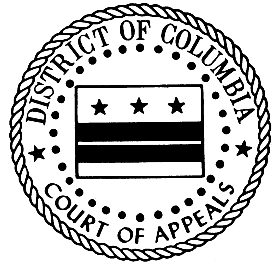

Clerk of the Court
Received 03/06/2024 12:27 PM
Filed 03/06/2024 12:27 PM

BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-55

RODNEY ALLEYNE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. 2020-CF3-5272

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Issues Presented

I. Assuming Alleyne has not waived his claim of instructional error by asking the trial court to give the pattern instruction he now complains of, whether the trial court plainly erred by failing to instruct the jury in a robbery case that the government must prove (1) that Alleyne took the victim's wallet with an intent to "permanently" deprive the victim of his property; and (2) that Alleyne intended to steal the victim's wallet at the moment he forcibly removed it from the victim's person.

II. Whether there was sufficient evidence Alleyne intended to rob the victim when the victim testified that after Alleyne caused a car crash between the two men, Alleyne: (1) pulled the victim from his car and used force to remove his wallet from his pocket; (2) seized the victim's jacket and mechanic's tool from the victim's car; (3) cursed and screamed at the victim that the victim was going to "pay him" and that Alleyne was "going to get something today"; (4) drove away with the victim's wallet, jacket, and tool despite the victim's repeated requests that Alleyne return the items; and (5) never returned any of the items and threw the victim's wallet in the trash.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-55

RODNEY ALLEYNE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed on February 25, 2021, appellant Rodney Alleyne was charged with robbery (of Henry Guardado-Romero's wallet) (D.C. Code § 22-2801); misdemeanor assault (D.C. Code § 22-404); unlawful entry of a vehicle (D.C. Code § 22-1341); second-degree theft (theft) (of Guardado-Romero's mechanic's tool and jacket) (D.C. Code §§ 22-3211, -3212(b)); and leaving after colliding (D.C. Code § 50-2201.05c(a)(2)) (Record on Appeal (R.) A:9, 12). After a jury trial before

the Honorable Jason Park on September 29, and October 3-4, 2022, Alleyne was convicted of all charges (R.24). On January 13, 2023, Judge Park sentenced Alleyne to 42 months' incarceration for robbery, and concurrent sentences of 60 days' incarceration on each of the remaining counts (R.A:30; R.37). On January 20, 2023, Alleyne timely noted his appeal (R.A:32; R.38).

The Trial

The Government's Evidence

Henry Romero-Guardado, a 20-year-old native of El Salvador present in the United States since 2019, testified with the assistance of an interpreter, that on May 13, 2020, at around 4:50 p.m., he was driving his dark-red 2008 Mazda on Pennsylvania Avenue, Southeast (9-29-22 Tr. 29-34). He was giving a co-worker a ride home, and was stopped at the stoplight at Alabama Avenue (*id*. at 34). When the light turned green, the car behind him, a gray Volkswagen Jetta, began honking; the driver pulled alongside Romero-Guardado and began making hand gestures (*id*. at 36-37). The driver appeared angry and threw a can at Romero-Guardado's car, striking his window (*id*. at 36-37). The driver then pulled into the lane in front of Romero-Guardado, pulled back out, pulled back

into Romero-Guardado's lane, and then "slammed on the brakes" (*id.* at 38). Romero-Guardado was driving the speed limit, but did not have time to brake and crashed into the silver Jetta, breaking his bumper (*id.* at 38-39).

The driver, subsequently identified as Alleyne (see 10-3-22 Tr. 39-43, 57), got out of his car, very angry, cursing, and screaming at Romero-Guardado that "You're going to have to pay for this" and that Romero-Guardado needed to "pay him for this" (9-29-22 Tr. 39-40, 44). Alleyne, who was a couple of inches taller than Romero-Guardado, opened Romero-Guardado's door, pulled him out of the car by his arm, and began going through Romero-Guardado's pockets and removed his wallet (*id.* at 41-42). Romero-Guardado was recovering from an appendectomy, and was apprehensive when Alleyne "glanced" (i.e., made contact with) his navel area (*id.* at 42, 97-98). Romero-Guardado managed to hide his cell phone in his underwear, and then give the phone to the driver of a work van that stopped; Romero-Guardado told the man he was being robbed and asked him to call 911 (*id.* at 42-44).[1] Alleyne then entered Romero-

[1] In the 911 call (Government Exhibit (GX) 3), a voice Romero-Guardado identified as Alleyne's is heard saying, "You ain't got nothin.' What's your (continued . . .)

Guardado's car, taking Romero-Guardado's jacket and a mechanic's wrench; Alleyne placed the jacket in the Jetta, and kept the wrench in his hand (*id.* at 44). Romero-Guardado asked Alleyne more than ten times to return the wallet, jacket, and mechanic's tool (*id.* at 77-78).

Romero-Guardado further testified that while his car and Alleyne's car remained stopped in the left travel lane, a Metro bus stopped in the right travel lane (9-29-22 Tr. 49-50). Romero-Guardado took the insurance and car registration documents from his car—his car was currently insured—and handed the documents to the bus driver through the open window on the driver's side of the bus (*id.*). He asked the bus driver to call 911 (*id.* at 51).[2] Alleyne came up thereafter, reached into

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name? Where your phone at?" (GX.3 at :19); "I know you ain't got no muthafuckin' insurance, no valid license" (*id.* at :45); and "Nah, all I got is this wallet right here" (*id.* at :59) (9-29-22 Tr. 46-49). Government and defense exhibits admitted at trial are attached to the accompanying government motion to supplement the record on appeal.

[2] Delgado Moore, the driver of the bus, testified that he called Metro dispatch upon Romero-Guardado's request (10-3-22 Tr. 74). He told dispatch he witnessed an accident that "turned into a robbery" (*id.* at 75).

Moore testified that he was stopped at the light behind the two cars; once the light turned green, he saw Alleyne's car swerve from the right lane to the left, almost striking a car, then swerve back to the right lane, before coming back into the left lane, and "slamm[ing] on the brakes" (10-3-22 Tr. 55). The vehicle behind Alleyne tried to stop but could not and

(continued . . .)

the bus driver's window, and retrieved Romero-Guardado's documents (*id.*) Romero-Guardado felt "[v]ery scared, terrified, and very nervous" (*id.* at 76).

Alleyne had taken Romero-Guardado's coworker's phone, and used it to try to call Romero-Guardado's insurance company (9-29-22 Tr. 51-52). Alleyne gave the coworker back his phone (*id.* at 51). Romero-Guardado told Alleyne he would "pay" and asked for his wallet back; Alleyne said no, but to follow him and he would give Romero-Guardado his things (*id.* at 52-53). Alleyne drove to a nearby gas station; he still had Romero-Guardado's wallet, jacket, and tool (*id.* at 53). Romero-Guardado followed him in his car, and again told Alleyne he would pay

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hit Alleyne (*id.* at 55-56). Moore stated that after the two cars stopped, Alleyne got out of his car "upset and angry," went to Romero-Guardado's window, and exchanged words in a "very aggressive" manner (*id.* at 58). Moore looked down to call Metro dispatch and was not sure how Romero-Guardado got out of his car (*id.* at 58-59). Romero-Guardado looked nervous and scared (*id.* at 59). He saw Alleyne get "in [Romero-Guardado's] face," take something from him, go into Romero-Guardado's car, take a jacket from the front seat, and then go into the back seat and possibly take another item (*id.* at 60-62). Moore called Alleyne over to him, and tried to calm him down (*id.* at 63). Alleyne told him a "Latino" hit him about a month ago and he did not get any compensation, but "he was definitely going to get something today" (*id.*). Moore stated that Alleyne caused the accident (*id.* at 65).

and asked for his wallet back (*id.* a 63). Alleyne repeated that he would give Romero-Guardado his wallet but for Romero-Guardado to follow him (*id.*). Romero-Guardado returned to the scene of the accident instead and waited for the police; he explained that he was afraid that Alleyne could do something to him if he followed him farther (*id.* at 63-64).[3] Romero-Guardado never got his wallet, jacket, or mechanic's tool back (*id.* at 80-81).[4] Alleyne never tried to contact him after the accident (10-3-22 Tr.

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[3] The court received GX.5 and GX.7, a Metro bus video shot from inside the bus looking forward (9-29-22 Tr. 67-70; 10-3-22 Tr. 27). Romero-Guardado identified himself in the video as the person in the green shirt; the defendant's car immediately in front of Romero-Guardado's car; himself giving his phone to the man in the work van; Alleyne going into Romero-Guardado's car; Alleyne taking the jacket and wrench from Romero-Guardado's car and putting the jacket in his car; and Alleyne putting everything in his car and telling Romero-Guardado to follow him (9-29-22 Tr. 68-73, 77). The court also received GX.6, a WMATA bus video shot from inside the bus looking out the driver's side window (9-29-22 Tr. 74; 10-3-22 Tr. 27). Romero-Guardado identified himself in GX.6 handing his insurance documents through the side window to the bus driver and asking him to call the police, and Alleyne coming to the side window of the bus and retrieving the insurance documents (9-29 Tr. 75).

[4] On cross-examination, Romero-Guardado admitted that he had not told the grand jury Alleyne had struck him in the navel (9-29-22 Tr. 97-99). Romero-Guardado denied that Alleyne had asked him for his information, but agreed that Alleyne had told him at least twice to call his insurance company (10-3-22 Tr. 9-10).

18). Romero-Guardado explained that "I felt like I was being robbed because I was having my things taken away from me" (*id*. at 22).

Police detained Alleyne after Romero-Guardado gave them Alleyne's license plate number (9-29-22 Tr. 65; 10-3-22 Tr. 38, 109). During a custodial interview, Alleyne told police he was involved in an accident, the other person involved told Alleyne he had no insurance and no money, so Alleyne took his wallet to be in contact with the man and arrange to get his car fixed (10-3-22 Tr. 116-19, 133; GX.11A). Alleyne told police he no longer had the wallet because he threw it away (GX.11A). He also stated that he took the man's jacket; he said he took the man's crowbar because he thought the man was going to hit him, but the crowbar was still in Alleyne's car and the man could have it back (GX.11B).[5]

SUMMARY OF ARGUMENT

For the first time on appeal, Alleyne presents two claims of instructional error: (1) that the trial court erred by instructing the jury

[5] Alleyne did not put on a case, but the court received two defense exhibits introduced for impeachment purposes (10-3-22 Tr. 140-41).

that the intent to steal required to convict Alleyne of robbery requires an intent to deprive Romero-Guardado of his property, without specifying an intent to "permanently" deprive; and (2) that the trial court erred by failing to instruct the jury that the mens rea and taking in a robbery must occur at the same instant. Alleyne has waived his first claim because the trial court gave the jury the exact *Redbook* instructions on robbery and theft that Alleyne's counsel requested. Even if this Court reviews this claim, Alleyne cannot show plain error in the *Redbook* mens-rea instruction given by the court. Nor can he show plain error on his second claim. Finally even if there was error in either respect, Alleyne's substantial rights were not prejudiced because the presentation of the case by the parties and the jury's verdict demonstrated that even if the jury had been instructed as Alleyne now wishes, there is no reasonable probability of a different result.

Contrary to Alleyne's claim, there was abundant evidence that Alleyne intended to steal the wallet he took from Romero-Guardado. Alleyne forcibly removed Romero-Guardado from his car, took the wallet from his person, cursed and shouted at him that he was going to get paid,

refused to return the wallet despite Romero-Guardado's repeated requests, and then left the scene with the wallet and never returned it.

ARGUMENT

I. Alleyne Has Waived His First Claim of Instructional Error Because the Trial Court Gave the Instruction He Requested; Even if Not, He Cannot Demonstrate Plain Error as to That or His Other Instructional-Error Claim.

For the first time on appeal, Alleyne urges (at 18-31) that the trial court erred by failing to instruct the jury that robbery requires an intent to "permanently deprive" Romero-Guardado of his property. He further claims (at 30, 32-35) for the first time that the trial court erred by failing to instruct the jury that Alleyne was required to have the requisite mens rea for robbery at the moment he reached into Romero-Guardado's pocket and took the wallet. Alleyne has waived the first claim because the trial court gave precisely the mens-rea instruction that counsel requested. In any event, Alleyne failed to present either claim to the trial court with specificity. To the extent this Court reviews his claims, it should only do so for plain error, which Alleyne has not shown.

A. Additional Background

During discussion of final jury instructions, Alleyne asked the trial court to instruct on the lesser-included charge of second-degree theft (wallet) to the charged robbery (wallet) count (10-4-22 Tr. 18-19). Reading from the *Redbook* instruction on Theft, *see Criminal Jury Instructions for the District of Columbia ("Redbook")*, No. 5.300 (5th ed. 2022), counsel urged that whereas robbery required proof of an "intent to steal," theft required proof only of an "intent to deprive another of property," which could mean "caus[ing] [the property] to be withheld from a person permanently under such an extended period or under such circumstances as the Defendant acquired a substantial portion of the property value," or "dispos[ing] of the property or [using or dealing] with the property in such a way as to make it unlikely that the owner will recover it" (10-4-22 Tr. 19-20). *See also* D.C. Code § 22-3211(b) (theft); § 22-3201 (definition of "deprive"). Counsel explained that if the jury found Alleyne's "intent was to hold [the wallet] and then to simply . . . get the information and then to give it back," Alleyne would be guilty of theft but not robbery, assuming the other elements were met (*id.* at 22). The court acknowledged that the jury could find that Alleyne "intended to

temporarily deprive [Romero-Guardado] of this property and intended to return it thereafter," but the "question is simply whether that matters" (*id*. at 24).

The court initially read *Lattimore v. United States*, 684 A.2d 357 (D.C. 1996), as suggesting that "there is no distinction in the case law between the deprivation of property elements of the robbery and theft statutes," and that the jury should not be instructed on theft as a lesser-included offense of robbery (10-4-22 Tr. 24-25). Counsel then stated, "based on that I would ask that the specific intent language be added to the robbery" (*id*. at 31). The court inquired what language counsel was referring to, and counsel responded, "I would ask that he took the property without right with specific intent to steal it" (*id*. at 32). The court responded that the robbery *Redbook* instruction already required what counsel was requesting, namely that Alleyne "intended to steal it and if [Alleyne] took the property for a lawful purpose, that there is no robbery" (*id*.). The court noted that, for either charge, the government would have to prove that Alleyne "intended to withhold the property or cause it to be withheld from a person permanently," and "that is the Government's only theory" (*id*. at 33).

After the lunch break, the court announced that it had further reviewed caselaw on the mens-rea requirement of robbery and theft, which "is a little bit of a mess," and now agreed with counsel (10-4-22 Tr. 38-41). Relying on *Fredericks v. United States*, 306 A.2d 268 (D.C. 1973), the court reasoned that whereas robbery requires an intent to steal, meaning "an intent to permanently deprive a person of property," "theft does not require an intent to appropriate the property permanently" (*id.* at 39). The court stated, "I think this was the point that [defense counsel] was trying to make" (*id.*). The court announced it would add the *Redbook* instruction on theft, and defense counsel twice stated he had no objection (*id.* at 40-41).

Without objection, the court instructed the jury, giving the *Redbook* instructions for Robbery and Theft, as a lesser-included offense (10-4-22 Tr. 57-63). *See Redbook*, No. 4.300 (Robbery); *Redbook*, No. 5.300 (Theft). The court told the jury that to convict Alleyne of robbery the government must establish Alleyne "took the property without right to it and intending to steal it" (10-4-22 Tr. 58). The court elaborated:

> 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 take it for his own use. (*Id*. at 59.)

The court further instructed the jury that to convict Alleyne of the lesser-included offense of theft of Romero-Guardado's wallet, the government had to prove that Alleyne "intended either to deprive Mr. Guardado of a right to the property or a benefit of the property or to take or make use of the property for him or for another person without authority or right" (*id*.). The court explained:

> To intend to deprive another of property means to intend to withhold the property or cause it to be withheld from a person permanently or for such an extended period or under such circumstances that the Defendant acquires a substantial portion of the property value. It may also mean to dispose of the property or to use or deal with the property in such a way as to make it unlikely that the owner will recover it. (*Id*.)

During closing argument, the government argued that Alleyne's statements on the scene insisting he get "paid" and "I'm getting something out of this today" evidenced his intent to steal Romero-Guardado's property (10-4-22 Tr. 66; *id*. at 77 ("So, how do you know that Defendant intended to steal [the wallet]? You know from his statements.")). The government urged that Alleyne took the wallet either to use the money inside the wallet or "to extract some kind of payment off scene away from the cameras and away from the cops" (*id*. at 77).

Defense counsel countered that "no robbery . . . occurred" (*id*. at 80). "There was never an intent to steal" because Alleyne's "whole intent was to try to get the necessary information to ensure that he could get his car fixed" (*id*. at 87). Counsel told the jury, "you need to determine whether or not this was a theft or whether it truly was a robbery" (*id*. at 89). Neither party suggested that Alleyne's intent changed once he drove away from the scene with the wallet.

B. Alleyne Has Waived His Claim; If Not, His Claim Can Only Be Reviewed for Plain Error.

As defense counsel requested (10-4-22 Tr. 18-25, 31-33), the trial court instructed the jury on the lesser-included offense of misdemeanor theft in addition to robbery with respect to Alleyne's taking of Romero-Guardado's wallet (*id*. at 57-63). In each case, the court gave the *Redbook* instruction, defense counsel suggested no modifications to that text, and twice stated expressly his satisfaction with the instructions (40-41, 57-63). To the extent that Alleyne now complains (at 30) that the trial court gave both pattern instructions without the modifications he now complains of, he is precluded from pressing this claim on appeal. *See Bland v. United States*, 153 A.2d 78, 79 n.2 (D.C. 2016) (invited error

doctrine precluded consideration of defendant's challenge to trial court's conclusion that prior conviction was a crime of violence for purposes of sentence enhancement, where defense counsel told trial court he would not challenge such a finding); *Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007) ("Generally, the invited error doctrine precludes a party from asserting as error on appeal a course that he or she has induced the trial court to take."); *Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993) ("We have repeatedly held that a defendant may not take one position at trial and a contradictory position on appeal.").

Even if his claim is not waived, Alleyne never asked the court to amend the *Redbook* mens-rea instruction to read "permanently deprive," as opposed to "deprive" (see 10-4-22 Tr. 59 ("It is necessary that Mr. Alleyne intended to deprive Mr. Romero Guardado of his property and take it for his own use."). Alleyne claims (at 29) that counsel preserved his objection by requesting the court to include "the specific intent language be added to the robbery" (10-3-22 Tr. 31), but when the court asked counsel what language he wished to add, counsel merely reiterated the language that was already in the pattern instruction (*id.* at 32). Alleyne never asked the court to add the word "permanently" to the

instruction, nor did he even suggest such an amendment with any specificity. *See Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992) ("Objections must be made with reasonable specificity; the judge must be fairly apprised as to the question on which he is being asked to rule."). In addition, the question of concurrence now pressed on appeal was never raised at all at trial. For these reasons, even if appellate review is available, this Court can only review these claims for plain error. *Buskey v. United States*, 148 A.3d 1193, 1205 (D.C. 2016) ("[B]ecause no objection to the initial jury instructions was raised before the jury retired to deliberate, our review of the initial instructions is subject to the plain error standard").

"Under the test for plain error, an appellant must show (1) error, (2) that is plain, and (3) that affected [his] substantial rights." *Buskey*, 148 A.3d at 1204 (citation omitted). "Even if all three of these conditions are met, this court will not reverse unless (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citation omitted). "[T]he plain-error exception is cold comfort to most defendants pursuing claims of instructional error." *Wilson v. United States*, 785 A.2d 321, 326 (D.C. 2001); *see also id.* ("While reversal of a

conviction based on unpreserved instructional error is theoretically possible, [it is] the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." (quoting *United States v. Weston*, 960 F.2d 212, 216 (1st Cir. 1992)).

C. Applicable Legal Principles

1. Robbery

The robbery statute provides that:

> 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. In the District of Columbia, "robbery retains its common law elements"; to prove robbery "the government must prove larceny and assault." *(Furl) Williams v. United States*, 113 A.3d 554, 560 (D.C. 2015); *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996); *United States v. Owens*, 332 A.2d 752, 753–54 (D.C. 1975); *see also Bailey v. United States*, 257 A.3d 486, 501 (D.C. 2021) (Glickman, J., concurring) (common-law basis for 1901 robbery statute).

To prove robbery, the government was required to show that Alleyne: (1) took property of some value from the complainant against the complainant's will; (2) took the property from the complainant's person or immediate actual possession; (3) used force or violence to take the property, by taking it by sudden or stealthy seizure or by snatching; (4) carried away the property; and (5) took the property without right and with the specific intent to steal it. *Zanders v. United States*, 678 A.2d 556, 563 (D.C. 1996).

2. Theft

> A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent: (1) To deprive the other of a right to the property or a benefit of the property; or (2) To appropriate the property to his or her own use or to the use of a third person.

D.C. Code § 22-3211(b). "Deprive" means

> (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or
>
> (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

D.C. Code § 22-3201(2).

D. Analysis

Contrary to Alleyne's claim, he cannot demonstrate plain error prejudicing his substantial rights with respect to either assertion of instructional error.

1. Alleyne Has Not Demonstrated That the Trial Court's Mens-Rea Instruction For Robbery Was Plainly Erroneous.

Alleyne urges (at 18-31) that the trial court plainly erred by giving the *Redbook* instruction on robbery without specifying that the intent to steal requires an intent to "deprive permanently" (see 10-4-22 Tr. 59 ("The Government must establish that Mr. Alleyne had no right to take the property and that he intended to steal it . . . It is necessary that Mr. Alleyne intended to *deprive* Mr. Romero Guardado of his property and take it for his own use.") (emphasis added). Alleyne cannot demonstrate plain error.

First, as Alleyne concedes (at 23), there is conflicting case law in this jurisdiction whether the intent to steal requires an intent to deprive "permanently." On this ground alone, Alleyne's argument fails because he cannot demonstrate error that is "clear under current law." *Anderson*

v. United States, 857 A.2d 451, 459 (D.C. 2004) (plain error must be "clear under current law").

As the trial court correctly recognized (see 10-4-22 Tr. 38-41), the case law in this jurisdiction sets out competing definitions of the intent to steal required for robbery (and larceny). In *Lattimore*, a robbery case, the Court stated that "[a]n 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.'" 684 A.2d at 360 (citing *Durphy v. United States*, 235 A.2d 326, 327 (D.C. 1967)). *Lattimore* cited two petit-larceny cases involving stealing from a store, *Durphy*, and *Groomes v. United States*, 155 A.2d 73, 75 (D.C. 1959), that stated the same mens-rea standard. *Lattimore*, 684 A.2d at 360. This Court has since repeated the *Lattimore* formulation. *See Corbin v. United States*, 120 A.3d 588, 591 n.3 (D.C. 2015) (citing *Lattimore*, 684 A.2d at 359-60, for proposition that a robbery conviction requires the government to "prove larceny and assault" and larceny includes "intent to permanently deprive).[6]

[6] In only one case did this Court apply the "permanently deprive" formulation to find the evidence of intent to steal insufficient; in that (continued . . .)

A second line of cases in this jurisdiction has held that larceny requires only "an intent to appropriate the property to a use inconsistent with the owner's rights." *Fredericks v. United States*, 306 A.2d 268, 270 (D.C. 1973); *see United States v. Johnson*, 433 F.2d 1160, 1163 (D.C. Cir. 1970) ("[L]arceny is in essence the unlawful taking and carrying away of property of another with intent to appropriate it to a use inconsistent with the latter's rights."); *Mitchell v. United States*, 394 F.2d 767, 770-71 (D.C. Cir. 1968) (same); *Pennsylvania Indem. Fire Corp. v. Aldridge*, 117 F.2d 774, 778 (D.C. Cir. 1941) ("[T]he old common-law definition of larceny has been largely modified by statute as well as by the courts which purport still to apply the common law. The only rule as to felonious

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case, there was no evidence of intent to deprive, temporary or permanent. *See Durphy*, 235 A.2d at 327 (evidence of statutory petit larceny insufficient where customer-defendant in supermarket placed meat products in shopping bag but did not try to pass check-out counter without paying). In the other cases cited by Alleyne (at 22), the "permanently deprive" language was not dispositive. *See Corbin*, 120 A.3d at 591 n.3 (repeating but not applying "permanently deprive" formulation); *Lattimore*, 684 A.2d at 359-61 (in robbery case, evidence of taking, asportation, and intent to steal sufficient where defendants seized victim's wallet by force but threw it back at him after finding no money). Alleyne's citation (at 22) to *Parker v. United States*, 449 A.2d 1076 (D.C. 1982) ("permanently deprive") is a cite to the dissent. *See id.* at 1078 (Mack, J., dissenting).

intent in larceny to which these statutes and cases can be reconciled, is that the intent of the taker must be to appropriate the property to a use inconsistent with the property rights of the person from whom it is taken.”).

This Court has since repeated the *Fredericks* formulation of intent to steal. *See Locks v. United States*, 388 A.2d 873, 875 (D.C. 1978) (“The crime of larceny presupposes the intent to appropriate the property to a use inconsistent with the owner’s rights.”) (cleaned up); *Fowler v. United States*, 374 A.2d 856, 859 (D.C. 1977) (“[L]arceny requires proof of a conversion after possession is obtained with the intent to appropriate the property to a use inconsistent with the owner’s rights.”); *see also In re Pelkey*, 962 A.2d 268, 278 (D.C. 2008) (“[T]heft under District law ‘does not require an intent to appropriate property permanently.’”) (citing *Fredericks*, 306 A.2d at 270); *In re Gil*, 656 A.2d 303, 305 (D.C. 1995) (same).

Indeed, in *Fogle v. United States*, 336 A.2d 833, 834 (D.C. 1975), a grand larceny case, this Court stated that “[t]he requirement of a felonious intent, or the animus furandi, is well settled in our case law.” The Court articulated the required animus-furundi mens rea as a

requirement that the defendant "intended to take the property and to appropriate it to a use inconsistent with the owner's rights, knowing that he had no authority to do so." *Id*.[7]

Federal courts are in accord that robbery does not require an intent to deprive permanently. *See United States v. Cruz-Santiago*, 12 F.3d 1, 2 (1st Cir. 1993) ("Although there is some dispute among authorities whether common law larceny requires an intent permanently to deprive an owner of his property, it has long been the case that 'if one takes another's property intending to use it recklessly and then abandon it, the obstacles to its safe return are such that the taker possesses the required intent to steal.'" (quoting 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.5, at 360-61 (1986)) (other citation omitted); *see also United States v. Moore*, 55 F.3d 1500, 1503 (10th Cir. 1995) (same). *Cf. United States v. Jackson*, 401 F.3d 747, 750 (6th Cir. 2005) ("stolen" as used in the U.S. Sentencing Guidelines does not require

[7] In *Gray v. United States*, 155 A.3d 377, 382 (D.C. 2017), this Court stated in dicta that the mens rea requirements for robbery and theft were identical. *See id*. ("Proof of robbery requires proof of the elements of theft plus several aggravating circumstances . . .").

a permanent deprivation of property, looking to federal law and the plain meaning of "steal").

In short, despite some different formulations in the caselaw, the prevailing view of the common-law intent to steal is that "one must intend to deprive the owner of the possession of his property either permanently or for an unreasonable length of time, or intend to use it in such a way that the owner will probably be thus deprived of his property." 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.5 (3d ed. Oct. 2023 update).

Contrary to Alleyne's claim (at 23), the cases in this jurisdiction stating that intent to steal does not require an intent to permanently deprive are not limited to construction of the larceny statute. *See Pennsylvania Indemnity Fire Corp.*, 117 F.2d at 776 ("In a number of cases which purported to apply the common-law definition, persons were held guilty of larceny in spite of the fact that in each case it was not the intention of the taker permanently to deprive the owner of his property."); *see also Mitchell*, 394 F.2d at 770-71 (same).

Alleyne also cites (at 26-29) isolated authority to the contrary in other jurisdictions, but that modest divergence cannot establish plain

error in this jurisdiction. *See, e.g., People v. Brown*, 38 P. 518 (Cal. 1894) (larceny requires "an intent to wholly and permanently deprive the owner thereof"; evidence of larceny insufficient where a 17-year-old boy took bike belonging to another boy who threw oranges at him not intending to keep it but to get even); *see also State v. Gover*, 298 A.2d 378, 380 (Md. 1973) ("larceny requires a specific intent to deprive the owner permanently of his property"; holding as a matter of law that drunkenness can negate the specific intent required to commit the crime of larceny).

For all of these reasons, Alleyne has failed to carry his burden of demonstrating plain error. *Anderson*, 857 A.2d at 459.

2. Alleyne Has Not Demonstrated That the Trial Court Plainly Erred by Failing to Give a Mens-Rea Concurrence Instruction.

Alleyne fares no better with his claim (at 32-35) that the trial court plainly erred by failing to instruct the jury sua sponte that to convict Alleyne of robbery the jury must find that he possessed the intent to steal at the moment he took Romero-Guardado's wallet. Alleyne cites no case in this jurisdiction setting out the rule of law he proposes, and indeed,

concedes (at 32 n.15) that the issue he presses "may be an unsettled question of law." *See Gray v. United States*, 155 A.3d 377, 385 n.16 (D.C. 2017) (noting that the Court in *Ulmer v. United States*, 649 A.2d 295, 297-98 (D.C. 1994) "did not resolve the question whether [in a charged robbery] the larcenous mental state and assaultive act must concur"). On this ground alone, he has failed to demonstrate error that is clear under current law. *Anderson*, 857 A.2d at 459.[8]

In fact, there is good reason to conclude that were this Court to decide this issue, it would not adopt the rule pressed by Alleyne. A robbery continues as long as the asportation. *See Castillo-Campos v. United States*, 987 A.2d 476, 491 (D.C. 2010) ("so long as the essential ingredient of asportation continues, the crime of robbery is still in progress") (quoting *Carter v. United States*, 223 F.2d 332, 334 (D.C. Cir. 1955)); *(McClinton) Williams v. United States*, 478 A.2d 1101, 1105 (D.C.

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[8] For the same reason, Alleyne's reliance (at 34) on an out-of-state unreported disposition also does not establish clear error in this jurisdiction. *See State v. Stevens*, No. 22-1114, 2023 WL 3860107, at *3 (Iowa Ct. App. 2023) (evidence of theft insufficient; jury was required to find defendant had purpose of permanently depriving company of its property when he drove away in the van).

1984); *Head v. United States*, 451 A.2d 615, 625 (D.C. 1982); *see, e.g., Carter*, 223 F.2d at 334 (evidence of felony-murder (robbery) sufficient where defendant robbed dry cleaners and shot police officer as he was running away; short interval between when defendant left dry cleaners and when he encountered police officer did not defeat felony-murder theory because the asportation, and therefore, the robbery was ongoing). This Court has also held that two other elements of the robbery crime, the use of force and the taking of the property, need not concur. *See Jacobs v. United States*, 861 A.2d 15, 22 (D.C. 2004) (to convict of robbery, no error to instruct jury that use of force could occur after taking of the property "where the threatened violence occurred directly on the heels of a plainly conditional transfer of possession"), *vacated and reissued*, 886 A.2d 510 (D.C. 2005). For these reasons, Alleyne has not shouldered his burden to demonstrate plain error. *Buskey*, 148 A.3d at 120.

3. Alleyne Cannot Demonstrate Prejudice to his Substantial Rights.

Even if the court plainly erred in either respect, Alleyne cannot demonstrate prejudice to his substantial rights. *Buskey*, 148 A.3d at 120. The government proceeded on one theory, that at the moment Alleyne

took the wallet from Romero-Guardado's person, he intended to steal it—to get "paid" by taking the money in the wallet or extracting an illegal payment away from the cameras and the police (10-4-22 Tr. 66, 77). As the court stated, on the robbery count, this was the government's only theory of intent (*id*. at 33).

By contrast, Alleyne presented the opposite theory, that at the time he took the wallet, Alleyne intended only "to get the necessary information to ensure that he could get his car fixed" (10-4-22 Tr. 87). Neither party argued to the jury that Alleyne intended to "deprive" Romero-Guardado of his wallet for an "extended period," as the Theft instruction indicated, but not "permanently," as Alleyne urges the Robbery instruction should read. Neither party argued to the jury that Alleyne's intent only ripened into an intent to steal after the initial taking.[9] In short, the parties presented the jury with a binary choice—was Alleyne's intent at the time he took the wallet to steal the cash inside

[9] Neither party suggested, for example, that Alleyne took the wallet to get Romero-Guardado's information, but that only after leaving the scene did Alleyne formulate the intent to deprive Romero-Guardado of his wallet by throwing it in the trash can.

and/or extort an illegal payment off-site, or was it to get the information necessary to press an insurance claim?

Given this binary presentation of the evidence, the jury's verdict convicting Alleyne of robbery necessarily establishes that any error in the instruction did not affect the verdict. *Cf. Pope v. Illinois*, 481 U.S. 497, 503 n.6 (1987) (in determining whether erroneous instruction as to element of offense was harmless error, Court considers whether "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same"). The jury must have found that, as the government argued, Alleyne took the wallet from the victim in order to steal the money inside or extort money from the victim. Accordingly, Alleyne has not met his burden of establishing that, "viewed in the context of the trial, there is a reasonable probability that but for the error the factfinder would have had a reasonable doubt respecting guilt." *Muir*

v. District of Columbia, 129 A.3d 265, 274–75 (D.C. 2016) (citation omitted).[10]

II. The Jury Received Sufficient Evidence That Alleyne Committed Robbery.

Contrary to Alleyne's claim (at 32-35), the government presented sufficient evidence at trial that Alleyne robbed Romero-Guardado.

A. Standard of Review and Applicable Legal Principles

In assessing evidentiary-insufficiency claims, this Court views the evidence "in the light most favorable to the government, giving full play to the right of the fact-finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence." *White v. United States*, 207 A.3d 580, 587 (D.C. 2019). The trier of fact is entitled "to draw reasonable inferences from basic facts to ultimate facts." *Davis v. United States*, 834 A.2d 861, 866 (D.C. 2003). "The evidence need not compel a finding of guilt or negate every possible inference of innocence." *Lattimore*, 684 A.2d

[10] For the same reasons, Alleyne cannot demonstrate that any error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Buskey*, 148 A.3d at 1204.

at 359; *accord Miller v. United States*, 115 A.3d 564, 570 (D.C. 2015). The government need only present some probative evidence on each element of the crime. *Jennings v. United States*, 431 A.2d 552, 555 (D.C. 1981). This Court can reverse a conviction "only where the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt." *Miller*, 115 A.3d at 570.[11]

B. Analysis

Romero-Guardado testified that Alleyne approached his car cursing and screaming, forcibly removed him from his car, and reached into his pocket against Romero-Guardado's will and took his wallet (9-29-22 Tr. 39-42). Moreover, Alleyne left the accident scene with Romero-Guardado's wallet (*id.* at 53). Romero-Guardado's testimony was corroborated by the 911 call from the driver of the work van, the testimony from the Metro bus driver Moore who witnessed the event, and the Metro bus video which corroborated the accounts of Romero-Guardado and Moore (supra pp. 3-6). On the strength of this evidence, the government demonstrated conclusively that Alleyne (1) took property

[11] The elements of robbery are set out in Part I.C.1 of the text.

from Romero-Guardado, (2) took it from his immediate actual possession, (3) used force to do so, and (4) carried it away. *See Zanders*, 678 A.2d at 563. Indeed, Alleyne does not suggest that evidence of these elements was not sufficient.

Moreover, the evidence was also sufficient to establish that when Alleyne took the wallet, he intended to steal it. *Zanders*, 678 A.2d at 563. Romero-Guardado told the jury Alleyne demanded he "pay him"; Moore told the jury Alleyne told him "he was definitely going to get something today" (9-29-22 Tr. 39-40, 44;10-3-22 Tr. 63). Alleyne took not only Romero-Guardado's wallet, but his jacket and mechanic's tool (9-29-22 Tr. 44). Alleyne yelled, screamed, used force, and caused Romero-Guardado to feel scared, terrified, and nervous (*id*. at 39-40, 44, 76). Moreover, Alleyne refused to return the wallet to Romero-Guardado despite being asked to do so as many as ten times (*id*. at 77-78). Both Romero-Guardado and Moore told the jury that that they thought it was a "robbery" (*id*. at 22; 10-3-22 Tr. 75).

Alleyne urges (at 35-36), as he argued to the jury at trial (see 10-4-22 Tr. 80-83), that the evidence was more persuasive that Alleyne only intended to take the wallet temporarily in order to ensure that he was

compensated for a future insurance claim. As the trial court acknowledged (see 10-4-22 Tr. 24), there was evidence to support this argument: Alleyne used the co-worker's phone to try to call Romero-Guardado's insurance company, his comments suggested he was exercising self-help to ensure he was not left without compensation as he had been in a previous accident with a "Latino," and he told Romero-Guardado that he would return his wallet if Romero-Guardado followed him to an undisclosed location (see supra pp. 5-6). Indeed, this was the explanation Alleyne gave police when he was arrested (10-3-22 Tr. 116-19, 133; GX.11A; GX.11B).

The jury was not required to credit Alleyne's explanation, however, or to draw the inferences urged by counsel at trial. *See, e.g., Corbin*, 120 A.3d at 591 n.3 (where defendant grabbed at keys from car ignition and managed to escape with keys other than the ignition key, jury was permitted to infer defendant intended to deprive victim of non-ignition keys, and was not required to conclude, as defendant claimed, that he intended to steal only ignition key). Alleyne's use of force seemed particularly unnecessary given Romero-Guardado's statement to Alleyne on the scene that he would pay, and Alleyne's possession of Romero-

Guardado's insurance information (9-29-22 Tr. 51-53). Instead, Alleyne's anger, violence, and wholly out-of-control road rage permitted a reasonable finding that, from the beginning of the incident, Alleyne intended to deprive Romero-Guardado of his property because he wanted, as the government contended in closing argument, to make Romero-Guardado "pay" (10-4-22 Tr. 66). Finally, Alleyne's decision not to return the wallet at all (or the jacket or mechanic's tool) further supported an inference that his original intent was to deprive Romero-Guardado of the property, and not to seize it temporarily. *See Bailey*, 257 A.3d at 502 (Glickman, J., concurring) (in robbery case, defendant's flight with shoes probative of his intent to steal).

For these reasons, viewing the evidence in the light most favorable to sustaining the jury's verdict, a reasonable juror could conclude that Alleyne intended to steal the wallet, and convict him on that ground. *See Lattimore*, 684 A.2d at 359-61 (in charged robbery, evidence sufficient that defendants intended to steal victim's wallet; although defendants seized the wallet by force and threw it back at victim after finding nothing of value, jury could find defendants intended to permanently deprive victim of his property when they took it).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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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
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(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;
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(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 mental health services and/or under evaluation for substance-use disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

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.

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23-CF-55
Case Number(s)

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3/6/2024
Date

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing appellee's brief to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Jason K. Clark, Esq., jason@clarkdefense.com, on this 6th day of March, 2024.

/s/ *David P. Saybolt*
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Assistant United States Attorney