

See: Minutes of Commission
7/19/68, p. 14, Vol. VIII
Tape #9

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

ARTICLE 17.

ROBBERY

Preliminary Draft No. 2; July 1968

Reporter: Donald L. Paillette

Subcommittee No. 1

ROBBERY

Preliminary Draft No. 2; July 1968

Section ____ . Robbery in the second degree. A person commits the crime of robbery in the second degree if in the course of committing or attempting to commit theft he uses or threatens the immediate use of physical force upon another person with the intent of:

- (1) Preventing or overcoming resistance to his taking of the property or to his retention thereof immediately after the taking; or
- (2) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft.

Section ____ . Robbery in the first degree. A person commits the crime of robbery in the first degree if he violates section ____ and he:

- (1) Is armed with a deadly weapon; or
 - (2) Uses or threatens the immediate use of a dangerous weapon;
- or
- (3) Causes or attempts to cause serious physical injury to any person; or
 - (4) Is aided by another person actually present.

COMMENTARY - ROBBERY

A. Summary

The draft creates two ascending degrees of robbery. "Robbery in the second degree" contains the basic definition of the crime; with "robbery in the first degree" being reserved for robbery that is aggravated in nature.

Under the provisions of the draft a person will commit robbery in the second degree if "in the course of committing or attempting to commit" theft he uses or threatens the

immediate use of physical force upon another for the purpose of either (1) preventing or overcoming resistance to the taking of the property or its retention immediately thereafter or (2) forcing another to deliver up the property or do any other act which might aid in the commission of the theft.

In the event the act is accompanied by one or more of the four aggravating factors, it is raised to the stature of robbery in the first degree. Those factors are: Being armed with a "deadly weapon" (i.e., a gun); using or threatening the immediate use of a "dangerous weapon" (i.e., a club); causing or attempting to cause serious physical injury; or being aided by an accomplice who is present. (Both of these terms will be defined in the general definitions.)

The rationale behind the provision for a higher degree of the crime is, of course, the increased danger to the victim when the robber is armed or attempts to seriously injure the victim or when the robber is reinforced by another criminal actually present.

The draft, by prohibiting the threat of "immediate" use of physical force upon another, distinguishes Robbery from Theft by Extortion as it is defined in section 4 of the theft article, i.e., a threat to cause physical injury "in the future."

B. Derivation

Robbery in the second degree is a combination of Michigan Revised Penal Law, section 3307; New York Revised Penal Law, section 160.00; the proposed Connecticut draft; and Model Penal Code section 222.1.

The section on robbery in the first degree combines language from Michigan's draft sections 3305, 3306; New York sections 160.10, 160.15; Model Penal Code section 221.1; and the Connecticut proposal.

C. Relationship to Existing Law

At common law robbery was the felonious taking of goods or money from the person or presence of another by means of force or intimidation, C.J.S. Robbery, s. 1, p. 446. The offense has four elements. First, there must be a taking of personal property or money from the person or presence of another. Second, there must be a use of actual or constructive force. Third, the force used must negate consent to the taking on the part of the victim. Fourth, there must be an animus furandi or intent to steal on the part of the offender. C.J.S. Robbery, s. 2, p. 450.

The Oregon court has defined robbery succinctly as "open and violent larceny from the person." State v. Broom, 135 Or 641, 297 P. 340 (1931). In Merrill v. Gladden, 216 Or 460, 337 P.2d 774 (1959), the court was dealing with ORS 263.270. It held that the statute included both the intent to commit armed and unarmed robbery. The court commented that robbery "can only be consummated through an assault." Id. at 464. Thus assault with intent to commit robbery is a lesser included offense of the crime of robbery. The court defined an assault as "an intentional attempt by one person by force or violence to do an injury to the person of another coupled with the present ability to carry the intention into effect." Supra at 463. The court noted that any force or display of force sufficient to accomplish the larceny was all that was required. Thus any use of force or violence or putting the victim in fear of force or violence which sufficiently overrides the will of the victim is sufficient assault to be encompassed by the robbery provisions.

Since the use of force and intimidation is a material element of the crime of robbery, an indictment must be specific in charging the accused with the use of force. State v. Eddy, 46 Or 625, 81 P. 941 (1905).

State v. Carrol, 155 Or 85, 62 P.2d 830 (1936), held that the crime of simple assault and battery is included in the crime of robbery not armed with a dangerous weapon.

State v. Dixon, 212 Or 572, 321 P.2d 305 (1958), reiterated the holdings in State v. Lawrence, 20 Or 236, 25 P. 638 (1891), and State v. Bailey, 90 Or 627, 178 P. 201 (1919), to the effect that the statement of the crime of robbery in the indictment and proof at trial is made out by stating or proving respectively that property was taken by some one or more of the means enumerated in the statute on robbery not armed with a dangerous weapon, ORS 163.290. Thus the indictment must show and the state must prove that the property was taken "by force and violence or by assault, or by putting in fear of force and violence or assault."

An allegation that the taking was "from the person" of the one robbed also is essential under the holdings of Lawrence, Bailey and Dixon. The "from the person" requirement is necessary under both ORS 163.290, robbery while not armed with a dangerous weapon, and ORS 163.280, robbery while armed with a dangerous weapon.

The personal possession of the property by the party robbed may be actual or constructive. If the property is in his presence or control, though not on his person, it is

sufficient. State v. McCarthy, 160 Or 196, 83 P.2d 801 (1938). In State v. Carcerano, 238 Or 208, 390 P.2d 923, cert. den. 380 U.S. 923 (1964), the court accepted this statement and expanded upon it by ruling that for the purposes of robbery, property was taken from the person of the victim if it is within his reach, inspection, observation, disposition or control so that if his will power is not overcome by threats or violence, he can dispose of it. The Carcerano case held that money taken from a store safe which was opened for armed robbers by the assistant manager of the store only at gun point was "taken from the person assaulted" within the meaning of the armed robbery statute.

ORS 163.290. Robbery or theft while not armed with a dangerous weapon.

In a prosecution under this statute the state must allege in the indictment and prove at trial that the property was taken by one of the means enumerated in the statute; that is, "by force and violence or by assault, or by putting in fear of force and violence or assault." State v. Lawrence, supra; State v. Bailey, supra; State v. Dixon, supra. Basically this requires a showing that the property was taken by "force" or "fear." The statute further requires a showing that the property was taken from "the person of another." Merrill v. Gladden, supra at 464, indicates that the person "of another" means the victim. Therefore it would appear to be the law in Oregon that the force, or assault, or the fear of force or assault must be applied against the victim of the larceny and not a third person.

ORS 163.280. Assault and robbery while armed with a dangerous weapon.

An indictment which charges the accused with being armed with a dangerous weapon sufficiently alleges assault. State v. Carlson, supra. Likewise, in State v. Shaw, 231 Or 345, 372 P.2d 777 (1962), the crime was assault and robbery while armed with a dangerous weapon. There the court said that the assault consisted of the use of the dangerous weapon to put the victim in fear and thereby to induce him to part with his money.

The statute states that a person is guilty of armed robbery if, armed with a dangerous weapon, he "assaults another and . . . takes from the person assaulted any money or other property which may be the subject of larceny."

Thus under ORS 163.280 it is not necessary to allege force and violence or fear of force or violence, the requirement being only an allegation of assault. Under Carlson and Shaw the allegation that the actor was armed with a dangerous weapon is a sufficient allegation of assault. Furthermore, under ORS 163.280, you must allege that money or property

was taken "from the person assaulted." Thus the statute specifically requires that the assault be directed at the victim of the robbery and not a third person who is also present.

ORS 163.270. Assault with intent to rob

"An assault is an intentional attempt by one person by force or violence to do an injury to the person of another, coupled with the present ability to carry the intention into effect." Merrill v. Gladden, supra; Smallman v. Gladden, 206 Or 262, 291 P. 2d 749 (1956); State v. Carrol, 155 Or 85, 62 P.2d 830 (1936); State v. Selby, 73 Or 378, 144 P. 657 (1914). This definition was expanded to include the completed attempt in State v. Collis, 243 Or 22, 413 P. 2d 53 (1966). There the court stated that "Physical violence, however slight, or the threat thereof, can be enough to constitute an assault."

An assault may be either with or without a dangerous weapon and therefore the statute is a general statute covering both the completed offenses charged by ORS 163.280 and ORS 163.290. Merrill v. Gladden, supra at 466. ORS 163.270 requires the assault be accompanied with a specific intent to rob. The criminal intent of the accused must be alleged when the criminality of an act depends upon the intent with which it was done, especially when the statute makes such intent one of the constituent elements of the offense. However, it is not necessary to allege the specific intent in the words of the statute if in alleging the acts done that intent is clearly disclosed. Merrill v. Gladden, supra at 469-70.

The robbery article retains the basic rationale of the existing Oregon statutes, i.e., the prohibition against the forcible taking of property from another. The scope of the fundamental concept of robbery is altered markedly. As the Michigan reporters observe, the present approach is that unless property is actually taken from the person or presence of the victim, there is no robbery. If the actor tries to rob and is prevented or is otherwise unsuccessful, the matter must be treated as attempted robbery or assault with intent to rob. This emphasizes the property aspects of the crime and treats it as an aggravated form of theft. If, however, the primary concern is with the physical danger to the victim, and his difficulty in protecting himself from sudden attacks against his person or property, then the actual taking of property becomes less important. The draft follows this line of reasoning and the view that repression of violence is the principle reason for being guilty of robbery. The language of "in the course of committing or attempting to commit theft" extends from the attempt state through the

phase of flight. This also eliminates the question of what is a lesser included offense to a charge of robbery.

Under existing statutes, the only factor that need be present to aggravate the crime is that of being armed with a dangerous weapon. As noted previously, that factor is retained, but in terms of a "deadly weapon," and three additional aggravating factors are added. The crime becomes first degree robbery if the actor uses or threatens the immediate use of a "dangerous weapon," while mere possession of a "deadly weapon" would be sufficient. Or, if the actor "causes or attempts to cause serious physical injury to any person." (This language is identical to that employed in the Burglary draft.) The presence of an accomplice is the remaining new factor.

The use or threat of force would not need to be directed at the owner of the property, as under present law. The important considerations should be whether the actor by the threats he uses intends to prevent or overcome resistance to the taking of the property or to its immediate retention by the robber, or to force the owner or another person to engage in conduct which might aid in the theft. If such threats are or might be effective, it should be immaterial that someone other than the owner is immediately threatened. As the Michigan commentary points out, there is no purpose served by calling it robbery if threats are directed against the wife or child of the owner, but something else if the same threats are directed against the owner's fiancée or a child of a complete stranger who might be present.

It would not be necessary, either, that the threat or use of force be directed toward a person "present." This would include within the ambit of robbery the not uncommon situation such as threatening to have an accomplice immediately harm the wife or children unless the store owner empties his safe for the robber in the store.

The draft would repeal a part of ORS 163.270, "Assault with intent to rob." The portions of the statute dealing with rape and mayhem will need to be picked up in the assault article. That portion of ORS 163.280 relating to "assault and robbery while armed with a dangerous weapon" would be repealed. The provisions dealing with assault with intent to kill would likewise need to be incorporated into the assault article. ORS 163.290, "robbery while not armed with a dangerous weapon," would be repealed.

ORS 163.330, "train robbery," also would be repealed and no comparable provision retained, inasmuch as train robbery does not appear to present any special problem in this day

and age requiring separate treatment apart from any other types of robbery. This represents the view taken by the American Law Institute.

"A more difficult question is posed by the fairly common statutes penalizing with special severity robbery or burglary of banks or trains. Here are particularly desirable and well-defended prizes, presumably chosen as targets by the most desperate and well-organized criminals. On the other hand, one reads of pathetic attempts of clumsy amateurs to rob banks; and the criteria which would lead to designating bank robbery for special treatment take us logically on to building and loan companies, credit unions, express companies, paymasters, post offices, jewelry stores, and truck loads of whisky, silk, or other valuable commodities. It is difficult if not impossible to draft an acceptable legislative definition of this category of unusually tempting victims. This, plus the fact that most states get along without special laws on the subject, supports our judgment against making exceptional provision here." (MPC, T.D. No. 11, p. 72 (1960).)

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 222.1. Robbery.

(1) Robbery Defined. A person is guilty of robbery if, in the course of committing a theft, he:

- (a) inflicts serious bodily injury upon another; or
- (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or
- (c) commits or threatens immediately to commit any felony of the first or second degree.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

(2) Grading. Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury.

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Text of New York Revised Penal Law

Section 160.00. Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Section 160.05. Robbery in the third degree

A person is guilty of robbery in the third degree when he forcibly steals property.

Robbery in the third degree is a class D felony.

Text of New York Revised Penal Law (Cont'd)

Section 160.10. Robbery in the second degree

A person is guilty of robbery in the second degree when he forcibly steals property and when he is aided by another person actually present.

Robbery in the second degree is a class C felony.

Section 160.15. Robbery in the first degree

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

1. Causes serious physical injury to any person who is not a participant in the crime; or
2. Is armed with a deadly weapon; or
3. Uses or threatens the immediate use of a dangerous instrument.

Robbery in the first degree is a class B felony.

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Text of Michigan Revised Criminal Code

Section 3301. Definition of Terms

(1) The definitions contained in section 3201 are applicable in this chapter unless the context otherwise requires.

(2) "In the course of committing a theft" embraces acts which occur in an attempt to commit or the commission of theft, or in flight after the attempt or commission.

Section 3305. Robbery in the First Degree

(1) A person commits the crime of robbery in the first degree if he violates section 3307 and is armed with a deadly weapon or dangerous instrument.

(2) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence under subparagraph (1) that he was so armed.

Text of Michigan Revised Criminal Code (Cont'd)

- (3) Robbery in the first degree is a Class A felony.

Section 3306. Robbery in the Second Degree

(1) A person commits the crime of robbery in the second degree if he violates section 3307 and is aided by another person actually present.

- (2) Robbery in the second degree is a Class B felony.

Section 3307. Robbery in the Third Degree

(1) A person commits the crime of robbery in the third degree if in the course of committing a theft he:

(a) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

(b) Threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

- (2) Robbery in the third degree is a Class C felony.

Section 3310. Claim of Right not a Defense

No person may submit in defense against a prosecution for robbery in any of its degrees that there was no theft because the taking was under a claim of right; claim of right is not a defense under this chapter.

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See: Minutes of Subcommittee No. 1
8/9/68, p. 13, Vol, X
Tapes #16, 17 & 18

Minutes of Commission
11/21/68, p. 3, Vol. VIII
Tapes #25 & 27

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

ARTICLE 17
ROBBERY

Preliminary Draft No. 3; August 1968

Reporter: Donald L. Paillette

Subcommittee No. 1

ROBBERY

Preliminary Draft No. 3; August 1968

Section 1. Robbery in the third degree. A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft he uses or threatens the immediate use of physical force upon another person with the intent of:

- (1) Preventing or overcoming resistance to his taking of the property or to his retention thereof immediately after the taking; or
- (2) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft.

Section 2. Robbery in the second degree. A person commits the crime of robbery in the second degree if he violates section 1 and threatens the immediate use of a dangerous weapon by any verbal, written or other representation.

Section 3. Robbery in the first degree. A person commits the crime of robbery in the first degree if he violates section 1 and he:

- (1) Is armed with a deadly weapon; or
- (2) Uses or attempts to use a dangerous weapon; or
- (3) Causes or attempts to cause serious physical injury to any person; or
- (4) Is aided by another person actually present.

COMMENTARY - ROBBERY

This draft is an attempt to incorporate the suggestions made by the Commission members at the meeting of July 19.

The article has been amended to provide for three degrees of robbery instead of two. Conduct that would have been second degree robbery in Preliminary Draft No. 2 is redefined

in section 1 as robbery in the third degree. The "unarmed" type of robbery would be covered by this section.

Section 2 represents the most significant difference from the earlier draft in that it makes threatening the immediate use of a dangerous weapon constitute the aggravated crime of robbery in the second degree. While such a threat by a robber, who is in fact unarmed, does not create any greater risk to the victim, it is common knowledge that it does heighten the terror in the victim's mind and is persuasive in overcoming resistance to the robbery. This section would cover the instances in which the robber uses a note, a "hand-in-the-pocket" technique or a fake weapon to convey the impression that he is armed.

It should be noted that under provisions of section 2 the state would not be required to prove that the defendant was actually armed or that he used or attempted to use a weapon. It is submitted, however, that since there is no more danger to the victim than would exist under robbery in the third degree, the mere threat to use a dangerous weapon, standing alone, should not raise the crime to first degree robbery. The primary aim of the proposal is nonetheless prophylactic because it subjects the robber who uses, for example, a toy gun, to a more severe penalty.

Section 3 has been amended by changing the language that appeared in subsection (2) of P.D. #2, "Uses or threatens the immediate use of a dangerous weapon," to "uses or attempts to use a dangerous weapon." This distinguishes the conduct from that prohibited by section 2 and requires the defendant actually to have the weapon in his possession and to go so far as to attempt to make use of it. A defendant who is tried under subsection (1) or (2) of section 3 could be found guilty of the lesser included crimes of second or third degree robbery, depending upon the nature of the evidence regarding the weapon and the use thereof by the defendant.

Your reporter assumes that the terms "deadly weapon" and "dangerous weapon" will be defined in the general definitions for uniform use throughout the code, and further, that such definitions will distinguish between an instrument that ordinarily has no other purpose except as a "weapon" and a thing which is not necessarily intended as a weapon but becomes such because of its use. These assumptions are implicit in the use of the terms in the robbery article.

New York Revised Penal Law defines the terms thusly:

"Section 10.00. Definitions of terms of general use in this chapter

"12. 'Deadly weapon' means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switch-blade knife, gravity knife, billy, blackjack, or metal knuckles.

"13. 'Dangerous instrument' means any instrument, article or substance, including a 'vehicle' as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury."

The Michigan draft employs definitions that are almost identical but adds "bludgeon" and "slungshot" to its list of deadly weapons. (Section 135).

As noted in previous Commentary, the Model Penal Code does not differentiate between armed and unarmed robbery; therefore, a definition of the above-mentioned terms is not required therein. Section 210.0, for the purposes of offenses against the person, employs this definition:

"'deadly weapon' means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury."

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