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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KAE LIN SAEPHAN,

Defendant and Appellant.

A135293

(Contra Costa County
Super. Ct. No. 51118280)

A jury convicted appellant Kae Lin Saephan of the unlawful driving or taking of a motor vehicle. The trial court found two prior conviction enhancements—one of them also charged as a strike—to be true. (Veh. Code, § 10851, subd. (a); Pen. Code, §§ 667, subds. (b)-(i), 667.5, subd. (b).) Sentenced to state prison for five years, he appeals. He and the Attorney General agree that the trial court misinstructed the jury on the defense of mistake of fact. (CALCRIM No. 3406.) As we find this error was harmless, we affirm the judgment.

I. FACTS

On October 13, 2011, Mulugeta Haile parked and locked his 1998 black Infiniti. The next morning, the car was gone. He reported the car stolen that morning.

On October 20, 2011, at about 9:30 p.m., San Pablo police saw Haile's stolen Infiniti. Police initiated a traffic stop, finding appellant Kae Lin Saephan in the driver's seat. Brandi Lombardi was also in the car. Both were handcuffed and the contents of the

vehicle were inventoried. Those contents included a shaved key¹ taken from the ignition, a second shaved key found on the passenger seat, a lock picking tool found inside a bag belonging to Lombardi² and a pair of white batting gloves on the drivers' seat. The car did not contain any paperwork indicating Saephan's name. An officer tried to start the car with the shaved key that had been in the ignition, but could not get the engine to turnover.

Police first interviewed Saephan's girlfriend Lombardi. She told police that she had taken the lock picking tool out of the car and placed it into her bag. Lombardi said that Saephan never told her that the car was stolen, but the two of them agreed that it seemed like it was. She did not believe that Saephan had \$300. She denied loaning him any money to buy a car.

Then, police conducted a recorded interview with Saephan.³ He said that he had purchased the car for \$750 from the girlfriend of an El Sobrante man named Mike Gardner. He did not know the name of the girlfriend. Saephan could not provide Gardner's address or telephone number.⁴ He told police that he borrowed \$500 from his mother and \$250 from Lombardi for the purchase of the vehicle. He bought the car from Gardner outside the San Pablo home of Lombardi's mother. Saephan also told police that there was a bill of sale in the car memorializing the sale. He did not know the name of Gardner's girlfriend who had completed the bill of sale. He thought that the bill of sale was in the door pocket or in the center console of the car. Police found no bill of sale or pink slip in the car. If found, it could have established that Saephan actually purchased the vehicle.

¹ A shaved key has filed edges, allowing the key to fit more easily into an older car's more worn ignition system. Shaved keys are often used to steal vehicles.

² This tool can be used to pick locks, operating as a shaved key does.

³ A tape of this interview was played for the jury at trial.

⁴ Initially, Saephan told police that he could take them to Gardner's address. Later, he admitted that he did not know this address but said that he intended to find out.

Police asked Saephan if he believed that the car was stolen. He said that earlier that day—before the police stopped him—he realized that the car was stolen because the key was shaved, the key did not work properly in the ignition, the bill of sale was strange, and he had not yet been given a pink slip. Once the police pulled him over, Saephan knew the car was stolen.

Police also asked Saephan about the gloves found in the Infiniti. He said that he used them to work on cars.⁵ When police noted that the gloves were clean and white, Saephan offered no response. The officer believed that automobile thieves often wore gloves to avoid leaving fingerprints in the cars.

In November 2011, Saephan was charged by information with one count of unlawful driving or taking of a motor vehicle and one count of receiving a stolen motor vehicle. The information also alleged that he had suffered a prior strike in 1996 and had two prior convictions—one in 1996 and another in 2001. (Pen. Code, §§ 496d, 667, subds. (b)-(i), 667.5, subd. (b); Veh. Code, § 10851, subd. (a).) Saephan entered a not guilty plea and denied the enhancement allegations.

At trial, a police officer told the jury about the traffic stop and the statements Saephan and Lombardi gave after the stop. Lombardi also testified against Saephan, although she still considered herself his girlfriend. She told the jury that she first saw Saephan with the car three days before they were pulled over by police. They had used the car for three days. He told her that he had been working in order to get a car. Saephan was not regularly employed but he sometimes worked on cars and did tattoos.

Lombardi told the jury that she and Saephan had lived at her mother's house until a few days before he showed up with the car. She was not certain where he got money to buy the car, but she had not seen him for a few days before he obtained it. She was living on social security. Lombardi repeatedly told the jury that she did not loan Saephan money for a car. She denied telling police on the night of the incident that she did not believe that Saephan had \$300.

⁵ When he was booked, Saephan told police that he was unemployed, but that he worked on cars.

Lombardi testified that she did not know the Infiniti was stolen until the police pulled the car over. The lock picking tool found in the car belonged to Saephan; she found it at her mother's house and took it. She told police at the time of the incident that it was hers. She admitted that in November 2011, a few weeks after she and Saephan were pulled over, she pled guilty to stealing a car. This conviction arose during a separate incident in which Saephan was not involved.

In January 2012, the jury found Saephan guilty of unlawful driving or taking of a motor vehicle. As the two charged crimes were charged in the alternative, the jury did not reach a verdict on the receiving stolen property charge. (Veh. Code, § 10851, subd. (a).) In an April 2012 court trial, both prior conviction allegations—both charged as enhancements, one charged as a strike—were found to be true. (Pen. Code, §§ 667, subds. (b)-(i), 667.5, subd. (b).) The trial court sentenced Saephan to five years in state prison. It imposed a four-year term for the new conviction—a midterm of two years that was doubled because of the prior strike—and a consecutive one-year term for his other prior conviction. An enhancement for the 1996 prior conviction used as a strike was stayed.

II. DISCUSSION

A. *Error*

On appeal, Saephan contends—and the Attorney General concedes—that the trial court misinstructed the jury on the defense of mistake of fact by requiring that any mistake be reasonable in order to constitute a defense. (CALCRIM No. 3406.) The jury was instructed at defense counsel's request on CALCRIM No. 3406. The jurors were told that Saephan was not guilty of the charged crimes if he lacked the required intent “because he reasonably did not know a fact or reasonably and mistakenly believed some other fact. If [Saephan's] conduct would have been lawful under the facts as he reasonably believed them to be, then he did not commit the crimes charged. [¶] If you find that [Saephan] believed that the car was not stolen and if you find that belief was reasonable, then he did not have the specific intent” for the charged crimes. If the jury

had a reasonable doubt about whether Saephan had this specific intent, the jurors were required to acquit him.

After this instruction was given, defense counsel asked the trial court to modify CALCRIM No. 3406. Saephan's attorney argued that even an unreasonable mistake of fact negated the required specific intent for a charge of unlawful driving or taking of a motor vehicle. The trial court denied the request for modification.

The offense of unlawful driving or taking of a motor vehicle requires a specific intent to deprive the vehicle's owner of ownership or possession of it. (*People v. Windham* (1987) 194 Cal.App.3d 1580, 1590; see Veh. Code, § 10851; *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1739.) In a case in which a defendant offers a mistake of fact defense to such a specific intent crime, CALCRIM No. 3406 must be modified to eliminate the requirement that the mistaken belief must be reasonable. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425-1426; see Bench Notes to CALCRIM No. 3406 (2012 edition).) In Saephan's case, as the Attorney General had conceded, the instruction that was given failed to eliminate the reasonableness requirement and thus, was erroneous.

B. *Prejudice*

The parties disagree about the effect of this error. Saephan urges us to conclude that it was prejudicial; the People argue that it was harmless. An erroneous mistake of fact instruction is reversible error only if it is reasonably probable that the defendant would have obtained a more favorable outcome if the error had not been made. (*People v. Zamani* (2010) 183 Cal.App.4th 854, 866; *People v. Russell, supra*, 144 Cal.App.4th at pp. 1431-1432; see *People v. Watson* (1956) 46 Cal.2d 818, 836; but see *People v. Salas* (2006) 37 Cal.4th 967, 984 [California Supreme Court does not determine the standard of prejudice applying to an erroneous instruction on an affirmative defense].)

Saephan argues that the jury likely rejected the prosecution claim that he actually knew that the car was stolen and thus convicted him on the basis of a finding that his mistake of fact was unreasonable. We disagree with his premise. The evidence at trial showed that Saephan said that he bought the car, but that no bill of sale was found; that

he could not identify the seller's name or contact information where she could be located; that his girlfriend—who had herself been convicted of car theft since the incident—repeatedly denied his claim that she gave him some of the money he used to buy the car; that he admitted to police that he realized that the car was stolen even before he was stopped; and that circumstantial evidence of shaved keys, a lock picking tool and gloves were found in the vehicle at the time of the traffic stop. Viewed in its totality, this was strong evidence that Saephan had actual knowledge of the stolen nature of the Infiniti and thus, labored under no mistake of fact—either reasonable or unreasonable.

We may also consider the closing arguments offered to the jury when assessing what prejudice may have flowed from an instructional error. (*People v. Hayes* (2009) 171 Cal.App.4th 549, 560.) During argument, the prosecutor reasoned that the evidence showed that Saephan knew that the Infiniti had been stolen before the traffic stop was made. She argued that Saephan admitted to police that he knew the car was stolen before he was stopped in the car—in fact, she asserted that he probably stole it himself. The defense argued that Saephan was not guilty of the charged crimes because he bought the car in good faith and did not believe that the car was stolen. These arguments satisfy us that the disputed issue at trial was whether Saephan *actually* knew that the car was stolen. As the *reasonableness* of any mistake of fact about the stolen nature of the car was not an issue, it is not reasonably likely that the jury would have reached a different result if it had been instructed with a properly modified version of CALCRIM No. 3406. (See *People v. Zamani, supra*, 183 Cal.App.4th at p. 866; *People v. Russell, supra*, 144 Cal.App.4th at pp. 1431-1432; see *People v. Watson*, 46 Cal.2d at p. 836.)⁶

The judgment is affirmed.

⁶ Assuming *arguendo* that the standard of prejudice is the more robust *Chapman* test, we would find that the trial court's erroneous instruction was harmless beyond a reasonable doubt. (See *People v. Salas, supra*, 37 Cal.4th 967, 984; see also *Chapman v. California* (1967) 386 U.S. 18, 24.) We are confident that the error did not contribute to the jury's verdict. (See *People v. Flood* (1998) 18 Cal.4th 470, 504.)

REARDON, J.

We concur:

RUVOLO, P. J.

HUMES, J.