Filed 12/21/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID CHRISTOPHER ULLOA, Defendant and Appellant.	E045880 (Super.Ct.No. RIF135376) OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine, Judge. Affirmed.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts 3, 4, 5, 6, and 7.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Christopher Ulloa appeals from judgment entered following jury convictions for first degree, residential burglary (count 1; Pen. Code, § 459)[1]; receiving stolen property (count 2; § 496, subd. (a)); and misdemeanor vandalism (count 3, § 594, subd. (b)). Defendant was sentenced to three years of formal probation and 120 days in jail.

Defendant contends he did not commit burglary as a matter of law because he was a cotenant in the apartment where the alleged burglary occurred. Defendant alternatively argues the trial court erred in not instructing the jury on property law principles required to assess his right to enter the apartment. Defendant also asserts there was insufficient evidence supporting his conviction for receiving stolen property and, alternatively, that the court erred in not instructing the jury on community property law principles relating to the alleged stolen property. Defendant further contends the court erred in failing to instruct the jury that defendant could not be guilty of receiving stolen property unless he intended permanently to deprive the victim of the property when he took it. Defendant also claims the trial court abused its discretion in allowing evidence impeaching the victim, which included unsubstantiated accusations defendant had committed uncharged offenses, and in allowing testimony about the circle of violence.

---

[1] Unless otherwise noted, all statutory references are to the Penal Code.

We conclude there was no prejudicial error or any constitutional due process violation, and affirm the judgment.

1. Facts

In December 2005, defendant and Tracy Ulloa, as lessees, jointly signed an apartment lease. The one-year lease term commenced on January 1, 2006, and converted to a month-to-month lease upon expiration of the initial one-year term. The lease was in full force and effect at the time of the charged crimes on February 2, 2007.

In June 2006, defendant and Tracy married and were still married at the time of defendant's trial in May 2008. Tracy acknowledged at trial that she and defendant had been separated two or three times prior to the trial and, at the time of the trial, they had been separated for a few months. When defendant and Tracy separated, defendant moved out as soon as he found somewhere else to live. While they were living in their jointly leased apartment (the apartment), they separated several times, "sometimes for a week, two weeks, a day." Tracy described defendant and her as "a breakup to makeup couple."

On February 2, 2007, at 5:00 a.m., Tracy called 911 and requested a police officer come out to her apartment because her husband was "kicking down the door and trying to get in my apartment." When the 911 operator asked Tracy if she and her husband were separated, Tracy said, "yes." Tracy again told the operator that defendant was kicking down her front door. When the operator asked if defendant was living with Tracy, Tracy said, "no."

Police Officer Quinn testified that at 5:00 a.m., he responded to Tracy's 911 call. Upon arriving at the apartment, he noticed the front door was so badly damaged he could see through it. He saw Tracy sitting on a couch crying. She appeared upset and frightened.

Tracy told Quinn that at 5:00 a.m. she was awakened by a knock. She did not answer because she thought it was defendant. She had received numerous phone calls throughout the night from him. After the initial knock, defendant began calling for her from outside the apartment. At one point while defendant was outside, Tracy went to check on her two young children who were asleep in the back room of the apartment.

Tracy said the knocking got louder and more forceful as defendant beat on the door. Eventually defendant broke into the apartment by breaking the door off the doorframe. Upon entering the apartment, defendant took Tracy's wallet out of her purse, which was in the living room, and withdrew $900. Tracy testified the money was hers and she was going to use it to pay the rent.

After taking Tracy's money, defendant began punching holes in the bathroom door. This caused the door to swing open and the mirror fell off the door and broke.

Tracy told Quinn this was not the first time she and defendant had had arguments that had escalated to this level.

Quinn testified that Tracy told him she was married to defendant but they had not been living together. She said they had been separated for four months and were going through a divorce. Defendant had not lived at the apartment for four months. Tracy told Quinn defendant did not have any of his personal property in the apartment.

Police Detective Dodson testified that on February 27, 2007, a few weeks after the incident, he spoke to Tracy on the phone. She told him defendant had been constantly calling her the night before he broke her door down and took her money. She said defendant's mother, Elizabeth, gave her back her wallet, with all her money in it.

Dodson testified he also spoke on the phone to Elizabeth about the incident. She was aware that defendant had taken cash from Tracy's wallet. Elizabeth told Dodson she had told defendant to return the property. Defendant gave Elizabeth Tracy's wallet and the cash and Elizabeth returned it to Tracy.

At trial, Tracy and Elizabeth recanted most of what they had told the officers. Tracy denied she and defendant were separated at the time of the incident. She claimed defendant was living with her and was out with friends that night. When he returned in the early morning on February 2, 2007, Tracy and defendant got into an argument. She tried to prevent defendant from entering the apartment with his keys but eventually she let him in and began arguing. Defendant eventually left and Tracy called the police because she wanted someone to mediate their dispute.

Tracy further testified that defendant had personal belongings at the apartment on February 2, 2007, although she might have told an officer defendant had no personal belongings at the apartment. Tracy said she was not afraid of defendant and never had been.

Tracy testified that most of what she told Quinn and Dodson was either false or exaggerated. Defendant did not cause all of the damage to the doors and did not take her purse. Someone else broke into the apartment in 2006 and damaged the front door.

Tracy and her children caused additional damage to the front door and to the bathroom door when they threw a shoe at the bathroom door, a computer fell over and struck the door, and Tracy's daughter struck the door with a toy. As to Tracy's missing purse, she claimed she misplaced it and later found it in her car. Tracy denied that defendant had taken anything of hers.

Defendant's mother, Elizabeth Ulloa, testified she never told defendant to return Tracy's wallet and money. Elizabeth also denied returning them to Tracy. Defendant never gave them to her. Elizabeth also denied she told Dodson defendant was living alone at the time of the incident or that defendant had caused damage to the apartment. Elizabeth testified that Tracy called her and told her to lie and tell the investigator defendant had given Elizabeth the money, and Elizabeth gave it back to Tracy. Elizabeth lied to the investigator because Elizabeth panicked when the investigator called right after Tracy.

2. Burglary Conviction

Defendant contends the trial court should have granted his Penal Code section 1118.1 motion for judgment of acquittal on the ground the apartment lease was a complete defense to burglary. At the time of the charged burglary offense, there was in effect, an apartment lease signed by both defendant and Tracy as joint tenants. At the expiration of the one-year lease term in January 2007, the lease had converted from a one-year lease to a month-to-month lease.

Even assuming defendant had a possessory interest in the apartment under the lease at the time of the charged crimes, this was not a complete defense to the burglary

charge because there was substantial evidence he had moved out of the apartment prior to the crimes and therefore no longer had an unconditional possessory interest in the apartment unit.

Under section 459, a burglary is committed when a person "enters any house, room, apartment, tenement . . . or other building, . . . with intent to commit grand or petit larceny or any felony . . . ." (§ 459.)

In the instant case, defendant's burglary conviction was founded on evidence defendant broke into the apartment and took Tracy's purse and $900 from her wallet. Citing *People v. Gauze* (1975) 15 Cal.3d 709 (*Gauze*), defendant argues he did not commit burglary because he was a cotenant on a valid lease to the apartment and thus he could not burglarize his own home. (*Id.* at pp. 714, 717.) But *Gauze* is distinguishable. In *Gauze*, the defendant shared an apartment with two other roommates. The defendant and one of his roommates got into an argument and defendant left the apartment to get a gun. Defendant then returned to the apartment, walked in, and shot the roommate. The defendant's burglary conviction was predicated on the defendant's entry into his own residence with the intent to assault his roommate.

In reversing the burglary conviction, the *Gauze* court explained that a burglary conviction under section 459 requires "an entry which invades a possessory right in a building" (*Gauze, supra,* 15 Cal.3d at p. 714) and it "must be committed by a person who has no right to be in the building." (*Ibid.*; see also *People v. Smith* (2006) 142 Cal.App.4th 923, 930 [4th Dist., 2d Div.] (*Smith*) and *People v. Gill* (2008) 159 Cal.App.4th 149, 159 (*Gill*).) The defendant in *Gauze* had a possessory right of

habitation and his right to enter was absolute. (*Gauze, supra,* at p. 714.) The *Gauze* court distinguished *People v. Sears* (1965) 62 Cal.2d 737, 746 (*Sears I*), in which the husband and wife had separated and the husband was staying in a hotel. The wife was living in a home, which she owned as separate property. (*Ibid.*; *People v. Sears* (1970) 2 Cal.3d 180, 182-184 (*Sears II*).) In *Sears I*, three weeks after separating and moving out, the defendant entered the wife's home through an unlocked door, with a concealed steel pipe. While looking for his wife, the defendant encountered the wife's daughter and killed her. (*Ibid.*)

In *Sears I*, the court reversed the burglary conviction based on instructional error but also rejected the defendant's contention that he could not be convicted of burglary because he had a right to enter the house. The *Sears I* court explained: "One who enters a room or building with the intent to commit a felony is guilty of burglary even though permission to enter has been extended to him personally or as a member of the public. [Citation.] The entry need not constitute a trespass. [Citations.] Moreover, since defendant had moved out of the family home three weeks prior to the crime, he could claim no right to enter the residence of another without permission. Even if we assume that defendant could properly enter the house for a lawful purpose (cf. Civ. Code, § 157), such an entry still constitutes burglary if accomplished with the intent to commit a felonious assault within it." (*Sears I, supra,* 62 Cal.2d at p. 746.)

The *Gauze* court concluded *Sears I* was not dispositive because in *Sears I* the defendant had no right to enter the wife's house and, even if he had a right to enter, it was conditional: "An entry for anything but a legal purpose was a breach of his wife's

possessory rights, in marked contrast to the entry in [*Gauze*].” (*Gauze, supra,* 15 Cal.3d at p. 715; see also *People v. Davenport* (1990) 219 Cal.App.3d 885, 891-892 (*Davenport*).) Unlike in the instant case, the *Gauze* defendant had an unconditional possessory interest in the apartment unit. Here, even assuming defendant had a possessory interest under the lease, he did not have an unconditional possessory interest in the apartment unit at the time of the incident because he had separated from his wife and moved out.

As in the instant case, in *Davenport*, the defendant was convicted of receiving stolen property and first degree burglary for entering his estranged wife’s home, which was a cabin owned by her parents. The *Davenport* court noted that “To sustain a burglary conviction, the People must prove that a defendant does not have an unconditional possessory right to enter his or her family residence.” (*Davenport, supra,* 219 Cal.App.3d at p. 892.)

The *Davenport* court upheld the burglary conviction, concluding there was substantial evidence that appellant did not have the right to enter the cabin or, alternatively, that any such right was conditional based on the following circumstances: The defendant and his wife had been separated for months prior to the burglary; the wife continued to live at the cabin and the defendant lived elsewhere; the defendant had relinquished his keys to the cabin and had already removed some of his personal property; the wife had instructed him not to take his remaining personal property unless she was present; though no dissolution or legal separation proceeding had been filed when the burglary occurred, serious difficulties in the marital relationship existed; the

wife did not have an ownership interest in the cabin but only a tenancy at will. (*Davenport, supra,* 219 Cal.App.3d at pp. 887-889.)

The *Davenport* court concluded under such circumstances, the defendant's right of entry under former Civil Code section 5102 (now Family Code section 753), which provided that neither spouse could be excluded from the other's dwelling, was qualified to a lawful purpose. (*Davenport, supra,* 219 Cal.App.3d at p. 892.) Thus, the defendant was not entitled to enter the cabin without permission or for an unlawful purpose, even though there was no formal decree of divorce. (*Ibid.*)

We acknowledge *Davenport* is factually distinguishable to the extent that in *Davenport*, the cabin was owned by the wife's parents, and the wife was a tenant at will, whereas in the instant case defendant and Tracy were signatories to a one-year lease, which had converted to a month-to-month tenancy. While defendant may have had a legal interest in the apartment under the lease, he did not own the property, and his possessory interest was not unconditional due to abandoning his unconditional possessory interest in the apartment by moving out. (*Davenport, supra,* 219 Cal.App.3d at p. 892.)

In *Smith, supra,* 142 Cal.App.4th 923, the defendant argued that even though there was a TRO and order removing the defendant from the family home, he should not have been convicted of burglary for entering his family home in which he owned a co-equal interest. (*Id.* at p. 929.) This court in *Smith* rejected the defendant's argument and affirmed the burglary conviction, concluding the defendant did not have an unconditional possessory right to enter the family residence due to the court order giving the wife temporary sole possession to the home. (*Id.* at p. 931.) We explained in *Smith* that a

possessory right has a different meaning in criminal law than in family law. "'The possessory right protected by section 459 is the "right to exert control over property to the exclusion of others" or, stated differently, the "right to enter as the occupant of that structure."'" (*Smith, supra,* 142 Cal.App.4th at p. 932.)

This court in *Smith* also stated that in order to convict a spouse of burglary for entering the residence of the other spouse, "there must be a danger that arises from one spouse's mere entry into the family home." (*Smith, supra,* 142 Cal.App.4th at p. 933.) We concluded in *Smith* such a danger was present based on the defendant's history of spousal abuse; the existence of a TRO; and the defendant's use of force in entering the home with intent to commit a crime. (*Ibid.*)

The People argue *Gill, supra,* 159 Cal.App.4th 149 is factually on point and dispositive even though there was no TRO or order removing the defendant from the family home. In *Gill*, the defendant and his wife were having marital problems. In accordance with his wife's request, the defendant moved out of the family home and gave his wife his keys to the home. A day later, the defendant broke into the family home and threatened, assaulted, sexually abused, and kidnapped his wife. The court in *Gill* upheld the defendant's burglary conviction, explaining that "Although the aforementioned cases [*Smith, supra,* 142 Cal.App.4th 923; *Gauze, supra,* 15 Cal.3d 709; and *Sears I, supra,* 62 Cal.2d 737] are factually dissimilar to this case in that T.G. did not have a court order granting her sole possession of the family home, was denied an emergency protective order, and defendant had only been out of the house for one day and evening, we believe the facts are within the principles enunciated in the *Sears* [*I*] and *Smith* cases. . . . By

voluntarily leaving the house, giving up his house keys . . . , and heeding the directives of T.G. to stay out of the family home, defendant waived his unconditional right to enter the home. By obtaining the house keys voluntarily from defendant, T.G. exerted possessory control over the family home to the exclusion of others, specifically the defendant. [Citation.] Defendant's subsequent conduct demonstrated that he gave up his right to possessory interest in the house and understood he did not have the right to enter the residence at will." (*Gill, supra,* 159 Cal.App.4th at p. 161.)

The *Gill* court added that "Here, as in *Smith,* the occupants of the family home were estranged, there had been prior threats to the safety of the victim and there had been incidents of spousal abuse. The victims feared for their safety. [Citation.] It is clear in these circumstances that danger *did* arise from the mere entry of defendant into his former home." (*Gill, supra,* 159 Cal.App.4th at p. 161.)

Here, there was evidence defendant and Tracy were estranged and separated due to having serious marital problems; defendant had voluntarily moved out of the apartment; defendant had committed prior domestic violence against Tracy; and Tracy feared defendant. Also, because defendant yelled at Tracy from outside the apartment at 5:00 a.m. and broke in, a reasonable inference could be made that defendant no longer had a key to the apartment and entered without Tracy's consent, with intent to commit theft or some other crime. Under such circumstances there was sufficient evidence supporting a finding that defendant did not have an unconditional possessory interest in the apartment. We thus conclude the apartment lease did not constitute a complete

defense to burglary and there was sufficient evidence supporting defendant's burglary conviction.

3. Jury Instruction on Burglary

Defendant complains that the instruction on burglary was deficient because the trial court failed to instruct the jury sua sponte on critical property law principles required to determine whether defendant had an absolute right to enter the apartment. This error, defendant argues, was compounded by the trial court's questioning Tracy, such that the court implied the lease had expired in January 2007, when it had not.

At the end of recross-examination by defense counsel, the court asked Tracy if she agreed that the one-year lease expired and was no longer valid as of January 1, 2007. Tracy said she agreed, but when she attempted to qualify her response, the court cut her off. The apartment lease stated the lease commenced on January 1, 2006, and continued until January 1, 2007, "as a leasehold. Thereafter it shall become a month-to-month tenancy."

A trial court has a sua sponte duty to instruct on all general principles of law that are closely and openly connected with the facts of the case. (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) In a criminal case, the general principles of the law include all the elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) If the elements of the offense include a term that has a technical legal meaning that is different from its common meaning, the court has a sua sponte duty to define that term. (*People v. Elam* (2001) 91 Cal.App.4th 298, 307.) The court is not required to instruct on

its own motion as to specific points of evidence. (*People v. Billings* (1981) 124 Cal.App.3d 422, 428 (*Billings*).)

"In determining whether error has been committed in giving or not giving jury instructions, the reviewing court must consider the instructions as a whole. The court must also assume that the jurors are intelligent beings and capable of understanding and correlating all instructions which are given to them." (*Billings, supra,* 124 Cal.App.3d at pp. 427-428.)

The People argue defendant forfeited his objection to the burglary jury instructions by not objecting in the trial court. We agree. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1024; see also *People v. Hardy* (1992) 2 Cal.4th 86, 153.) If defendant believed the burglary instructions were incomplete or needed elaboration, he was obligated to request additional or clarifying instructions. His failure to do so forfeited his jury instruction challenge in this court. (*People v. Dennis* (1998) 17 Cal.4th 468, 514; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1189.) This court will not reverse erroneous rulings that could have been, but were not, challenged below. (*Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 546.)

Defendant argues his objection was not forfeited because it would have been futile to object after he raised the issue in his section 1118.1 motion, and the court denied the

motion. But defendant did not argue in his motion the insufficiency of the burglary instructions or assert the need for such instruction.

There are, however, exceptions to the general forfeiture rule whereby certain issues may be raised on appeal despite the appellant's failure to raise them in the trial court. Section 1259 provides that the appellate court may "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

Here, defendant argues his fundamental, constitutional rights to due process and a fair trial were violated by the trial court failing adequately to instruct sua sponte on property law principles. But the record reflects the court properly instructed the jury on the elements of burglary and made a concerted effort to instruct the jury properly on the additional element, that of defendant not having an unconditional possessory interest in apartment. Defense counsel made no attempt to assist the court in drafting the instruction on the additional element nor objected to the instruction proposed by the court, even when the court asked counsel for input. Since the court properly instructed the jury on each element of burglary and since defendant did not object in the lower court to the adequacy of the burglary instructions, defendant forfeited his objection on appeal.

Even if defendant did not forfeit his objection and assuming, without deciding, the trial court erred in not instructing the jury on legal principles concerning defendant's property interest in the apartment, such omission was harmless under both *People v. Watson* (1956) 46 Cal.2d 818, 835-836 (*Watson*) and *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

Where there is instructional error our high court has held that reversal of the jury's guilty verdict is not required. "An instruction that omits a required definition of or misdescribes an element of an offense is harmless only if 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 774.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) Under this test, the error may be deemed harmless beyond a reasonable doubt if the factual issue posed by the omitted instruction was necessarily resolved adversely to the defendant under other properly given instructions. (*People v. Marshall* (1996) 13 Cal.4th 799, 852.)

The apartment lease clearly stated the lease became a month-to-month lease upon expiration of the one-year term and there was no evidence it was anything other than that at the time of the incident. As discussed above, even though defendant was named as a lessee on the lease and the lease was in full force and effect as a month-to-month lease at the time of the crimes, defendant did not have an unconditional possessory interest in the apartment if he had separated from his wife and moved out prior to the crimes.

Not only was there overwhelming evidence of this but, furthermore, under the burglary jury instructions, the jury must have made such a finding since it convicted defendant of burglary and the only basis for finding defendant did not have an absolute or unconditional right to enter the apartment was evidence defendant and Tracy had separated and defendant had moved out prior to the crimes. Since the jury convicted

defendant of burglary, the jury must have made such a finding. Therefore, even if the instructions were deficient in not explaining property law principles, such error was harmless since it did not contribute to the verdict obtained, and it is not reasonably probable the outcome would have been any different had such instruction been given. (*People v. Flood* (1998) 18 Cal.4th 470, 504.)

4. Sufficient Evidence of Receiving Stolen Property

Defendant contends this court must reverse his conviction for receiving stolen property because the prosecution failed to prove Tracy's wallet and the $900 were Tracy's separate property, rather than community property.

The People, in proving the commission of the crime of receiving stolen property, must, by substantial evidence, establish "(1) that the particular property was stolen, (2) that the accused received, concealed or withheld it from the owner thereof, and (3) that the accused knew the property was stolen. [Citations.]" (*People v. Dishman* (1982) 128 Cal.App.3d 717, 721; see also *In re Anthony J.* (2004) 117 Cal.App.4th 718, 728 and § 496, subd. (a).) "The burden of proving each of these elements, whether by direct or circumstantial evidence, is upon the district attorney. The burden of proving innocent intent is upon a defendant. . . ." (*Dishman, supra,* at p. 721.)

To establish the property was stolen, that is, theft by larceny, the prosecution is required to prove (1) defendant took "possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away. [Citations.] The act of taking personal property from the possession of another is always a trespass unless the owner consents to the taking

freely and unconditionally or the taker has a legal right to take the property. [Citation.]" (*People v. Davis* (1998) 19 Cal.4th at 301, 305, fns. omitted.) The trespass at issue "is not traditional trespass onto real property, of course, but trespass *de bonis asportatis* or trespass 'for goods carried away.' [Citation.]" (*Ibid.*, fn. 2.)

The People's theory at trial was that defendant stole Tracy's wallet and $900, and concealed or withheld the items until defendant's mother, Elizabeth, told defendant to return the property to Tracy. Defendant argues the prosecution failed to prove the property was property of another, as opposed to defendant's community property. Defendant argues that since there was no showing as to when Tracy had acquired the wallet and money, the prosecution did not establish the property was Tracy's separate property, rather than community property belonging to both defendant and Tracy. Defendant also argues there was insufficient evidence that defendant and Tracy were separated, such that any income or property accumulated after separation was separate property.

Defendant acknowledges that under the current state of the law, as stated in *People v. Llamas* (1997) 51 Cal.App.4th 1729 (*Llamas*), a person can be convicted of simple theft of his or her own community property. Defendant urges this court, however, to disregard *Llamas*. In *Llamas,* the defendant was convicted of stealing his wife's car. The defendant's wife testified that during an argument with the defendant, the defendant took her car without permission and she filed a stolen vehicle report. Law enforcement observed the defendant in the presence of the car and arrested him for car theft, as well as for other crimes. (*Id.* at pp. 1734, 1737.)

The defendant in *Llamas* argued the car was community property, and since the crime of auto theft required the vehicle taken be the property of another, he could not be guilty of taking the car, which was his own property. (*Llamas, supra,* 51 Cal.App.4th at p. 1737.) Citing the seminal California case, *People v. Sobiek* (1973) 30 Cal.App.3d 458, 463-469, the *Llamas* court rejected the defendant's argument, noting that "In California, theft occurs when a co-owner takes jointly held property with the intent to permanently deprive other owners of their interest in that property." (*Llamas, supra,* at p. 1738.)

The *Llamas* court also cited *People v. Kahanic* (1987) 196 Cal.App.3d 461, 463-467, in which the court held a spouse could be convicted of vandalizing his own community property because the offense occurs when a person maliciously damages property not his own: "Each community property owner has an equal ownership interest and, although undivided, one which the criminal law protects from unilateral nonconsensual damage or destruction by the other marital partner." (*Llamas, supra,* 51 Cal.App.4th at p. 1739, quoting *Kahanic, supra,* at p. 466.) Based on this case law, the *Llamas* court concluded that "a spouse may be criminally liable for the theft of community property." (*Llamas, supra,* at p. 1739.)

Defendant in the instant case asserts that the *Llamas* decision is bad law because its holding is in plain and irreconcilable conflict with the Family Code provisions that allow both spouses to manage and control community property, including disposing of community property. We are not persuaded by defendant's argument urging this court to disregard *Llamas*. Since we do not consider *Llamas* wrongly decided, we conclude in

accordance with *Llamas*, that the evidence was sufficient to support defendant's conviction for receiving stolen property, based on theft of the wallet and money.

Likewise, we also reject defendant's contention the trial court erred in failing sua sponte to instruct the jury (1) that defendant could not be guilty of stealing his own community property or guilty of receipt of such stolen property; and (2) on how to determine whether the wallet and money were community or separate property. First, defendant forfeited such jury instructions by not raising them in the trial court. (*People v. Bolden* (2002) 29 Cal.4th 515, 557.)

Second, even if the objection was not forfeited, defendant could be found guilty of stealing his own community property and receiving it as stolen property under *Llamas*. Any instruction that defendant could not be found guilty of stealing his own community property or receiving it as stolen property would have been an incorrect statement of law, and there can be no error in the court failing to give legally incorrect instructions. (*People v. Kelly* (1992) 1 Cal.4th 495, 532.)

5. Jury Instruction on Intent

Defendant contends the trial court erred in not sua sponte instructing the jury that he could not be guilty of receiving stolen property unless he intended permanently to deprive Tracy of her wallet and the $900 at the time he took possession of the items. The trial court gave CALCRIM Nos. 1800 on larceny and 1750 on receiving stolen property.

Defendant argues that these instructions do not sufficiently instruct the jury on the crime of receiving stolen property because CALCRIM No. 1800 (larceny) was not given in conjunction with instruction on receiving stolen property. Rather, it was given in

connection with burglary. Defendant argues that, as a consequence, the receiving stolen property instruction and burglary instruction, when read together, allowed the jury to convict defendant under the following two incorrect scenarios: (1) the instructions read as whole erroneously allowed defendant to be convicted of receiving stolen property if he intended to take Tracy's wallet and money when entering the apartment, but he then changed his mind and no longer intended to permanently deprive Tracy of the property when he actually took Tracy's wallet and money; (2) the instructions allowed the jury to convict defendant of receiving stolen property if he entered the apartment with intent to commit vandalism, and then after entering took possession of the wallet and money with intent only to temporarily deprive Tracy of the property.

We conclude the trial court's instruction on the crime of receiving stolen property was sufficient since the court instructed on larceny. In determining whether the trial court committed instructional error, this court "must consider the instructions as a whole. The court must also assume that the jurors are intelligent beings and capable of understanding and correlating all instructions which are given to them. [Citation.] It is the trial court's duty to instruct the jury as to the general principles of law relevant to the issues raised by the evidence. [Citation.] . . . It is equally as clear that the court is under no obligation to instruct on its own motion as to specific points of evidence. [Citation.]" (*Billings, supra,* 124 Cal.App.3d at pp. 427-428.)

Here, the trial court first provided the standard instructions on burglary, CALCRIM Nos. 1700 and 1701, which stated in part that defendant was guilty of burglary if, when he entered the apartment, he "intended to commit theft or the felony

offense of assault with force likely to produce great bodily injury or felony vandalism." The trial court then instructed the jury on the underlying offenses of theft, assault, and vandalism.

After instructing on count 1, burglary, and the related, underlying offenses, the court instructed on count 2, receiving stolen property. The instruction on receiving stolen property stated that a conviction required a finding the property was stolen. The instruction thus incorporated the instruction on larceny, CALCRIM No. 1800, which clearly states that larceny or theft requires a finding that "When the defendant took the property he intended (to deprive the owner of it permanently or to remove it from the owner's possession."

Thus, in considering the instructions as a whole, including CALCRIM No. 1800, in conjunction with CALCRIM No. 1750, we assume the jurors intelligently and correctly correlated these instructions and understood that in order to convict defendant of receiving stolen property (*Billings, supra,* 124 Cal.App.3d at p. 428), the jury was required to find that defendant intended permanently to deprive Tracy of her wallet and the $900 at the time he took possession of the items.

Defendant cites *People v. MacArthur* (2006) 142 Cal.App.4th 275, 280 for the proposition that, if there is a factual dispute as to whether the stolen property was taken with intent permanently to deprive the owner of possession, the court has a sua sponte duty to instruct on the complete definition of theft. *MacArthur* is inapposite because in the instant case, unlike in *MacArthur*, the trial court instructed the jury on larceny and the specific intent required to commit theft. There also was very little, if any evidence, that

defendant took Tracy's wallet and money with any intent other than permanently to deprive Tracy of her property. It was not until after defendant's mother insisted defendant return the property, that the wallet and money was returned to Tracy. Furthermore, defendant's mother, not defendant, returned the items.

There thus was no instructional error because sufficient instruction on intent was provided and defendant did not request at trial any further instruction on intent in connection with receiving stolen property. Thus, by failing to assert his objection to the instruction in the trial court, defendant forfeited his objection on appeal. (*People v. Dennis, supra,* 17 Cal.4th at p. 514; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1189.)

6. Evidence of Uncharged Offenses

Defendant contends the trial court abused its discretion in allowing testimony regarding Tracy's statements made in her 2003 and 2007 declarations supporting her applications for TRO's against defendant. Defendant argues Tracy's allegations against defendant contained in the declarations were unduly prejudicial and therefore should not have been admitted under Evidence Code section 352.

A. Procedural Background

During Tracy's testimony at trial, she recanted most all of her allegations against defendant regarding the charged offenses, stated to officers. Over defendant's objection, the trial court permitted the prosecutor to impeach Tracy's statement she was no longer afraid of defendant by allowing the prosecutor to question Tracy regarding statements she had made in her 2003 and 2007 declarations alleging defendant had committed various acts of violence against her. The trial court ruled that Tracy's statements in the

declarations were inadmissible for use as propensity evidence but could be used as impeachment evidence, to show Tracy was not a credible witness, was fearful of defendant, and recanted at trial.

With regard to Tracy's 2003 declaration, the prosecutor asked Tracy whether she had stated in her declaration that defendant "came into your apartment and hit you several times, destroying property in your home"; "[t]hreatening to kill you with kitchen knives"; "gave you bruises on your head, arms, and thighs"; "pulled your hair, 'held [a] gun to [your] head, hit [you] several times, throw[*sic*] beer bottles, threatened to kill [you], and pushed [you] out of the car while driving 70 to 80 miles an hour"; and "broke your fingernails." In response, Tracy acknowledged these statements were in her declaration but testified that not everything she wrote in the 2003 declaration was true. She claimed she had exaggerated, although she acknowledged that defendant may have thrown beer bottles at her.

With regard to Tracy's post-incident, September 2007 declaration, the prosecutor asked Tracy whether she made the following statements: "'At Mr. Ulloa's request, there have been times I've made arrangements for visitations. We've encountered, at times, a drunk, angry, and violent Mr. Ulloa who has publicly embarrassed and endangered my children's well-being to the point where I've been forced to cut off all ties with him, not only fearing my safety, but the children's too'"; "'They have seen more than their share of abuse, and I refuse to continue to let it happen'"; "'Things have escalated to dangerous points, and waiting for a future court date would just be another reason for this to continue'"; "'In the past five years, [defendant] has physically striked [*sic*] me with his

hands'"; "'[Defendant] pulled your hair and began to throw out your personal belongings [in September 2007]'"; "'Over the past five years, this has been a physically and verbally abusive relationship'"; "'There has been a history of domestic violence throughout our relationship;'" and "'I will be moving soon, and I request my address remain confidential due to the respondent's history of violence.'"

Tracy acknowledged she had written these statements in her 2007 declaration but claimed she had lied in the 2007 declaration because she was trying to get full custody of her children. The trial court instructed the jury during Tracy's testimony that the jury could only consider the testimony concerning the 2003 and 2007 declarations for purposes of determining Tracy's credibility as a witness.

B. Applicable Law

Evidence Code section 1101, subdivision (a), prohibits the use of specific instances of conduct to prove a defendant's conduct on any specified occasion or to prove that he has a propensity to commit the charged offense. Evidence Code section 1101, subdivision (c), however, allows such evidence when used to support or attack the credibility of a witness. In other words, so long as the evidence is not unduly prejudicial in comparison to its probative value, and will not confuse the jury or consume too much time, it is admissible under Evidence Code section 352. A trial court's determination of the admissibility of evidence is reviewed for an abuse of discretion. (*People v. Benavides* (2005) 35 Cal.4th 69, 90.)

C. Analysis

Defendant contends Tracy's testimony relating to her 2003 and 2007 declarations should have been excluded under Evidence Code section 352 as unduly prejudicial character evidence, lacking in substantial probative value. Defendant argues the following factors establish that the evidence was inherently prejudicial and weigh against admissibility: (1) The evidence provided, at most, a very weak inference that Tracy feared defendant, she was not a credible trial witness, and she was lying during her trial testimony; (2) the source of the evidence (Tracy) concerning the charged offenses and uncharged offenses, was one and the same; (3) defendant was not punished for the alleged prior misconduct; (4) the uncharged offenses alleged in the 2003 and 2007 declarations were significantly more inflammatory than the charged offense; and (5) the uncharged offenses occurred at least a year and four months and in some cases more than five years before the trial. Defendant also asserts the evidence was unnecessarily cumulative.

We conclude, to the contrary, that the declaration evidence revealing Tracy's prior allegations against defendant and her fear of defendant was highly probative and therefore admissible for the legitimate non-character purpose of establishing that Tracy was not a credible witness and recanted on the witness stand. There was no abuse of discretion in the trial court finding that this probative value outweighed any prejudice. The trial court considered the prejudicial nature of the evidence and attempted to minimize any prejudice by instructing the jury during Tracy's testimony to consider the declaration evidence solely for the purpose of evaluating Tracy's credibility as a witness.

The court also ordered there was to be no mention by counsel or witnesses of the TRO's against defendant. In addition, the court excluded all evidence of domestic violence allegations involving defendant and his ex-wife.

Later in the trial, the trial court concluded the domestic violence evidence was most likely admissible under Evidence Code section 1109 but nevertheless excluded it other than for the limited purpose of determining Tracy's credibility as a witness. Because the jury's determination of Tracy's credibility as a witness was critical in this case, the trial court did not abuse its discretion in allowing the declaration evidence. The trial court appropriately balanced the probative value and prejudicial nature of the evidence, and reached a well-reasoned decision allowing limited consideration of the evidence for the purpose of determining Tracy's credibility as a witness.

Furthermore, even if the trial court erred in allowing the evidence, doing so was harmless error under *Watson, supra,* 46 Cal.2d at pages 835-836, and *Chapman, supra,* 386 U.S. at page 24. Any such evidentiary error did not constitute a violation of defendant's due process rights since defendant received a fundamentally fair trial. Defendant had the opportunity to cross-examine Tracy regarding her testimony and declaration statements, and Tracy testified that most all of her statements in her 2003 and 2007 declarations were false. Tracy also explained she made the allegedly false statements to win child custody and support.

In addition, there was compelling evidence supporting defendant's convictions, including the officers' testimony regarding Tracy's and her mother's statements implicating defendant, made shortly after the incident. There also was physical evidence

of recent damage to the apartment and a recording of Tracy's conversation with the 911 operator.

7. Circle of Violence Testimony

Defendant contends the trial court erred in allowing Officer Dodson to testify about the "circle of violence," which refers to domestic violence victims commonly reporting acts of violence and then later recanting. Defendant argues the testimony was improper propensity evidence and prejudicial because defendant was not charged with domestic violence, there was no evidence Tracy was a domestic violence victim, and the evidence was inadmissible profile evidence.

Although defense counsel objected to the evidence at trial on relevancy and insufficient foundation grounds, the prosecution argues that many of defendant's other grounds were not raised in the trial court and therefore were forfeited. Regardless of whether defendant may have forfeited some of the grounds for excluding the evidence, we will consider defendant's challenge on the merits.

A. Background Facts

Officer Dodson testified during cross-examination by defense counsel that he had encountered situations where victims and/or witnesses had lied. Dodson stated that the instant case involved a "domestic-type situation" concerning defendant and Tracy, who were husband and wife. Defense counsel asked Dodson whether in such situations, "complaining witnesses lie to get their partner in trouble." Dodson's said, "yes."

On rebuttal by the prosecutor, Dodson testified that he had responded to thousands of domestic violence calls. Noting Dodson had just testified that sometimes a person lies

to get their partner in trouble, the prosecutor asked Dodson whether he also had encountered domestic violence victims who reported violence and then recanted. Dodson said he had and that recanting was common.

When asked by the prosecutor if Dodson was familiar with the "circle of violence," Dodson said he was. Defense counsel objected on relevance and foundational grounds. The court sustained the objection on the ground the prosecutor had not laid a sufficient foundation. Dodson thereafter testified he had taken continuing education courses on investigating domestic violence cases. He also had personally investigated thousands of domestic violence cases and had seen cases go from the initial report of the offense, all the way to trial.

According to Dodson, the victims recanted in a "mid" percentage of the cases. It was not uncommon. Dodson stated that, based on his training and personal experience, victims recanted because the victim and suspect had reunited or the victim decided to talk to the suspect and the suspect persuaded the victim to drop the charges.

B. Analysis

Defendant argues Dodson's testimony relating to domestic violence victims recanting ("circle of violence testimony") was inadmissible propensity evidence because it was offered to prove Tracy acted consistent with the characteristics of domestic violence victims who recant. Defendant also argues such evidence was prejudicial because it could be inferred from Dodson's testimony that since defendant had in the past committed domestic violence, he was violent and abusive at the time of the incident.

As stated above, character evidence is inadmissible to prove conduct on a specific occasion under Evidence Code section 1101, subdivision (a). Defendant argues the evidence was not admissible under any exception to the rule since he was not charged with attempting to physically injure Tracy or placing her in fear of imminent great bodily injury.

Even though defendant was not charged with committing domestic violence, there was evidence he had a history of domestic violence. There was also evidence that during the charged incident, he was violent and abusive toward Tracy. He harassed her by repeatedly calling her; he showed up at 5:00 a.m., yelling at Tracy from outside her apartment; he pounded on her front door; he broke the front door off the doorframe and forced his way into her apartment; he punched holes in the bathroom door and caused the bathroom mirror on the door to fall to the ground and break; and he took Tracy's wallet and $900. Right after the incident, Tracy reported to officers that defendant had committed these acts and said she was afraid of defendant, but at trial recanted. Under such circumstances, Dodson's testimony that it was not uncommon for domestic violence victims to recant was relevant and proper.

Likewise we reject defendant's contention Dodson's testimony was inadmissible because there was no relevancy foundation for the circle of violence testimony, since there was no evidence Tracy was a victim of physical violence. We conclude, as stated above, there was ample evidence that defendant had a history of domestic violence, including against Tracy, even though defendant was not charged with committing a domestic violence crime.

In addition, Dodson's testimony regarding domestic violence victims recanting was proper rebuttal to defense counsel eliciting Dodson's testimony that a complaining spouse might lie to get his or her spouse in trouble. We also reject defendant's contention that the evidence was improper profile evidence because Dodson based his opinion testimony on his own investigation of domestic violence cases, rather than on expertise as a psychologist or social worker with experience evaluating the cognitive motivations and other aspects of domestic violence victims and perpetrators.

Expert testimony about the behavior of domestic violence victims is admissible to assist the trier of fact in understanding the tendency of victims of domestic violence to recant or minimize their initial reports of that violence. (*People v. Brown* (2004) 33 Cal.4th 892, 906-907; see also Evid. Code § 1107, subd. (a); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Other courts have stated that such expert testimony is admissible to dispel common misconceptions about domestic violence. (*People v. Bledsoe* (1984) 36 Cal.3d 236, 242-243, *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.)

Dodson's testimony was permissible since it was based on his expertise as an officer and was limited to what he had personally experienced and observed. When asked if Dodson was familiar with the circle of violence, he merely stated he was familiar with it. Dodson did not define or discuss it any further. Dodson's testimony was well within his expertise and personal experience as an officer who had investigated thousands of domestic violence cases.

In addition, Dodson's testimony did not constitute objectionable profile evidence since it was not being used to implicate defendant but, rather, was being used to explain

or establish victim conduct. Also, under Evidence Code section 1101, subdivision (c), such evidence was permissible to attack the credibility of a witness.

Finally, even if the trial court abused its discretion in allowing the circle of violence evidence, it was harmless error since Dodson's testimony was brief and there was a great deal of other evidence establishing that Tracy had recanted and defendant had committed the charged offenses. (*Watson, supra*, 46 Cal.2d at pp. 835-836.)

8. Disposition

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.