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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HIDAYAT SURJAATMADJA,

Defendant and Appellant.

A140285

(City & County of San Francisco
Super. Ct. No. MCN 12032279, SCN
219763)

Defendant Hidayat Surjaatmadja was convicted by a jury of one count of theft, embezzlement, forgery, or fraud upon an elder (Pen. Code, § 368, subd. (d); Count 1), and one count of grand theft of personal property (Pen. Code, § 487, subd. (a); Count 2). He received a two-year sentence in county jail on Count 1, and a two-year sentence on Count 2, which was stayed (Pen. Code, § 654). The court ordered that the final six months of the sentence be suspended, and that Surjaatmadja be placed under the supervision of adult probation.

Surjaatmadja contends that due to his counsel's incompetence and the prosecutor's misstatement of the law, the jury failed to consider potentially exculpatory evidence. This argument has merit, but the error was manifestly harmless. Surjaatmadja argues that the court erred when it failed to instruct the jury, sua sponte, to view with caution testimony that he made an allegedly inculpatory oral admission. But, again, any error on the point was clearly harmless. Accordingly, we affirm the judgment.

I. BACKGROUND

Eleanor Hartley was 87 or 88 years old in 2010 and 2011, when Surjaatmadja deposited checks for \$25,000, \$25,000, and \$5,000 from her Wells Fargo bank account, and checks for \$801.51 and \$850.73 from her Citibank retirement account, into his account at Charles Schwab. Surjaatmadja opened the Schwab account in 2001, and Hartley signed an application Surjaatmadja prepared to add her name to the account in 2010. On the application, Surjaatmadja listed his address as Hartley's address, and his email address as hers (she did not own a computer). It was undisputed at trial that Surjaatmadja wrote out the Schwab application and the Wells Fargo checks, and not effectively disputed that Hartley signed and endorsed the checks.

The Schwab application provided for issuance of two debit cards, but Hartley never received one. Surjaatmadja used money from the Schwab account to make purchases from, among others, Geico, Comcast, the Apple Store, Macy's, Safeway, Best Buy, NetFlix, Starbucks, Panda Express, and the Gold Beach Inn.

Hartley testified at trial that Surjaatmadja was her personal banker at Wells Fargo for about three years. They did not socialize, but he was friendly and "very business like." When Hartley was asked whether she started to have trouble writing checks around 2009, she said, "I don't think so. I used to ask Hedy [her name for Surjaatmadja]. I'd tell him what I wanted for my allowance." She did not own a car "or anything like that," and was "not a big spender." She would tell Surjaatmadja that she needed \$60 a week for what she thought of as her "allowance," for "groceries and shoe repair whenever I needed it."

Hartley testified that she would never write a check for \$25,000 from her Wells Fargo account containing her life savings. She was asked, "Did you ever intend for Hedy to have \$25,000 of your money?" She answered, "I don't know why I'd do such a stupid thing." Nor did she want Surjaatmadja to have money from her retirement account at Citibank. She did not want Surjaatmadja to have any of her money, and did not know about the Schwab account.

Hartley discovered the Schwab account with the help of her long-time friends, Judith Bray and Lynne Borter, or, as the prosecutor referred to them in closing argument, “Miss Marple.” Bray had lived in Hartley’s apartment building for decades, and they became friends in the early 1990’s. Borter had known Hartley since 1979 when they both worked at Bechtel, and they stayed friends. Around 2007, Bray noticed Hartley getting forgetful, losing her bus passes and locking herself out of her apartment. Bray saw Hartley crossing the street, “[a]nd there were times when I was very afraid of her not being attentive to cars.”

In December 2009, Bray discovered that Hartley’s phone had been disconnected. Bray called Borter. They had not met, but Bray knew that Hartley and Borter were good friends. Bray went through Hartley’s bills and wrote a check to PG&E so that Hartley’s power would not be shut off the following day. Hartley told Bray that she was signing papers at the bank that Hedy had given her, but she did not know what the papers were for. Bray was worried and went to talk to Surjaatmadja without telling Hartley because Hartley was “fiercely independent an pride[d] herself on her ability to take care of herself.” She spoke briefly with Surjaatmadja, he seemed indifferent to her concerns, and Bray told Hartley that she had run into him and did not trust him.

In May 2011, Hartley called Borter and said that Surjaatmadja had left the bank. Borter and Hartley went to the bank and obtained statements for Hartley’s account that included a \$5,000 check Hartley said she did not write that was deposited in the Schwab account. They went to Schwab and learned of the other deposits of Hartley’s money. Borter testified that Hartley was “aghast” when she learned that she was on Surjaatmadja’s Schwab account, and said “It’s just like we’re married.”

The matter was referred to Schwab fraud investigator Wanda Atkins. Atkins testified that she called Surjaatmadja to get his side of the story and spoke with him for less than a minute. At that point, around \$4,000 remained in Surjaatmadja’s account with Hartley. Surjaatmadja did not deny receiving the money deposited into the account from Hartley but claimed that Hartley wanted to help him with his finances. When Atkins said Hartley had indicated that she did not want to be on the account, Surjaatmadja said,

“Well, I’ll call her.” Atkins replied, “No, don’t call her. You need to call an attorney.” Atkins thereafter received a call from an attorney for Surjaatmadja who offered to pay the money back. Atkins referred him to a San Francisco police detective who was investigating the case. Schwab reimbursed Hartley for the two Citibank checks, and returned the rest of the money in the account to Wells Fargo.

Wells Fargo fraud investigator Carol Mariscal handled the matter for the bank. Mariscal testified that Wells Fargo reimbursed Hartley for her loss, and that Surjaatmadja returned the money he took from Hartley.

Attorney Martin Malkin was the only defense witness. He testified that he spoke with Atkins on Surjaatmadja’s behalf and told her that Surjaatmadja had a \$10,000 cashier’s check that he wanted to pay to Hartley through Schwab. Atkins told him that she could not deal with the matter because it had been referred to the police. Malkin contacted Mariscal at Wells Fargo and got the same response. Malkin spoke with a police inspector, who said the check could not be accepted because the case had been referred to the district attorney’s office. Malkin contacted a representative of the district attorney who told him that the office wanted to go forward with an investigation and would not accept any payment at that time.

Presentation of evidence and argument in the case took approximately two and one-half court days. The jury deliberated for less than an hour before reaching its verdicts.

II. DISCUSSION

A. Instruction on Surjaatmadja’s Attempts to Repay Hartley

Surjaatmadja contends that his counsel was ineffective because he did not request the court to instruct the jury that offers to repay allegedly stolen funds can be considered in assessing whether defendant had the requisite larcenous state of mind. Surjaatmadja further argues that the prosecutor misstated the law when she argued to the jury that such offers were irrelevant to his guilt.

(1) *Record*

The court instructed the jury that the crime of theft from an elder required commission of “theft, embezzlement, forgery, fraud or identity theft” (CALCRIM No. 1807), and that the elements of grand theft required proof that “[w]hen the defendant took the property he intended to deprive the owner of it permanently.” The jury was instructed pursuant to CALCRIM No. 1862: “If you conclude that the People have proved that the defendant committed the crimes charged in Counts 1 and 2, the return or offer to return some or all of the property wrongfully obtained is not a defense to either charge.”

The prosecutor began her closing argument by emphasizing the CALJIC No. 1862 instruction:

“[T]he judge just told you . . . that you’re going to get a copy of the jury instructions that you’ll have in the jury room. And that should be, I hope, very useful to each of you.

“Now, there is also one other important jury instruction that neurotic compulsion requires that I talk to you about; and that is, that if you . . . believe that the defendant took the money and he returned some or all of the property, then . . . that could be a defense.

“But you know what? In this case, that is definitely not the case.

“But let’s go to the reason of that rule. And it’s a very good reason that we have this rule. That just because somebody gives back the property, well, you know, he can claim—and I think the defendant wants to claim that no harm, no foul.

“Well, number one, . . . he’s paid back the money. And you cannot consider that as to whether he unlawfully took the money. So you have to put that aside that he did return the money.

“But you know what? More importantly, the reason that we have this law is that we don’t want people with means or people that have to be able to buy their way out of a criminal case because we have got to look at what happened in the case and make a determination as to whether a crime is committed or not.

“So, anybody that has money—and certainly there is no particular group of people; rich, poor, not color, not race, not age. Everyone wants to be treated fairly and wants to be treated the same.

“But the fact that the defendant gave back the money he’s caught—doesn’t help him one single bit. And you cannot consider that, . . . we want a fair application of the law. So that’s a very important jury instruction that the judge has read to you.”

In his closing argument, defense counsel singled out various instructions he considered to be most important, including “1862 . . . hav[ing] to do with paying back or attempt to paying back the money as a defense. And I take issue with counsel about the interpretation of that and I’ll explain why a little bit later.” When counsel returned to CALCRIM No. 1862, he argued: “Now, what that says is, ‘Repayment or attempt to repay is not an affirmative defense’; that is, it’s not a complete defense to the charges. [¶] . . . [¶] However, repayment or attempt to repay bears on the defendant’s intent to deprive permanently. And you may consider that. In fact, you should consider that because all of the offers to pay were right after he had talked to Ms. Atkins and were well before he was ever charged with a crime. In fact, about six months before he was charged with a crime. So it bears on intent.”

Defense counsel recounted attorney Malkin’s unsuccessful attempts to return \$10,000 of the money Surjaatmadja obtained from Hartley. Counsel described Wells Fargo’s refusal to accept the money as “interesting because Wells Fargo has already paid back Ms. Hartley. So, by default, Mr. Surjaatmadja owed this money to Wells Fargo and now Wells Fargo doesn’t want the money. [¶] . . . [¶] Now, he had paid full restitution, over \$50,000. Of course, this is in 2013. Again, this may be considered for intent purposes.” After the prosecutor objected “[t]hat is not the law,” and the court admonished the jury that “the law is as set forth in the instructions,” defense counsel continued: “But I want you to focus mostly and primarily on the offers to make repayment right away. Because this bears on Mr. Surjaatmadja’s lack of intent to deprive the alleged victim permanently.”

In her rebuttal argument, the prosecutor returned to the subject of repayment, noted that Malkin had offered to repay only \$10,000 of the money, and said “that’s why the Court is going to tell you again . . . you cannot consider the fact that the defendant offered or paid back some of the money in determining his guilty intent in this case.” When defense counsel objected that the prosecutor had misstated the law, the court re-read CALJIC No. 1862.

(2) Analysis

Surjaatmadja is correct to argue, citing *People v. Edwards* (1992) 8 Cal.App.4th 1092 (*Edwards*), that “[w]here a person has taken property, and offers to return it prior to being charged, the offer authorizes the inference that the property was not taken with the intent to steal.” The defendant in *Edwards*, a church pastor, caused the victim, a member of his congregation, to deed his home to the defendant for the ostensible purpose of assisting the victim to sell it. The victim also gave the defendant \$29,000 believing he would then be eligible to reside in a development for low-income senior citizens. The victim understood that the money would be returned to him upon request, but the defendant claimed the money along with the house were gifts because the victim did not want his estate to go to the government when he died. The defendant wanted to introduce evidence that he gave the victim’s money back when he asked for it, a total of over \$5,000. He also wanted to present evidence that he had made improvements to the victim’s home, and transferred title to the home back to the victim after criminal charges were filed against him. The court allowed evidence of the money returned to the victim but only for purposes of impeaching the victim’s testimony that the defendant never gave him anything back.

Edwards held that the defendant was entitled to introduce evidence of the home improvements and the returned money “to demonstrate that his handling of the property was consistent with a nonlarcenous intent at the time of the taking.” (*Edwards, supra*, 8 Cal.App.4th at p. 1100.) Defendant’s reconveyance of title to the home after he was arrested was properly excluded under Penal Code sections 512 and 513. (*Ibid.*) Penal Code section 512 states: “The fact that the accused intended to restore the property

embezzled, is no ground of defense or mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, or an indictment found by a grand jury, charging commission of the offense.” Penal Code section 513 provides: “Whenever, prior to an information laid before a magistrate, or an indictment found by a grand jury, charging the commission of embezzlement, the person accused voluntarily and actually restores or tenders restoration of the property alleged to have been embezzled, or any part thereof, such fact is not a ground of defense, but it authorizes the court to mitigate punishment, in its discretion.”

Another case supporting Surjaatmadja’s position is *People v. Braver* (1964) 229 Cal.App.2d 303 (*Braver*). There, the defendant obtained a loan under false pretenses and sought to introduce evidence that he had made payments on the loan. (*Id.* at pp. 305–306, 308.) The trial court excluded the evidence and instructed the jury: “It is not a defense to a prosecution for theft that after the theft was committed, complete or partial restitution was made to the owner of the stolen property, or that his loss was wholly or partly recouped by any other means.” (*Id.* at p. 308.) The *Braver* court observed, “It is, of course, true that when money is obtained by the use of false pretenses, subsequent restitution or repayment is not a defense.” (*Id.* at p. 306.) On the other hand, “[t]he subsequent conduct of the defendant with respect to the obligation was of some evidentiary value as to whether he had an intent to defraud at the time the loan was sought and obtained.” (*Id.* at p. 307.)

The court’s instruction in *Braver* gave the jury the erroneous impression that such evidence was entirely irrelevant: “ ‘Technically such instruction was correct, but as given it was susceptible of being misunderstood by the jury. The jury might very well not have understood the difference between a “defense” and proof which tends to show no offense was committed, and without further explanation they might have assumed that they could not consider the fact of payment or reimbursement for any purpose.’ ” (*Braver, supra*, 229 Cal.App.2d at pp. 307–308.) To avoid this misimpression, this court in *People v. Katzman* (1968) 258 Cal.App.2d 777, 792, disapproved on another ground in *Rinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780, footnote 11, held that an

instruction like the one Surjaatmadja advocates “would have been proper under *Braver* if requested.”

In this case, the prosecutor’s closing remarks followed by the court’s immediate reading of CALCRIM No. 1862 make it reasonably likely that the jury would have erroneously understood that it could not consider Surjaatmadja’s pre-arrest offers to repay \$10,000 in determining whether he intended to permanently deprive Hartley of her money when he took it.

Whether this error is deemed to have resulted from counsel’s incompetent failure to request an instruction on the relevance of the evidence, or prosecutorial misstatement of the law, the error was prejudicial only if it is reasonably probable that it could have changed the outcome of the case. (*People v. Ochoa* (1998) 19 Cal.4th 353, 415 [defendant asserting ineffective assistance of counsel must show reasonable probability of a different result]; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353 [prosecutor’s misstatement of the law is harmless unless a different result was reasonably probable].)

The error here was harmless under any standard. As evidenced by the brevity of the jury’s deliberations, Surjaatmadja’s guilt was abundantly clear. He induced an elderly person with declining faculties to trust him, caused her to sign over sums of money that given her lifestyle she would never have knowingly spent, put the money in an account he set up in a way that kept it secret from her and then used the money to pay for a wide array of his living expenses. He offered to return a fraction of the money only after the fraud departments of the account holding financial institutions were alerted to his scheme and the case had been referred to the district attorney. There was no prospect that consideration of his offers of repayment would have changed the jury’s view of his intent when he took Hartley’s money.

B. Instruction Regarding Surjaatmadja’s Allegedly Inculpatory Admission

As we have said, Atkins had one brief telephone conversation with Surjaatmadja. When Atkins told Surjaatmadja that Hartley had no desire to share his Schwab account, Surjaatmadja said he would call Hartley. Atkins advised Surjaatmadja to call a lawyer

instead. In closing argument, the prosecutor characterized Surjaatmadja's statement that he would contact Hartley as "an attempt to hide his crime."

Without objection, the court instructed the jury pursuant to CALCRIM No. 358: "You have heard evidence that the defendant made oral statements before the trial. You must decide whether the defendant made any of the statements in whole or in part. If you decide that the defendant made such statements, consider the statements along with all the other evidence in reaching your verdict. It is up to you to decide how much importance to give to the statements." The court did not include bracketed language in CALCRIM No. 358 that reads: "Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded."

Surjaatmadja contends that the court had a sua sponte duty to give this cautionary instruction because of the prosecutor's passing reference to the evidence of his plan to call Hartley. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1529 [instruction to view evidence of an oral admission cautiously "should be given sua sponte," citing *People v. Beagle* (1972) 6 Cal.3d 441, 455 (*Beagle*), and other Supreme Court cases]. After the close of briefing in this case, our Supreme Court held in *People v. Diaz* (2015) 60 Cal.4th 1176, 1191 (*Diaz*), that a cautionary instruction on a defendant's admissions is not "so necessary to the jury's understanding of the case to require the court to give it sua sponte." The *Diaz* court did not decide whether its new rule applied retroactively, because omission of the cautionary instruction was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 835–836. (*Diaz, supra*, 60 Cal.4th at p. 1195 [not reasonably probable the jury would have reached a result more favorable to the defendant had the instruction been given].)

So, too, here. Surjaatmadja's desire to talk to Hartley was not especially incriminating, and was a tiny fraction of the prosecution's case. The cautionary instruction could have made no conceivable difference in the outcome. Moreover, failure to give the instruction is harmless where, as here, there was no dispute that the defendant

made the statement in question. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1135; *People v. Carpenter* (1997) 15 Cal.4th 312, 393; *Beagle, supra*, 6 Cal.3d at p. 456.)

C. Cumulative Error

Surjaatmadja contends that the errors he identifies were cumulatively, if not individually, prejudicial. We reject this argument because neither error was remotely prejudicial.

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Pollak, J

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