 Tr. 93:5-9 (patted down pockets after being taken out). Mr. Guardado had his wallet in his pants pocket, not in his hands. 9/29/22 Tr. 93:10-14 (wallet in pants pocket), 94:15-17 (wallet removed from left-hand pocket). Mr. Guardado testified that Mr. Alleyne went into his pants pocket

and removed his wallet. 9/29/22 Tr. 41:25-42:1 ("He took my wallet out."), 93:15-18. Mr. Guardado claimed his wallet contained his bank card, laundry card, and driver's license. 9/29/22 Tr. 81:3-6.

While Mr. Alleyne was going through Mr. Guardado's pockets, Mr. Guardado testified he was hit in the abdomen, near the navel. 9/29/22 Tr. 42. Mr. Guardado explained that he had just had appendix surgery a month earlier, 9/29/22 Tr. 42, and did not resist Mr. Alleyne in any way because he feared that he might be touched where he had his surgery and was still healing. 9/29/22 Tr. 93-94; *see also* 10/3/22 Tr. 22. On cross-examination, Mr. Guardado clarified that Mr. Alleyne did not hit him so much as brush across his abdomen when Mr. Alleyne was searching his pockets. 9/29/22 Tr. 97:4-6 ("I never said that he had struck me as such, but I did mention that he glanced to me when he was going from one pocket to the other."). Defense counsel impeached Mr. Guardado with the omission from his grand jury testimony any mention of being glanced or struck in the abdomen. 9/29/22 Tr. 97-99 ("And in that answer to the grand jury, you never mentioned anything about being hit in the navel near your surgery, did you?").

On redirect the government introduced Mr. Guardado's statement to the grand jury in which he stated: "Well, that day when the police came they asked if I needed an ambulance and I had actually just had surgery one month earlier and that was one of the reasons why I was also so afraid because I just had this operation

and I was still pretty delicate. Is that what you testified to in the Grand Jury?" 10/3/22 Tr. 21. The statement made no mention of being hit in the abdomen, yet defense counsel did not object to its admission.

Mr. Alleyne took Mr. Guardado's wallet and walked back to his own car and put the wallet inside. 9/29/22 Tr. 42. After Mr. Alleyne put Mr. Guardado's wallet in his vehicle, he came back to Mr. Guardado's car "opened up all the car doors and started taking everything he could see." 9/29/22 Tr. 43-44. Mr. Guardado stated that Mr. Alleyne went into his vehicle and took a "24 mechanics wrench and my jacket." 9/29/22 Tr. 43. Mr. Alleyne put the jacket in his Jetta, but kept the wrench[4] in his hand. 9/29/22 Tr. 44:3-4.

4) Passerby in a van stops to assist

According to Mr. Guardado, he believed that Mr. Alleyne would also take his phone, so he tried to hide it in his boxers at first. 9/29/22 Tr. 42. However, a work van drove by, and Mr. Guardado passed his cell phone off to the driver of the van for safekeeping. 9/29/22 Tr. 42-43, 44:18-20. The man in the work van parked in front of Mr. Guardado's vehicle, which was still stopped in the road, and attempted to assist in calming down the situation. 9/29/22 Tr. 44:23-24 ("Well, he parked his van, his work van, in front of us. And he got out, and he tried to talk -- talk to us and tried to get the guy to calm down."); 10/3/22 Tr. 8:2-15 (tried to

[4] What Mr. Guardado refers to as a "wrench," is also referred to as a "tire iron."

intervene). Mr. Guardado asked the man from the work van to call police, and he did. 9/29/22 Tr. 45:1-8.

5) 911 Call Admitted (Govt's Ex. 3)

The man from the work van did not testify at trial. The government introduced a recording of the man's 911 call through Mr. Guardado without objection. 9/29/22 Tr. 45-47 (911 call introduced as Govt's Ex. 3). Mr. Guardado testified that the 911 call accurately captured what was being said at the time of the call. 9/29/22 Tr. 45:21-24. Also introduced by the government was Exhibit 12, a stipulation that the 911 call (Govt's Ex. 3) was an unaltered recording of the 911 call made on May 13, at 16:53:41. 9/29/22 Tr. 47-48 (stipulation read to the jury). Mr. Guardado identified the voice of the guy from the van and stated he was the person making the 911 call. Mr. Guardado also identified the voice of the Jetta's driver (Mr. Alleyne) in the background of the call. 9/29/22 Tr. 48:21-49:4 (voice in background saying, "What's your name? Where your phone at?" is Mr. Alleyne). Mr. Guardado explained that Mr. Alleyne had already taken his wallet at the time the 911 call was made, but remained on scene. 9/29/22 Tr. 49:8-15.

6) Insurance Documents

Mr. Guardado testified that at some point there was a public bus behind him. 9/29/22 Tr. 49:19. Mr. Guardado stated that he grabbed a bag of documents, which included his insurance and registration information, and tried to give them to the bus driver. 9/29/22 Tr. 49:19-50:2. Mr. Guardado testified the vehicle was insured

through State Farm. 9/29/22 Tr. 50:6. When asked why he brought the documents to the bus driver, he explained: "Well, I was pretty new to this country at that time, and I knew I was being robbed. And I thought that if he took the documents and he took the car, I wasn't going to be able to recover the car. It was my first car, so I was afraid that could happen." 9/29/22 Tr. 50:14-18. Mr. Guardado explained that he did not actually hand the documents to the bus driver, but stuck his hand in the driver's window which was open, and put the documents inside on the dashboard. 9/29/22 Tr. 50:23-25, 107:5-8 (dashboard), 109:7-9. Mr. Guardado also asked the bus driver to call the police. 9/29/22 Tr. 51:4, 107:9-12.

After placing the documents inside the bus, Mr. Alleyne came over and grabbed the documents, taking them out of the bus. 9/29/22 51:7-12; 10/3/22 Tr. 5:24-6:2. Mr. Guardado said that after Mr. Alleyne took the documents out of the bus, it was "more of the same" arguing and yelling. 9/29/22 Tr. 51:15-17. At one point the bus driver got out and tried to calm down Mr. Alleyne. 9/29/22 Tr. 51:16-17.

There is a confusing exchange wherein Mr. Guardado seems to say that Mr. Alleyne, at some point, took the phone of his co-worker, however how or when that happened is never explained. 9/29/22 Tr. 51:20-24. Mr. Guardado said that Mr. Alleyne "put it on the roof of his car" and tried to call the insurance company. 9/29/22 Tr. 51 ("He put it on the roof of his car, and he tried to call the insurance

company, and that's when he returned my coworker's cell phone as well as the documents."); 10/3/22 Tr. 9:4-5 (put co-workers phone on roof). Mr. Guardado said that Mr. Alleyne had his co-worker's phone. 9/29/22 Tr. 52. While Mr. Alleyne held the insurance paperwork, Mr. Alleyne was reportedly "saying to call the insurance." 9/29/22 Tr. 52:8-15, 91:11-13 ("Not until he took the bag with my documents in it and threw it on top of his car did he mention that insurance and told me to call them.").

Mr. Guardado suggested that he tried to call his insurance, but that Mr. Alleyne would not let him.[5] 9/29/22 Tr. 52:17-18; *see also* 10/3/22 Tr. 9:20-22 ("When I was trying to call them [insurance] he wouldn't let me because he was trying to take the phone away from me. That is my work mate's phone."). Mr. Guardado denied that Mr. Alleyne asked him for his information, 10/3/22 Tr. 9:13, but admitted after being confronted with the video, Govt's Ex.7 @1:53-3:21, that Mr. Alleyne remained on scene and asked him to call his insurance carrier. 10/3/22 Tr. 9:25-10:17. Mr. Guardado stated that Mr. Alleyne never provided his name or contact information. 9/29/22 Tr. 65:3-7.

[5] It is never explained how Mr. Alleyne did not allow him to call his insurance. It is also unclear how Mr. Guardado could have tried to call given that he had handed his phone off to the van driver and no longer had it. 10/3/22 Tr. 8:4-5 (Mr. Alleyne did not have Mr. Guardado's cell phone).

7) Mr. Alleyne Eventually Leaves

Mr. Guardado then asked Mr. Alleyne to "give me my wallet back . . . ." 9/29/22 Tr. 52:21-23. Mr. Alleyne did not return the wallet, but said to follow him to get his wallet back. 9/29/22 Tr. 52-53 ("I asked for my wallet back, and he told me to follow him.").

Mr. Alleyne returned to his car and tried to drive it. 9/29/22 Tr. 53. However, Mr. Guardado's car was stuck to Mr. Alleyne's vehicle and Mr. Guardado's vehicle did not have the emergency brake engaged. 9/29/22 Tr. 53; 10/3/22 Tr. 11, 13. Thus, when Mr. Alleyne's vehicle moved, Mr. Guardado's vehicle moved as well. So, Mr. Guardado entered his vehicle and engaged the emergency brake. After that, Mr. Alleyne was able to drive his vehicle away. 9/29/22 Tr. 53. Mr. Alleyne drove away telling Mr. Guardado to follow him and that he would give Mr. Guardado his stuff. 9/29/22 Tr. 53:18-21 ("Well, to follow him and that he was going to give me my stuff."), 77:16-17 ("That's when the other driver had everything in his car, and he left and told me to follow him."); *see also* 10/3/22 Tr. 11:12-14, 13. Mr. Alleyne drove away with Mr. Guardado's wallet, jacket, and wrench, but he did not go far. 9/29/22 Tr. 77:18-20.

8) Mr. Guardado Encounters Mr. Alleyne At A Nearby Gas Station

Mr. Guardado then drove to the next intersection down, where the driver of the work van was now located. 9/29/22 Tr. 54 (explaining the man in the work van had left the scene and was stopped at the following stoplight), 63:3-6 (left scene of

accident to find man in work van). Mr. Guardado went to the driver of the work van to ask for his phone back, but the van driver had already given the phone to his (Guardado's) co-worker. 9/29/22 Tr. 53-54, 63:3-9.

When Mr. Guardado went to turn around and return to the scene of the accident, he saw the Jetta Volkswagen, driven by Mr. Alleyne, stopped at a nearby gas station. 9/29/22 Tr. 53-54; 10/3/22 Tr. 14. Mr. Guardado drove towards Mr. Alleyne and asked for his wallet back. 9/29/22 Tr. 54. Mr. Alleyne said, "No, follow me. Not here." 9/29/22 Tr. 54:4; 10/3/22 Tr. 14.

Mr. Guardado explained: "When I was about to make a U-turn, I saw him pulling out of the gas station, and so I pulled up alongside him and asked him to return my wallet to me. I told him I was going to pay. And once I told him that, he told me he was going to give it to me but for me to follow him. But I didn't follow him. I merely returned to the spot where the accident had occurred." 9/29/22 Tr. 63:19-25. It is not clear where Mr. Alleyne proceeded to drive to after this exchange.

Mr. Guardado stated he "was afraid" to follow Mr. Alleyne because "something further" could happen. 9/29/22 Tr. 64:2-4; *see also* 10/3/22 Tr. 17:17-20. Mr. Guardado said that in total, he asked for his things back, "[m]aybe more than ten [times]. I don't know." 9/29/22 Tr. 77:24. Each time, Mr. Alleyne responded, not now, but that he would give them to Mr. Guardado later. 9/29/22

Tr. 78:1-2. Mr. Guardado stated that he never received his wallet, jacket, or wrench back. 9/29/22 Tr. 80:25-81:2.

After leaving the vicinity of the gas station, Mr. Guardado returned to the location of the accident. 9/29/22 Tr. 64:5-7. Mr. Guardado explained he went back to the scene to meet police whom he expected would be arriving shortly. 9/29/22 Tr. 64.

Mr. Guardado spoke to the police on scene. 9/29/22 Tr. 89. Mr. Guardado provided Mr. Alleyne's license plate number to police. 9/29/22 Tr. 64-65. Mr. Guardado spoke to a Spanish speaking officer who relayed his statements to a detective. 9/29/22 Tr. 89. According to Mr. Guardado, Mr. Alleyne never contacted him after the incident. 10/3/22 Tr. 18.

B. Officer James Abdeljabbar

Officer James Abdeljabbar testified that he recovered videos showing portions of the interaction between Mr. Alleyne and Mr. Guardado. The videos were taken from a nearby metro bus. The videos were received as government's exhibits five (Ex. #5 is a video showing the external area in front of the bus) and six (Ex. #6 is a video showing the interior of the bus).

C. Detective James Langerbach

Detective James Langerbach arrived on scene the day of the accident. Det. Langerbach interviewed the bus driver, Delgado Moore. Delgado Moore

identified—via a photo array identification procedure—Mr. Alleyne as the driver of the struck vehicle. 10/3/22 Tr. 43, 47-48.

D. Delgado Moore (Bus Driver)

Mr. Delgado Moore testified for the government. Mr. Moore testified that he was operating a WMATA Metro bus near the scene of the car accident. 10/3/22 Tr. 50-51. Mr. Moore explained that he witnessed the car accident and some of the interaction between Mr. Alleyne and Mr. Guardado.

Mr. Moore described seeing Mr. Alleyne take something from Mr. Guardado's pocket after the accident. 10/3/22 Tr. 61. Mr. Moore's description of events was largely consistent with Mr. Guardado's testimony; however, Mr. Moore denied seeing a can being thrown. 10/3/22 Tr. 85:5-6.

Mr. Moore did explain that at one point, he called Mr. Alleyne over to him and told him, "Like look, this ain't what you should be doing. Calm down." 10/3/22 Tr. 63. Mr. Alleyne responded to Mr. Moore that "something like this happened to him a month or so ago." Mr. Alleyne explained to Mr. Moore that his vehicle had been hit a month prior, "and he didn't get the vehicle fixed or get any compensation for them hitting him and he was definitely going to get something today." 10/3/22 Tr. 63, 99.

E. Agent Joseph LaFrance

Prior to becoming an agent for the Internal Affairs Division, Agent LaFrance was a detective with the MPD's 6th District Detective's office. 10/3/22 Tr. 105-06.

Agent LaFrance arrived on the scene of the accident and spoke to Mr. Guardado. 10/3/22 Tr. 108. Agent LaFrance also testified that he interviewed Mr. Alleyne following his arrest. 10/3/22 Tr. 116. Through Agent LaFrance, the government admitted Exhibits 11 A-F, all segments of the recorded interrogation of Mr. Alleyne. 10/3/22 Tr. 118.

STANDARD OF REVIEW

"We review the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to sustaining the judgment, and making no distinction between direct and circumstantial evidence." *Fitzgerald v. United States*, 228 A.3d 429, 436 (D.C. 2020) (citations, brackets, and internal quotation marks omitted). When the evidence, viewed in this manner, "is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime, then the evidence is insufficient and we must say so." *Williams v. United States*, 113 A.3d 554, 560 (D.C. 2015) (internal quotation marks omitted).

Although "the government's evidence need not negate every possible inference of innocence to support a guilty verdict," *Campos-Alvarez v. United States*, 16 A.3d 954, 964 (D.C. 2011), "[t]he evidence must support an inference, rather than mere speculation, as to each element of an offense." *Lewis v. United States*, 767 A.2d 219, 222 (D.C. 2001) (internal quotation marks omitted); *see also Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc) ("[W]hile a jury is

entitled to draw a vast range of reasonable inferences from evidence, it may not base a verdict on mere speculation." (brackets and internal quotation marks omitted)); *Williams*, 113 A.3d at 560 (evidence is insufficient "if, in order to convict, the jury is required to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation" (internal quotation marks omitted)). "Relatedly, slight evidence is not sufficient evidence, and a mere modicum cannot rationally support a conviction beyond a reasonable doubt." *Bailey v. United States*, 257 A.3d 486, 492-93 (D.C. 2021) (quoting *Russell v. United States*, 65 A.3d 1172, 1176 (D.C. 2013) (internal quotation marks omitted).

A trial court's jury instructions are reviewed for abuse of discretion. *See Terrance Johnson v. United States*, 840 A.2d 1277, 1279 (D.C. 2004)

ARGUMENT SUMMARY

The trial court's jury instruction on the count of robbery misstated the law and misled the jury when it failed to make clear that, that Mr. Alleyne could not be found guilty of robbery, absent proof beyond a reasonable doubt that *at the time* Mr. Alleyne grabbed Mr. Guardado's wallet, he intended to wholly and permanently deprive him of said wallet. The jury instructions thus permitted the jury to find Mr. Guardado guilty of robbery based upon factual findings which only amounted to a common law larceny, or a second-degree theft.

Finally, the evidence presented at trial was legally insufficient because under the common law, and pursuant to D.C. Code § 22–2801, the fact finder was necessarily required to find that Mr. Alleyne intended to permanently deprive Mr. Guardado of his wallet *at the moment* he committed the assault which constituted the basis of the robbery charge, i.e, the grabbing from Mr. Guardado's pocket. The evidence, in the light most favorable to the government, can only support an inference that Mr. Alleyne formed the requisite intent after the fact. Thus, the actus reus and mens rea required for robbery never coincided. To hold otherwise would be speculation.

ARGUMENT

I. The Jury Instruction on The Charge of Robbery Incorrectly Stated the Law When It Failed to Require the Jury to Find Mr. Alleyne Intended to Permanently Deprive Mr. Guardado Of The Wallet.

D.C. Code § 22–2801 defines robbery as:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery . . . .

D.C. Code § 22-2801. Robbery. To obtain a conviction of Mr. Alleyne for robbery, the government needed to prove he (1) took property of some value, (2) from Mr. Guardado's person or immediate actual possession, (3) against his will, (4) by force or violence, (5) and carried the property away (asportation), (6) without right

and with the intent to steal it.[6] *See Bailey*, 257 A.3d at 499 (emphasis added); *Gray v. United States*, 155 A.3d 377, 382 (D.C. 2017); *Earl Johnson v. United States*, 756 A.2d 458, 462 (D.C. 2000); *Zanders v. United States*, 678 A.2d 556, 563 (D.C. 1996).

A. Robbery requires the jury find the defendant had the intent to steal.

Robbery requires the defendant to act with the purpose to steal another's property. *Bailey*, 257 A.3d at 502 (D.C. 2021) (J. Glickman concurring) ("The required mental state for robbery is simply the intent (or, as we may prefer to say, the purpose) to steal."). This Court's opinions often refer to the specific intent of Robbery, as the purpose to steal. *See e.g., Bailey*, 257 A.3d at 499 ("with intent to steal it."); *Gray*, 155 A.3d at 382 (steal); *Williams*, 113 A.3d at 560-61 (intent to steal); *(Earl) Johnson v. United States*, 756 A.2d 458, 462 (D.C. 2000) (same); *Lattimore v. United States*, 684 A.2d 357, 360 (D.C. 1996) (same); *Zanders v. United States*, 678 A.2d 556, 563 (D.C. 1996) (same); *Fogle v. United States*, 336

[6] The intent to steal has been variably referred to as the *animus furandi*, *animo furandi*, or felonious intent. *See, e.g.*, *Fogle v. United States*, 336 A.2d 833, 834 (D.C. 1975) ("The requirement of a felonious intent, or the *animus furandi*, is well settled in our case law."); *see, e.g.*, *Williams*, 113 A.3d at 560-61 (*animo furandi*). "It is this intent which distinguishes larceny from a mere civil trespass. Every taking of another's property without legal justification is a trespass upon the owner's right to its continued possession, but it does not constitute a crime unless the act is perpetrated feloniously, that is *animo furandi* or with the intent to steal." 6 Corpus Juris 761-763, § 101.

A.2d 833, 834 (D.C. 1975) ("To find the accused guilty of a larceny, the court must find beyond a reasonable doubt that he had the specific intent to steal."). However, the offense of stealing, and its mens rea—intent to steal—is not defined in the criminal code.[7] So, what does a person intend when they have the *intent to steal*?

1. Jurisprudence addressing the offense of larceny explains what is meant by the *intent to steal*.

Jurisprudence concerning the common law offense of larceny offers guidance. Under the common law, it was robbery to take the property of another from their person by force or violence. *See Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). Where a taking was not with sufficient force of violence, the taking was considered the lesser included offense of larceny, assuming the requisite intent. *Id*. "Therefore, as larceny is an ingredient of robbery, we look to the components of the former to ascertain the requisite mental element of the latter." *State v. Gover*, 298 A.2d 378, 381 (Md. 1973); *see also Lattimore*, 684 A.2d at 359-60 (stating that a robbery conviction requires the government to the prove the elements of "larceny and assault" which includes the specific intent to

[7] This Court has held that absent a statutory definition of a crime, the common law definition for the offense controls. *Peoples v. United States*, 640 A.2d 1047, 1052 (D.C. 1994).

steal); *Ulmer v. United States*, 649 A.2d 295, 297 n.3 (D.C. 1994) (explaining that larceny is a lesser included of robbery).

At common law, larceny required the specific intent *to steal*. The intent to steal was the distinguishing factor between larceny and the lesser included offense of taking property without right.[8] *See Fogle*, 336 A.2d at 834 (The intent to steal "is the element which distinguishes larceny from the lesser included offense of taking property without right . . . ."); *Simmons v. United States*, 554 A.2d 1167, 1170 (D.C. 1989) (robbery requires specific intent to steal while taking property without right requires only a general intent). Thus, the intent to steal oft repeated in the elements of robbery, is the intent to steal transposed from the incorporated elements of larceny.

2. The intent to steal is the intent to permanently deprive the lawful possessor of their property.

This Court, in *United States v. Owens*, 332 A.2d 752, 754 (D.C. 1975), quoting the Supreme Court, stated that "[to] steal means to take away from one in lawful possession without right with the intention to keep wrongfully." (quoting *Morissette v. United States*, 342 U.S. 246, 271 (1952)) (internal quotations

[8] The offenses of larceny and taking property without right—among a number of other similar offenses—was repealed in 1982 and replaced with the current theft statute, D.C. Code § 22-3211. BILL NO. 4-133, The "District of Columbia Theft and White Collar Crimes Act of 1982" at 10, 28; *see also Dobyns v. United States*, 30 A.3d 155, 157 n.1 (D.C. 2011).

omitted). Other opinions of this Court have explained that the intent to *keep* wrongfully, is the intent to *permanently deprive* the lawful possessor of said property. *See Lattimore*, 684 A.2d at 359-60 (larceny requires "intent to permanently deprive"); *see also Corbin v. United States*, 120 A.3d 588, n.3 (D.C. 2015) (citing with approval to *Lattimore*); *Parker v. United States*, 449 A.2d 1076 (D.C. 1982) ("intent to 'permanently deprive' necessary for . . . larceny conviction."); *Durphy v. United States*, 235 A.2d 326, 327 (D.C. 1967) (An individual has committed larceny if that person "without right took and carried away property of another with the intent to permanently deprive the rightful owner thereof.")

In contrast, and not without some confusion, this Court has also stated that the intent to permanently deprive is not fundamental to larceny in the District of Columbia. *See, e.g.*, *Fredericks v. United States*, 306 A.2d 268, 270 (D.C. 1978) ("Rather, the proof must merely manifest an intent to appropriate the property to a use inconsistent with the owner's rights."); *see also Mitchell v. United States*, 394 F.2d 767, 771 (D.C. Cir. 1968) ("Moreover, it is arguable that an intent to appropriate property permanently is not an element of larceny in the District of Columbia. Although no case in this jurisdiction has been found which makes a finding on this specific issue, this court has frequently referred to larceny as a taking and carrying away of something of value without specifying an intent to

take permanently."). In *Fredericks*, the Court acknowledged that traditionally larceny required the intent to permanently deprive, but explained that, "larceny, defined by D.C. Code 1967, § 22-2201, as the felonious taking and carrying away of anything of value" did not. *Fredericks, 306 A.2d at 270*. Thus, there appears some conflict in this Court's precedents.[9]

Regardless of who has the right of the argument, it is apparent that in the resulting confusion, what was being discussed in the Court's jurisprudence was the District's former larceny statute, not the common law.[10] Thus, while this Court has not consistently stated with clarity whether the intent to permanently deprive was necessary for larceny, this Court was opining in reference to the statutory offense then applicable in the District of Columbia and not the common law offense of larceny. Adding to the confusion, the Court has even in at least one opinion, defined the elements of robbery in terms of the rather different modern theft statute.[11]

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[9] Another court explained that "robbery requires the specific intent to deprive the victim of [their] property, not merely the general intent to take something 'on purpose.'" *Jackson v. United States*, 348 F.2d 772, 773 (D.C. Cir. 1965).

[10] The former larceny statutes were codified at D.C. Code §§ 22-2201 and 22-2202 (1981) (repealed 1982).

[11] In *Gray*, 155 A.3d at 381-82, this Court stated that "it is well-established that second-degree theft is a lesser included offense of robbery" and went on to state that "[p]roof of robbery requires proof of the elements of theft plus several aggravating circumstances," . . . .). However, appellant would argue that it is more accurate to state that proof of robbery requires proof of the elements of common

However, in the District of Columbia, robbery retains its common law meaning, *see Lattimore*, 684 A.2d at 359, and the common law definition has only been expanded by statute to include stealthy takings. *See Irby v. United States*, 250 F. Supp. 983, 988 (D.D.C. 1965), aff'd, 390 F.2d 432 (D.C. Cir. 1967) (en banc); *United States v. Dixon*, 469 F.2d 940, 943 (D.C. Cir. 1972), *see also Jacobs v. United States*, 861 A.2d 15, 28 (D.C. 2004) (J. Terry, dissenting); *Bailey*, 257 A.3d at 500 (J. Glickman, concurring) (discussing congressional intent in enacting the districts robbery statute). Congress enacted what is now § 22-2801 in 1901. *Bailey*, 257 A.3d at 500 (J. Glickman, concurring) (citing *Noaks v. United States*, 486 A.2d 1177, 1179 (D.C. 1985)); An Act To establish a code of law for the District of Columbia, ch. 854, 31 Stat. 1189 (1901).[12]

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law larceny, which includes many, but not all thefts. By contrast theft under District law "does not require an intent to appropriate property permanently." *In re Gil*, 656 A.2d 303 (D.C. 1995) (citing *Fredericks v. United States*, 306 A.2d 268, 270 (D.C. 1973)).

[12] An Act To establish a code of law for the District of Columbia, ch. 854, 31 Stat. 1189, 1189 (1901) (chapter one, section one states: "The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.") (enacted March 3, 1901) (codified at D.C. Code § 45-401(a)).

Thus, with the one modification to include stealthy takings, the District of Columbia's robbery statute is the embodiment of common law robbery, and the lesser included common law larceny; not the former larceny statute now repealed, or the current theft statute which did not exist in 1901. Robbery was and remains "[a] crime . . . which is substantially a statutory codification of [the common law offense], [and] may not be deprived of its common-law element of intent." *See Hughes v. United States*, 338 F.2d 651, 652 (1st Cir. 1964) (citing *Morissette*, 342 U.S. 246 (1952)); *see also Samantar v. Yousuf*, 560 U. S. 305, 320, n.13 (2010) ("Congress 'is understood to legislate against a background of common-law . . . principles'"); *cf. People v. Bullard*, 460 P.3d 262, 267 (2020) ("[D]espite the facial breadth of section 484's language, we have long understood the definition of "theft" to track its definition at common law: The thief must not only take property, but also must intend by doing so to permanently deprive the owner of possession."). "'[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)).

At common law, the requirement of the intent to permanently deprive a person of their rightful property was an unflinching requirement of larceny. "Traditionally, larceny is not committed when the defendant takes property of the

owner with the intent of borrowing it temporarily and of returning it thereafter." *See Fredericks*, 306 A.2d at 270 (citing 2 WHARTON'S CRIMINAL LAW, § 454 (Anderson ed. 1957).

In *People v. Brown*, 38 P. 518 (Cal. 1894), the court had before it an instruction which declared, in effect, that it was not necessary that a defendant intend permanently to deprive the owner of his property. At trial, John Brown, a seventeen-year-old boy, testified: "[I took the bicycle] to get even with [another boy], and of course I didn't intend to keep it. I just wanted to get even with him." *Id*. Mr. Brown further explained that when he took the bicycle, he had intended to eventually return it. *Id*. at 519. The trial court misstated the intent required of larceny when it charged the jury as follows:

> I think counsel for the defense here stated to you in this argument very fairly the principles of law governing this case, except in one particular. In defining to you the crime of grand larceny he says it is essential that the taking of it must be felonious. That is true; the taking with the intent to deprive the owner of it; but he adds the conclusion that you must find that the taker intended to deprive him of it permanently. I do not think that is the law. I think in this case, for example, if the defendant took this bicycle, we will say for the purpose of riding twenty-five miles, for the purpose of enabling him to get away, and then left it for another to get it, and intended to do nothing else except to help himself away for a certain distance, it would be larceny, just as much as though he intended to take it all the while. A man may take a horse, for instance, not with the intent to convert it wholly and permanently to his own use, but to ride it to a certain distance, for a certain purpose he may have, and then

> leave it. He converts it to that extent to his own use and purpose feloniously.

Id. at 519. The court held the above instruction erroneous, stating the trial court erred when it permitted the jury to convict upon finding something less than the intent to wholly and permanently deprive the rightful owner.

> This instruction is erroneous, and demands a reversal of the judgment. If the boy's story be true he is not guilty of larceny in taking the machine; yet, under the instruction of the court, the words from his own mouth convicted him. The court told the jury that larceny may be committed, even though it was only the intent of the party taking the property to deprive the owner of it temporarily. We think the authorities form an unbroken line to the effect that the felonious intent must be to deprive the owner of the property permanently. The illustration contained in the instruction as to the man taking the horse is too broad in its terms as stating a correct principle of law. Under the circumstances depicted by the illustration the man might, and again he might not, be guilty of larceny. It would be a pure question of fact for the jury, and dependent for its true solution upon all the circumstances surrounding the transaction. But the test of law to be applied to these circumstances for the purpose of determining the ultimate fact as to the man's guilt or innocence is, Did he intend to permanently deprive the owner of his property? If he did not intend so to do, there is no felonious intent, and his acts constitute but a trespass. While the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use,[13] still it must in all

[13] There was some early debate about whether larceny required the taking to be for the pecuniary advantage, or gain of the taker, i.e., the *lucri causa*. *See, e.g.*, *State v. Slingerland*, 19 Nev. 135 (N.J. 1885) (discussing the early debate). As one court explained:

> cases be an intent to wholly and permanently deprive the owner thereof.

Brown, 38 P. at 519 (footnote added). The intent to permanently deprive was and remains the felonious intent required to establish the crime of larceny at common law. *See, e.g., People v. Avery*, 405, 38 P.3d 1, 3 (Cal. 2002) ("California courts have long held that theft by larceny requires the intent to permanently deprive the owner of possession of the property."); *State v. Gover*, 298 A.2d 378, 381 (Md. 1973) ("The crime [of robbery], however, is not committed unless there is an intention to deprive the owner permanently of his property or the property of another lawfully in his possession."); *Putinski v. State*, 161 A.2d 117, 119 (Md. 1960) ("It is generally held that the intent must be to permanently deprive the owner of his property."); *Pachmayr v. State*, 229 A.2d 434, 436 (Md. App. 1967) ("[A]n intention to permanently deprive . . . [is] essential . . . ."); *Stanley v. Webber*, 531 S.E.2d 311, 315 (Va. 2000) ("Larceny, a common law crime, is the

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> Reliance is also placed upon section 1783 of Wharton's American Criminal Law, where the author says: "In this country there has been some reluctance to accept this supposed modification of the common-law definition of larceny, and in one or two cases it has been expressly rejected. Thus, it has been declared not to be larceny, but malicious mischief, to take the horse of another, not *lucri causa*, but in order to destroy him."

Id. at 140. *See also State v. Hawkins*, 8 Port. 461, 1839 Ala. LEXIS 16** (Ala. 1839) (discussing early cases and English common law while holding that taking a slave in order to set her free lacked the requisite intent for larceny). Ultimately, it was the *animo furandi*, not the *lucri causa* which was deemed fundamental to larceny in the United States.

wrongful or fraudulent taking of another's property without his permission and with the intent to permanently deprive him of that property."); *Impson v. State*, 58 P.2d 523, 525 (Ariz. 1936) ("It is well settled that the taking of property temporarily and with the intention of returning it is not larceny."); *State v. Perry*, 204 S.E.2d 889, 891 (N.C. 1974) ("Felonious intent as applied to the crime of larceny is the intent . . . [to] wholly and permanently [] deprive the owner of his property.") (citation and quotation marks omitted);

Thus, the intent to steal, *animus furandi*, or felonious intent, variously referred to in the context of robbery, is the intent of permanent deprivation, not a temporary taking. To find a person guilty of robbery in the District of Columbia, the jury must find beyond a reasonable doubt that the defendant intended to permanently deprive the person of their property.

B. The instructions in this case permitted the jury to convict Mr. Alleyne without finding that he intended to permanently deprive Mr. Guardado of his wallet.

Prior to instructing the jury, the trial court engaged in a discussion of the issues concerning robbery, the lesser included offense of larceny, and the difference between larceny and theft. Defense counsel argued that the requisite intent was the intent to permanently deprive, 10/4/2022 Tr. 19, and asked for the specific intent language to be added to the court's instructions. *Id.* at 31 ("I would ask the specific intent language be added to the robbery.")

The trial court stated:

> THE COURT: Well, I think that the jury could find based on the evidence presented that Mr. Alleyne intended to temporarily deprive the Defendant of this property and intended to return it thereafter. Obviously, they could find differently too, but they could make that finding and the question is simply whether or not that matters.

10/4/2022 Tr. 24. The trial court did not initially appreciate any difference between the deprivation requirement demanded by the robbery statute versus the theft statute, 10/4/2022 Tr. 24-25, but eventually noted some "mess" in the case law and agreed to give the lesser included instruction for theft. 10/4/2022 Tr. 39. However, the trial court did not modify the instruction to explain the intent to steal meant the intent to permanently deprive. Thus, the requisite intent remained unclear.

At trial the judge instructed the jury that on the count of robbery:

> The government must establish that Mr. Alleyne had no right to take the property, and that he intended to steal it. There can be no robbery if the defendant takes the property for a lawful purpose. It is necessary that Mr. Alleyne intended to deprive Mr. Romero-Guardado of his property and to take it for his own use.

R. at 162. This instruction fails to state that Mr. Alleyne needed to have the intent to permanently deprive Mr. Guardado of his property. The instruction also fails to make clear when Mr. Alleyne was required to have possessed the requisite intent. *See infra*. Moreover, without explanation of what was meant by *to steal*, the instruction leaves a jury free to apply their own common meaning of steal, rather

than the very specific *animus furandi* defined by common law. Steal, as defined by Websters, is open to many widely varying meanings. A jury could simply have believed only that Mr. Alleyne intended to "to take [Mr. Guardado's property] without permission" and was thus guilty of robbery.[14] The instruction permitted the jury to find Mr. Alleyne guilty for any intended unlawful taking, regardless of whether he intended to return the wallet, which the trial court acknowledged was a possible interpretation of the evidence. Following this instruction, the jury could well have believed Mr. Alleyne took the wallet unlawfully, for the purpose of looking at Mr. Guardado's information and deemed that sufficient for robbery, even if they also believed Mr. Alleyne intended to return it. The instruction, as given, failed to disabuse them of that notion. The instruction, in essence, permitted the jury to find robbery based upon the elements of the present-day theft statute, not the specific intent offense of robbery. Given the totality of the circumstances, the trial court erroneously abused its discretion in giving this misleading, albeit standard jury instruction, in light of the concerns raised by counsel.

[14] "Steal." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/steal, (last accessed 4 Nov. 2023) (defining "steal," *inter alia*, as "to take away by force or unjust means" or "to take surreptitiously or without permission.").

II. The Evidence Was Insufficient to Support a Conviction for Robbery Because The Evidence Did Not Demonstrate Beyond A Reasonable Doubt That At The Time Mr. Alleyne Took The Wallet, He Had The Requisite Intent To Permanently Deprive Mr. Guardado.

Even if this Court believed the evidence sufficient to find Mr. Alleyne's intent to permanently deprive Mr. Guardado of his wallet, *at some point*, the evidence does not demonstrate beyond a reasonable doubt that he had the requisite intent *at the time* he reached into Mr. Guardado's pocket to take the wallet. The law requires, or should require,[15] Mr. Alleyne to have the intent to deprive at the time he commits the assaultive act which constitutes the alleged robbery.

A. The law requires the actus reus and mens rea to coincide.

"In the criminal law, both a culpable mens rea and a criminal actus reus are generally required for an offense to occur." *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980). Actus reus and mens rea are independent concepts, and only constitute a crime under D.C. law when they occur together. *Rose v. United States*, 535 A.2d 849 (D.C. 1987); *accord Fleming v. United States*, 224 A.3d 213, 229-30 (D.C. 2020); *In re Moore*, 271 A.3d 190, n.9 (D.C. 2022) ("[D]ispositive question is what was [defendant's] mental state . . ." at the time of the act which constituted the CPO violation); *Washington v. United States*, 965 A.2d 35, 43 n.24 (D.C. 2009) ("[A]ppellant's conduct satisfied the actus reus requirement for an attempt,

[15] It appears this may be an unsettled question of law. *See infra*; *see also Gray*, 155 A.3d at 385 n.16.

assuming appellant performed it with the required mens rea."); *Morissette*, 342 U.S. at 251-52 ("Crime, as a compound concept, generally constituted only from *concurrence* of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.") (emphasis added); *United States v. Broxmeyer*, 616 F.3d 120, 129 (2d Cir. 2010) (reversing conviction where the required specific intent to engage in sexual activity did not coincide with the actus reus of crossing state lines); *United States v. Hersh*, 297 F.3d 1233, 1246 (11th Cir. 2002) ("The government was required to prove . . . that [the defendant] had formed the intent to engage in sexual activity with a minor *when he crossed state lines*.") (emphasis added).

"Reducing it to its simplest terms, a crime consists in the **concurrence** of prohibited conduct and a culpable mental state." 1 WHARTON'S CRIMINAL LAW § 27, at 135 (C. Torcia 14th ed. 1978) (footnote omitted). "It is the simultaneous existence of the named conduct and the related criminal intent which constitutes the [criminal offense]. If either the actus reus—the unlawful conduct—or the mens rea—the criminal intent—is missing at the time of the alleged offense, there can be no conviction." *Rose*, 535 A.2d at 852.

Actus reus and mens rea, to be sure, are independent concepts, and only constitute a crime under District of Columbia law when they occur together. The law requires proof of simultaneous occurrence of both the actus reus (the taking

from the person by force) and the intent to permanently deprive the person of the property taken.

Thus, the Court's review here turns on whether the circumstantial evidence in this case was legally sufficient to support the jury's finding that Mr. Alleyne possessed, at the time of the actus reus of the offense, the requisite specific intent. This question necessarily requires determination of whether Mr. Alleyne had the intent to permanently deprive Mr. Guardado of his wallet when he reached into Mr. Guardado's pocket and removed the wallet. *Cf. State v. Stevens*, No. 22-1114, 2023 Iowa App. LEXIS 455, at *5 (Iowa Ct. App. June 7, 2023) ("Proof that Stevens acted with the purpose of permanently depriving S&S Electric of its van required the jury to decide what he was thinking *when he drove away in the van*.") (emphasis added)

This Court does not seem to have addressed the issue of concurrence in the context of an assaultive robbery. *See, e.g.*, *Gray*, 155 A.3d at 385 n.16 ("The court in *Ulmer* did not resolve the question whether the larcenous mental state and assaultive act must concur, as the court instead relied on the stealthy snatching form of robbery."). In *Ulmer,* 649 A.2d at 297-98, the appellant's argument depended on the premise that he could not be convicted of robbery unless the government proved that he had the intent to steal at the time he attacked the deceased. However, the court in *Ulmer* did not resolve the question of whether the

larcenous mental state and assaultive act must concur. *Id*. Instead, the court relied upon the stealthy-seizure form of robbery and concluded that *Ulmer* had the requisite intent when he lifted the wallet from the incapacitated victim. Thus, the court did not address the issue of whether an assaultive taking and the intent to permanently deprive must occur simultaneously. Moreover, while Ulmer claimed that he did not have the intent to take the victim's wallet when he initially stabbed him, there was no suggestion that when he left the incapacitated and dying victim, that he had any intention to return the wallet.

Even assuming the issue is undecided in this jurisdiction, it seems fundamental that the mens rea and actus reus must coincide. When a robbery involves an assault like taking, the intent to permanently deprive and the assault must coincide.

B. The trial evidence is insufficient to establish the requisite intent at the moment of the actus reus.

The evidence at Mr. Alleyne's trial was simply insufficient to establish he formed the requisite intent to permanently deprive Mr. Guardado of his wallet. The trial evidence demonstrated that Mr. Guardado and Mr. Alleyne were involved in a traffic accident. As an accident, there is no evidence that Mr. Alleyne chose to engage with Mr. Guardado. The evidence also showed that Mr. Alleyne did not take Mr. Guardado's wallet and immediately flee the scene. Rather, Mr. Alleyne stayed on scene and demanded Mr. Guardado call his insurance company and

provide Mr. Alleyne with his insurance information. And when Mr. Guardado asked Mr. Alleyne to return his wallet, Mr. Alleyne's response showed only that he was unwilling to return the wallet immediately, but that he would eventually return it. By all indications, Mr. Alleyne's purpose, at least initially, was to hold the wallet until he received Mr. Guardado's insurance information. While Mr. Alleyne ultimately left the area of the accident with the wallet in hand, there is no indication he formed the intent to permanently deprive Mr. Guardado of the wallet at or before the time he initially took it. Thus, the assaultive taking (actus reus), never coincided with the requisite mens rea. Mr. Alleyne's initial action may have been an unlawful taking, it may have been theft, but the evidence was insufficient to permit the fact finder to find the requisite elements of a robbery.

CONCLUSION

This Court should reverse Appellant's conviction for Robbery and remand to the trial court for dismissal of count one of the indictment.

November 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2023, I caused the foregoing to be served via the Court's electronic filing and service system, upon all counsel of record.

s/ Jason K. Clark
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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s/ Jason K. Clark
Signature

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Case Number(s)

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Date