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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD CHARLES OREMUS, Defendant and Appellant.	C061297 (Super. Ct. No. CRF084691)

Insofar as is relevant to this appeal, a jury convicted defendant Richard Charles Oremus of the taking or unauthorized driving of a vehicle (Veh. Code, § 10851, subd. (a)--count 1) (hereafter section 10851(a)) and receipt of a stolen vehicle. (Pen. Code, § 496d, subd. (a)--count 3) (hereafter section 496d(a)). Defendant admitted that he had served three prior prison terms. He was sentenced to state prison for seven years.

On appeal, defendant contends: (1) his conviction for receiving stolen property must be reversed because it violates the common law rule prohibiting dual convictions based upon stealing and receiving the same property; and (2) both

convictions must be reversed because the trial court failed to instruct the jury, sua sponte, on the defense of mistake of fact.

We reject defendant's first contention. We agree with him on his second contention but find the error harmless. We affirm the judgment.

FACTS AND PROCEEDINGS

On August 31, 2008, at about 2:00 a.m., defendant, accompanied by Jessica R., drove his Dodge Durango to the Thunder Valley Casino and stopped in a lane for valet parking. While defendant paid for his valet ticket, Jessica R. walked to the casino. About this time, Mary H. parked her Ford Explorer behind defendant's Durango in the valet line, got a valet ticket, and went into the casino. Mary H. left her keys in her car.

Defendant testified that, when Jessica R. approached him outside the casino, she told him that she was talking to somebody and would be right back. Defendant waited and when Jessica R. returned she told him that a friend of hers had said that she and defendant could "take his car." Defendant and Jessica R. got into Mary H.'s Explorer and defendant drove off. Defendant only drove about 20 feet when Jessica R. told him he was drunk, so he let her drive.

Jessica R. suggested that the two get a motel room, which they tried to do but were unsuccessful in doing because defendant did not have acceptable identification. The two then

drove to meet a friend of Jessica's in Woodland. He got them a room at a Motel 6, and then left. Defendant fell asleep before sunrise and did not wake up until after sunset. When defendant awoke Jessica R. was gone. Defendant called his friend Amber R., picked her up in the Explorer, and they went looking for Jessica R. Defendant denied knowing that the owner of the Explorer had not given consent for its taking or that he intended to steal it.

Around midnight of August 31, 2008, Woodland police officers went to the Motel 6 in response to a call regarding a disturbance in room 226, the room occupied by defendant and Jessica R. When no one responded to the officers' knocking, they entered and found the room empty. On a table were registration and insurance papers for Mary H.'s Explorer. The officers ran the Explorer's license plate number and found the vehicle had been reported stolen. About 2:00 a.m. on September 1 defendant and Amber R. returned in the Explorer to the Motel 6 and defendant was arrested.

DISCUSSION

I

Multiple Convictions

Relying on the common law rule that a thief may not be convicted of both stealing and receiving the same property, in this case Mary H.'s Explorer, defendant contends that his conviction for receiving stolen property pursuant to section 496d(a) must be reversed. We disagree, concluding that the

issue is controlled by *People v. Garza* (2005) 35 Cal.4th 866 (*Garza*).

We first note that *Garza* involves prosecutions under section 10851(a) and Penal Code section 496, subdivision (a) (hereafter section 496(a)) whereas in the present case the convictions were under section 10851(a) and section 496d(a). Section 496(a) is a general statute covering the reception of stolen property and states that "no person may be convicted both pursuant to this section and of theft of the same property." Section 496d(a) is a special statute governing the unlawful reception of motorized vehicles and vessels. Section 496d(a), unlike section 496(a), does not expressly prohibit dual convictions for the receiving and the theft of the same property. Nevertheless, *Garza* recognized the existence of a common law rule to the same effect (*Garza, supra,* 35 Cal.4th at p. 874 [a "common law rule likewise prohibits separate convictions for stealing and receiving the same property"]). Consequently, this common law rule applies to section 496d(a). The parties do not claim otherwise.

In *Garza,* the defendant worked for a limousine rental company but was terminated from employment prior to December 5, 2000. (*Garza, supra,* 35 Cal.4th at p. 872.) On December 21 the company discovered that one of the limousines was missing and, on December 27, reported it stolen. (*Ibid.*) Later that same day, a police officer saw the missing limousine in a parking lot with its engine running and the defendant sitting in the driver's seat in a drug-induced stupor. (*Ibid.*)

The defendant was charged with receiving stolen property (§ 496(a)) and unlawfully taking or driving a vehicle (§ 10851(a)). (G*arza*, *supra,* 35 Cal.4th at p. 872.)

At the times relevant in *Garza, s*ection 10851(a) provided in relevant part, as it does today, "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense . . . ."

The trial court instructed the jury that to prove a violation of section 10851(a), the prosecution had to prove "'[a] person took or drove a vehicle belonging to another person'" and that either the taking or the driving of the vehicle could constitute such proof. (*Garza, supra,* 35 Cal.4th at p. 873.) The court did not instruct the jury, as it was required to do on its own motion, that the jury "could not convict defendant both for theft and for receiving the same stolen property." (*Id.* at p. 881.)

The jury convicted the defendant of unlawfully taking or driving a vehicle in violation of section 10851(a) and of receiving stolen property in violation of section 496(a). (*Garza, supra,* 35 Cal.4th at pp. 873-874.) From the record, including the jury's general verdict, it could not be determined whether the section 10851(a) violation was based on the taking or the posttheft driving, or both. (*Garza, supra,* at p. 874.)

The California Supreme Court upheld both convictions, reasoning as follows: "The only reasonable inference that a juror could draw from the evidence at trial . . . was that defendant had driven the car [to the parking lot] before being overcome by the effects of drug intoxication. The theft of the vehicle six days earlier was long since complete, and the driving therefore constituted a separate, distinct, and complete violation of section 10851(a). Under these circumstances, we conclude that it is not reasonably probable that a properly instructed jury would have found defendant guilty of violating section 10851(a) by stealing the car but not by posttheft driving. Accordingly, we may uphold both convictions by construing defendant's conviction under section 10851(a) as a nontheft conviction for posttheft driving." (*Garza, supra,* 35 Cal.4th at p. 882.)

In so holding, the California Supreme Court expressly observed that it was not deciding "the precise demarcation point" where "once a person who has stolen a car has passed that point, further driving of the vehicle is a separate violation of section 10851(a) that is properly regarded as a nontheft offense for purposes of the dual conviction prohibition of section 496(a)." (*Garza, supra,* 35 Cal.4th at pp. 880-881.)

The present case is in the same procedural posture as that in *Garza*--the court instructed the jury that to prove a violation of section 10851(a), the People must prove that "[t]he defendant took or drove someone else's vehicle without the owner's consent," and that "[w]hen the defendant did so,

(he/she) intended to deprive the owner of possession or ownership of the vehicle for any period of time." (CALCRIM No. 1820.) And as in *Garza*, it was error for the court not to instruct the jury, on its own motion, that it could not convict the defendant of violation of section 496d(a) based only on his theft of the Explorer. Also, like *Garza*, it cannot be determined from review of the trial record, including the jury's general verdict, whether the section 10851(a) conviction was based upon the theft or the posttheft driving of the Explorer, or both.

Applying the reasoning of *Garza,* if after defendant's theft of the Explorer there exists a point at which his further driving of the vehicle amounts to a nontheft violation of section 10851(a) for purposes of the common law prohibition against dual convictions under section 496d(a), we may then uphold "both convictions by construing defendant's conviction under section 10851(a) as a nontheft conviction for posttheft driving." (*Garza, supra*, 35 Cal.4th at p. 882.)

Defendant's own testimony establishes such a point. Shortly after 2:00 a.m. on August 31, 2008, defendant stole the Explorer and he and Jessica R. unsuccessfully tried to get a motel room. They then drove to the apartment of a male friend of Jessica R. and he obtained a room for them at a Motel 6 in Woodland. Defendant fell asleep in the motel room before sunrise and did not awaken until after sunset, a period of about 12 hours. After awakening and discovering Jessica R. was gone, defendant drove to Amber R.'s residence and the two went looking

for Jessica R. Defendant returned to the Motel 6 about 2:00 a.m. on September 1, at which time he was arrested.

Thus, defendant not only obtained a place of temporary safety at the Motel 6, i.e., a safe haven, but he also slept approximately 12 hours before he again drove the Explorer after awakening at the motel. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1153 [suggesting theft is complete when the taker reaches a place of temporary safety]; *People v. Strong* (1994) 30 Cal.App.4th 366, 375 [suggesting taking is complete when the driving is no longer part of a continuous journey away from the *locus* of the theft].) Because the theft of the Explorer had been completed long before defendant again drove it, it is not reasonably probable that a properly instructed jury would have found defendant guilty of violating section 10851(a) by stealing the vehicle but not by the posttheft driving of it. Consequently, we uphold both convictions.

II

Instructional Error

Defendant contends that reversal of his section 10851(a) and section 496d(a) convictions are required because the trial court prejudicially erred when it failed to instruct the jury, sua sponte, on his proffered defense of mistake of fact. The People impliedly agree that the court's failure to so instruct was error, but argue the error was harmless. We agree that the failure to instruct on mistake of fact as a defense was error, but, like the People, we conclude the error was harmless.

"The court has a sua sponte duty to instruct on mistake of fact if the defendant relies on the defense or if there is substantial evidence that supports the defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1427 (*Russell*).) Here, substantial evidence supported the defense because defendant testified that Jessica R. told him that she had spoken to a friend, the friend said they could use his Explorer, and therefore defendant believed he had the consent from the Explorer's owner to drive it. That defendant relied on a mistake of fact is established because his counsel so argued to the jury. Consequently, it was error for the court not to instruct the jury, sua sponte, on a mistake of fact defense.

Prejudice

"Error in failing to instruct [a jury] on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836." (*Russell, supra,* 144 Cal.App.4th at p. 1431.) In the absence of the error is it likely the defendant would have obtained a more beneficial result. (*Id.* at p. 1432.)

Defendant's argument that he was prejudiced by the court's error is as follows: Both section 10851(a) and section 496d(a) are specific intent crimes. (*People v. Scott* (1983) 146 Cal.App.3d 823, 830 [conviction under section 10851(a) requires "a finding that the accused had the specific intent to deprive the owner of title to or possession of his vehicle"];

Russell, supra, 144 Cal.App.4th at p. 1425 ["With regard to the knowledge element, receiving stolen property is a '"specific intent crime"'"].) Because both section 10851(a) and section 496d(a) are specific intent crimes, the court should have instructed the jury pursuant to CALCRIM No. 3406 (mistake of fact defense) that if they found defendant actually believed he had the owner's consent to take the vehicle, even if that belief was unreasonable, he was not guilty of violating section 10851(a). Similarly, if the jury found that defendant actually believed he was not stealing the vehicle, even if that belief was unreasonable, they must find him not guilty of violating section 496d(a).

We find that, even if the jury had been properly instructed, there is no reasonable likelihood the jury would have found that defendant actually believed he had the consent of the owner to take the vehicle. First, defendant's credibility was severely weakened by his three prior convictions for unlawfully taking automobiles and his admission that he had only recently been discharged from parole. Second, his testimony regarding how he came into possession of the vehicle was completely incredible. He said that, when he and Jessica R. arrived at the casino in his Durango, which was newly purchased and contained everything he owned including $1,000 worth of tattoo equipment, he went to the valet booth and she walked to the casino, but was unable to get in. According to defendant, she told him that a friend had told her they could use his Explorer, which had just been parked with the keys in it behind

his Durango. They drove off in the Explorer, leaving behind defendant's Durango, which contained all of his belongings. Defendant did not offer any credible reason why they would want to do that when defendant's car was sitting right in front of them. When asked what he thought about getting into the Explorer, defendant replied, "I am not going to answer no questions about it" and that "[w]hen somebody says, let's go, I am not going to sit and ask a hundred questions about or not the car is stolen or this or that." The only possible conclusion from all of this is that defendant and Jessica R. decided to steal the Explorer and come back for his car later.

In addition, when he was arrested at the motel, Mary H.'s vehicle registration and other paperwork were on the table. Had defendant and Jessica R. legitimately borrowed the car, there would have been no reason to remove its registration and proof of insurance. Defendant had no explanation for how or why they had gotten there.

In sum, defendant's credibility was so thoroughly impeached by his prior three convictions for auto theft and his testimony regarding how he came into possession of the Explorer was so absurd that there is no reasonable likelihood that the jury would have concluded that he actually believed he had permission to take the Explorer. Hence, the court's error in failing to instruct on a mistake of fact defense was harmless.

III

Penal Code Section 4019

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. We conclude that the amendment does apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239 [applying *Estrada* to amendment involving conduct credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying rule of *Estrada* to amendment allowing award of custody credits].) Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b)(2), (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant having served 176 actual days of presentence custody, is entitled to 176 of conduct credits, for a total of 352 days.

DISPOSITION

The judgment is modified to reflect that defendant is entitled to an additional 88 days of presentence credit. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly and to send a copy

of the amended abstract to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

SCOTLAND, Acting P. J.*

CANTIL-SAKAUYE, J.

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Having concurred in the majority opinion, I write separately to observe that, even without an instruction on mistake of fact, this defense was adequately before the jury by virtue of counsel's argument and the jury instructions which required, for conviction, a mental state inconsistent with mistake of fact. In other words, based upon the instructions given and upon the argument of counsel, no reasonable jury would have felt it could convict defendant even if it believed his defense. Hence, there was no reversible error.

_____SCOTLAND_____, Acting P.J.*

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* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.