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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TARA BUI,

Defendant and Appellant.

B236448

(Los Angeles County
Super. Ct. No. TA117316)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick Connolly, Judge. Affirmed.

Holly J. Jackson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Tara Bui appeals from the judgment entered following her conviction of one count of grand theft (Pen. Code,¹ § 487, subd. (a)), with a true finding on an enhancement. Bui argues that the trial court abused its discretion and violated her constitutional right to due process by denying her the opportunity to obtain and present evidence of the victims' complete tax history for the period of the alleged theft. Bui also asserts that the trial court erred in instructing the jury on the elements of theft by larceny rather than theft by embezzlement. In addition, Bui requests that we review the trial court's in-camera hearings on discovery of the victims' tax records to determine if any additional materials should have been disclosed to the defense. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Information

In an amended information, the Los Angeles County District Attorney charged Bui with one count of "GRAND THEFT BY EMBEZZLEMENT, in violation of PENAL CODE SECTION 487(a)."² It was alleged that the theft occurred from June 2007 to June 2010 and that the victims of the theft were Kennedy Occupational Medical Center, Superior Care Providers Medical Center, Kevin Nownejad, and Claudio Hoegel. It was further alleged that the value of the property taken exceeded \$1 million within the meaning section 12022.6, subdivision (a). Bui pleaded not guilty to the charged offense and denied the enhancement allegation.

II. Prosecution Evidence

Bui worked in the billing department of two chiropractic clinics owned by Kevin Nownejad and Claudio Hoegel – Superior Care Medical Center (Superior) in Gardena and Kennedy Occupational Medical Center (Kennedy) in Los Angeles. Nownejad also

¹ Unless otherwise stated, all further statutory references are to the Penal Code.

² As discussed below, section 487, subdivision (a) defines theft by larceny whereas section 503 defines theft by embezzlement.

owned a third chiropractic clinic called Total Urgent Care which he ultimately closed and merged with Kennedy. Hoegel was a partner in Superior and Kennedy and had a 51 percent ownership interest in each clinic. Hoegel was solely responsible for patient care and was not involved in the business side of the operations. Nownejad, on the other hand, spent 90 percent of his time managing the business and 10 percent of his time treating patients.

Each of the clinics owned by Nownejad was structured as a separate S corporation with its own tax identification number. At his accountant's suggestion, Nownejad also set up a separate management company for each clinic and a separate payroll company to pay the clinics' employees. Nownejad personally owned the real estate where Superior and Kennedy were located and collected rent from them. Although Superior and Kennedy shared a single billing department, the two clinics maintained separate bank accounts.

In 1996, Nownejad hired Bui to work in the billing department. As Bui earned Nownejad's trust, he increased her level of responsibility in the management of the business. Bui eventually became responsible for paying all of the bills associated with the clinics, including payroll, mortgages, and taxes. Bui also was responsible for opening all of the mail, collecting any checks paid to the clinics, and arranging for those checks to be deposited at the appropriate bank. Nownejad instructed Bui to use the signature stamp of the relevant clinic to endorse the checks received before depositing them into the clinic's bank account. He never told Bui to endorse the checks by handwriting the clinic's name. When Bui began working for Nownejad, he periodically reviewed the bank statements for each clinic, but over time, he stopped reviewing the bank statements and the checks written or endorsed by Bui. According to Nownejad, he trusted Bui "100 percent."

In August 2007, Elizabeth Romero began working at Superior as Bui's assistant. In addition to handling collections, Romero made bank deposits after Bui processed the checks and prepared the deposit slips. When Bui went on vacation, Romero was responsible for opening the mail and collecting the checks for deposit. During those

times, Romero observed that the daily deposits were about \$2,000 higher than when Bui was in the office. In 2009, Romero discovered that some of the checks the insurance companies sent to the clinics were not credited to an account, and at other times, the checks were credited to an account, but she did not receive them for deposit.

Bui was responsible for paying the clinics' bills and directed Romero not to mail the payments until there were sufficient funds in the clinics' bank accounts. At times, the clinics' suppliers contacted Romero to complain that their bills were not being paid. Starting in 2009, Bui asked Romero not to cash her paychecks for a period of time because the business did not have enough money to pay employees due to the economic recession. Bui also instructed Romero to tell the other employees that they could cash their paychecks at a check cashing store if they needed immediate payment. Near the end of 2009, there were insufficient funds to pay the employees almost every pay period. When Romero went to the bank to make the deposits for Superior, she occasionally was told that the account had a negative balance.

Over the years, Nownejad also noticed that the business at times did not have sufficient funds. When he asked Bui about the matter, she explained that insurance companies were closing due to the poor economy and not paying their bills. In 2010, Nownejad learned that the property on which Kennedy was located was going into foreclosure because he was behind in his mortgage payments. That same year, Nownejad became aware that the business often was not meeting its payroll obligations. Bui again blamed the poor economy for the lack of sufficient funds and assured Nownejad that she was expecting a large payment.

In June 2010, Romero and another employee named Patty Macias told Nownejad that they suspected Bui was stealing checks from the business. At Nownejad's request, Romero obtained copies of two cancelled checks that had been paid to the clinics. The checks were not endorsed to either clinic's bank account with the appropriate signature stamp, but rather were endorsed by Bui with a handwritten signature to a separate account ending in 9299. Nownejad asked Romero to make a list of all of the checks received in the mail and then compare them to the checks that Bui later gave Romero to

deposit in the bank. After making the list, Romero determined that there was a discrepancy between the number of checks received and the number of checks deposited.

On June 29, 2010, Nownejad was alerted by Macias that Bui was packing her belongings and taking boxes from her office to her car. Nownejad rushed to the clinic in Gardena and confronted Bui about her suspected theft. Bui initially denied diverting any business funds into her personal bank account. After Nownejad showed Bui the two cancelled checks that Romero had obtained, Bui said, "You got me." At one point, she told Nownejad that she used the money to remodel the office. When Nownejad demanded to see her personal bank statements, Bui reluctantly agreed. After reviewing Bui's 2010 bank statements, Nownejad discovered that Bui had been depositing \$25,000 to \$40,000 per month into her personal checking account. Nownejad immediately called Romero into the office and told her that Bui had been stealing money and was no longer going to work for him. Sitting silently, Bui nodded her head in agreement.

The following day, Bui called Nownejad and asked to see him. When they met, Bui signed over the title to her Mercedes Benz as a partial repayment for the money she had taken. After Bui's termination, Nownejad instituted changes in the clinics' billing practices and began personally reviewing all deposits. Since that time, the weekly deposits have increased by approximately \$10,000, and the clinics have not had any issues with insufficient funds in their accounts.

At trial, Nownejad denied that he ever had a sexual relationship with Bui. He also denied that he ever instructed Bui to divert any funds from his business to avoid the payment of income taxes. Both Nownejad and Hoegel testified that they did not give Bui permission to deposit any checks payable to the clinics into her personal checking account.

Veronica Mayorga, an operations representative for Bank of America, reviewed a February 2010 bank statement for Bui's personal checking account ending in 9299. The statement showed that there were eight deposits made into the account during that month, including checks payable to Superior Care Medical Center and Kennedy Occupational Medical Center. Los Angeles County Sheriff's Detective Anthony Willis also reviewed

the activity in Bui's Bank of America checking account. From July 2007 to June 2010, all of the checks deposited into that account were payable to Superior or Kennedy. No payroll or other personal checks payable to Bui were deposited. The total amount deposited into Bui's account from July 2007 to July 2010 was \$1,290,411.52.³ Bui's tax returns reflected an annual income of approximately \$44,000.

III. Defense Evidence

Bui testified on her own behalf. In 1996, Bui began working for Nownejad as a biller at an annual salary of \$45,000. In 2000, Nownejad was treating Bui for an injury on her thigh when he suddenly started groping her. Bui initially rejected Nownejad, but he was aggressive and able to overpower her. Bui reluctantly began a sexual relationship with Nownejad at that time which lasted until June 2010. They spent weekends together at Nownejad's house and went on trips to Las Vegas, Palm Springs, and Cabo San Lucas. Nownejad also gave Bui a variety of expensive gifts.

In 2001, Bui was promoted to chief financial officer at an annual salary of \$50,000. Approximately 50 percent of the clinics' income was from personal injury cases, 40 percent of the income was from workers' compensation cases, and 10 percent of the income was from cash-paying walk-in patients. Bui only managed the finances for the workers' compensation cases. Nownejad managed the finances for the personal injury and walk-in cases, and any money received from those cases went directly to him. Once a week, Nownejad went to Gage Check Cashing where he cashed all of the personal injury checks. He told Bui that he was using Gage Check Cashing for income tax purposes.

Between 2001 and 2004, the business was doing well. In 2004, Superior moved into a new medical building and the two other clinics owned by Nownejad merged together. As a result, the business doubled in volume. In 2005, Nownejad told Bui that

³ The deposits totaled \$25,065.11 in July 2007, \$170,428.83 from August to December 2007, \$483,590.33 in 2008, \$423,908.81 in 2009, and \$203,482.55 from January to July 2010.

he wanted the income of the business to remain the same as the prior year because he did not want to pay any more in taxes. Nownejad instructed Bui to deposit the business checks received from the workers' compensation cases into her own personal bank account, but to leave sufficient funds in the clinics' accounts to cover the payroll and business expenses. He also instructed Bui to cash her own payroll checks and deliver the cash to him. In exchange, Bui could use the funds deposited into her account to pay her personal bills and expenses as well as other expenses as directed by Nownejad.

Soon thereafter, Nownejad began withdrawing money from Bui's personal bank account. Nownejad used some of the money to renovate buildings that he had purchased. With Nownejad's permission, Bui used some of the money to buy promotional gifts, including jewelry, clothing, and tickets to sporting events, for the clinics' business clients. Nownejad also allowed Bui to spend \$10,000 to \$15,000 a month on herself as compensation for her employment. Nownejad periodically reviewed the activity on Bui's personal account and was responsible for approving the purchases that Bui made.

In 2008, Nownejad decided that he wanted to invest some of the money in Bui's personal bank account in the real estate market. At Nownejad's request, Bui found a single family home in Gardena for investment, but Nownejad did not want title to the property to be in his name to avoid the payment of taxes. Macias, one of the employees who would later report Bui's alleged theft to Nownejad, agreed to be the title owner for two years during which time the house would be renovated and sold. Bui used the money in her personal account to provide the down payment, to pay the loan, taxes, and appraisal fees owed on the property, and to renovate the house for resale. The renovations were performed by Carlos Menjivar with whom Bui had a romantic relationship. Menjivar lived in the house after the renovations were completed and paid rent to Macias. The house was later sold by Macias at a profit of \$90,000. Bui did not receive any proceeds from the sale nor was she reimbursed for any of the payments that she made in connection with the property.

With the assistance of Nownejad's accountant, Bui was responsible for preparing the payroll for the clinics. The accountant would review an invoice of the employees'

hours, make any necessary adjustments, and then mail the invoice to Nownejad for his approval. Once Nownejad approved the invoice, Bui printed out the payroll checks. In early 2010, Nownejad deliberately began bouncing the payroll checks because he was applying for a government loan which required a showing of financial hardship. To that end, Nownejad instructed Bui not to deposit any of the checks received by the clinics into the clinics' bank accounts.

One of Bui's paystubs showed that her yearly earnings to date were \$223,000. According to Bui, the accountant calculated her payroll earnings by including the business funds that were deposited into her personal bank account. In addition to preparing the corporate tax returns for the business, the accountant prepared the individual tax returns for both Nownejad and Bui. Although Bui was earning \$130,000 to \$140,000 per year, the accountant adjusted her annual gross income to \$50,000 in preparing her tax returns. At the accountant's instruction, Bui did not claim the business funds in her personal bank account as income in her tax returns.

In early June 2010, Nownejad confronted Bui about her romantic relationship with Menjivar. Shortly thereafter, Nownejad became very distant toward Bui which made it difficult for them to maintain a professional relationship. Bui told Nownejad that she wanted to take some time off from work. On June 29, 2010, Nownejad came into the office while Bui was collecting her personal belongings. He asked Bui to write two checks from her personal bank account and then walked her to her car. As Bui was leaving, Nownejad told her that she had betrayed him. On July 1, 2010, Nownejad called Bui and demanded that she return the Mercedes Benz he had purchased as a gift for her. Bui agreed and signed over the title to the car to Nownejad. Bui denied that she was fired from her job.

Between 2006 and 2010, Bui used the money in her personal bank account to pay for many of her expenses. Bui spent approximately \$400,000 remodeling her house in San Pedro and took funds from the account to pay the loans and property taxes owed on the house. She also used the money to pay for a timeshare in Mexico, to purchase items for her house in San Pedro, and to buy jewelry and clothing for herself. Bui testified that

she did not reimburse Nownejad for any of the funds that she took to pay for her personal expenses because it was her “earned payroll, it was not his money.”

Elizabeth Orozco testified on Bui’s behalf. Orozco and Bui had been friends since 2000. On one occasion in 2001, Orozco picked up Bui from the airport where she was waiting with Nownejad. Orozco dropped off Nownejad at his house and saw Bui and Nownejad hug and kiss on the mouth as they said goodbye. Menjivar also testified on Bui’s behalf. Menjivar had a romantic relationship with Bui that ended in December 2009. From 2008 to 2010, Menjivar remodeled and then rented a house in Gardena from Macias. Bui paid Menjivar \$125,000 for his work on the Gardena house and \$60,000 for his work on Bui’s San Pedro house. Bui and Nownejad periodically came to the Gardena house to supervise the remodeling and would converse about the work being performed.

Nownejad was recalled as a defense witness. He admitted that he wrote \$99,000 in business checks to Gage Check Cashing in 2007. He testified that he was repaying a loan that he had received from Gage Check Cashing to meet the business’s payroll obligations and to remodel one of the clinics. Nownejad also was shown a tax summary of the 2007 income tax returns filed on behalf of Superior. He acknowledged that the tax summary reflected that Superior had gross receipts of \$639,000 and no tax liability in 2007.

IV. Verdict and Sentencing

At the conclusion of the trial, the jury found Bui guilty of one count of grand theft in violation of section 487, subdivision (a). The jury also found true the enhancement that the value of the property taken by Bui exceeded \$1 million within the meaning of section 12022.6, subdivision (a). The trial court sentenced Bui to a total of four years in state prison. Following her sentencing, Bui filed a timely notice of appeal.

DISCUSSION

I. Admissibility of Evidence of Victims' Entire Tax History

On appeal, Bui first argues that the trial court abused its discretion and violated her constitutional right to due process when it denied Bui discovery of the complete corporate and individual income tax returns filed by Nownejad, and then excluded evidence of Nownejad's corporate tax liability at trial. Bui reasons that the entirety of Nownejad's tax history from June 2007 through June 2010 was relevant to her defense of consent and that trial court's rulings denied her the opportunity to present a complete defense. We conclude that the trial court neither abused its discretion nor violated due process in ruling on the admissibility of the tax evidence.

A. Relevant Background

Prior to trial, defense counsel issued a subpoena duces tecum for the complete income tax returns filed by Nownejad from 2007 to 2010 as an individual or an officer on behalf of any corporation. When Nownejad refused to produce the requested documents, the matter was transferred to Judge Paul Bacigalupo for resolution of the discovery dispute. Judge Bacigalupo ordered Nownejad to produce his personal and corporate income tax returns for an in-camera review. After reviewing the records in camera, Judge Bacigalupo ordered the disclosure of the tax returns filed on behalf of Superior, but did not make any specific ruling with respect to the tax returns filed on behalf of Kennedy.

The parties subsequently asked the trial court to conduct an in-camera review of the tax returns filed on behalf of Nownejad's third clinic, Total Urgent Care, because Kennedy had operated under that name until 2010. After conducting an in-camera review and an ex parte hearing with defense counsel, the trial court asked for an offer of proof as to the relevance of the documents in open court. Defense counsel argued that the two entities, Kennedy and Total Care, were essentially the same enterprise and that Nownejad operated these multiple enterprises to engage in tax fraud. The prosecutor responded that

Nownejad objected to the disclosure of the tax records on privacy grounds and that she objected to the disclosure on relevance grounds.

The trial court ruled as follows: “. . . I have been given five packets, three for Total Care, Incorporated, and two for Total Urgent Care Medical Center, Incorporated. One of the packets for Total Care appears . . . to basically be the same information. But out of an abundance of caution -- and this may go to impeachment -- what I am going to do is I am going to turn over the income tax summaries for each of these packets. And so I will make those copies and I will turn those over. All right. Now, as to the relevance as far as depending on what the testimony is, that may be impeachment. As to a defense in this matter, the court has not been satisfied with an offer of proof at this point. But it's also a situation where the court may lack understanding or clarification as to what that is. Right now I don't see it going to a defense. And depending on what the testimony is and what the objections are, at this point in time the court may be inclined to sustain those objections. That notwithstanding, again, I am going to turn over those tax summaries.”

During trial, defense counsel recalled Nownejad as a witness. When defense counsel showed Nownejad a copy of Superior's 2007 tax return summary, Nownejad agreed that the gross receipts for Superior in 2007 were \$639,000 and the amount of taxes owed was zero. Nownejad added, however, that he believed his business always owed taxes and defense counsel should contact his accountant for clarification. When defense counsel attempted to question Nownejad about Superior's 2008 tax return, the prosecutor objected on relevance grounds and the trial court sustained the objection.

Following the close of the defense evidence, the prosecution objected to the admission of the defense exhibits, including Superior's 2007 tax return summary.⁴

⁴ The trial court noted that Superior's tax summary was not one of the documents that it had reviewed in camera. Defense counsel explained that each of the tax documents that he either showed or attempted to show Nownejad during trial had been disclosed to the defense by Judge Bacigalupo.

Defense counsel argued that Superior’s “zero tax liability” corroborated Bui’s testimony that she was caught up in a scheme devised by Nownejad to avoid the payment of taxes. The prosecutor asserted that the summary only showed a “bottom line” figure on corporate tax liability and that the jury would not know how to interpret the summary without a tax class on S corporations. Noting that the prosecutor could still offer rebuttal evidence, the trial court overruled the objection and admitted Superior’s 2007 tax return summary into evidence.

B. Legal Analysis

A trial court generally has broad discretion concerning the admission of evidence, including assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Cole* (2004) 33 Cal.4th 1158, 1197; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) “[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question. . . .’ [Citation.]” (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) “Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodrigues, supra*, at pp. 1124-1125.)

Bui contends that the trial court abused its discretion by denying her the opportunity to present evidence of the victims’ entire tax and financial picture. According to Bui, the core of her defense to the theft charge was that the main victim, Nownejad, orchestrated the diversion of funds from his business to Bui’s personal bank account as part of a scheme to avoid the payment of taxes. Bui claims that the details of Nownejad’s corporate and individual tax returns would show how he profited from Bui’s diversion of funds, and thus, provide support for her defense of consent. We disagree.

Apart from a general assertion that Nownejad's entire tax history was relevant to her defense, Bui fails to explain how either the tax summaries or the complete sets of tax returns would show that Nownejad knowingly claimed less income in his tax returns than his business actually earned. The tax summaries that were produced to Bui in discovery provided information on the clinics' total gross receipts, total deductions, total ordinary business income, and total taxes owed. As to the amount of taxes owed by each clinic, the bottom line tax liability reflected in either the tax summaries or the full tax returns would not establish that Nownejad was failing to report the clinics' total income. Rather, to demonstrate that Nownejad was not claiming all of the income earned by the clinics, Bui would have to show a discrepancy between the actual gross receipts paid to the clinics and the gross receipts claimed in their tax returns. Absent evidence of the clinics' actual gross receipts, neither the tax summaries nor the complete tax returns would reflect any such discrepancy.

Moreover, Bui testified at trial that she was solely responsible for collecting and processing the checks paid to the clinics from any workers' compensation cases and that she deposited a significant portion of those checks into her personal bank account. Bui further testified that the sole income documentation that she provided to Nownejad's accountant for purposes of preparing the clinics' tax returns were the clinics' quarterly bank account statements, which would not have included any of the diverted checks. Under these circumstances, any discrepancy between the gross receipts actually paid to the clinics and the gross receipts claimed in their tax returns would simply be consistent with Bui's diversion of funds from the business. However, it still would not show whether such diversion was done at the direction of Nownejad.

The only other information that the complete sets of tax returns presumably could have provided is an itemized list of the business expenses and other deductions claimed by each clinic. However, Bui never testified that part of Nownejad's alleged tax scheme involved claiming more business expenses than actually paid. Rather, Bui's defense was that the scheme involved claiming less income than actually earned through the diversion of funds into her personal account. Detailed information about the deductions claimed by

the clinics in their tax returns would not have been relevant to Bui's defense of consent, and Bui does not offer any other argument as to how the victims' complete tax history could have supported such a defense. Accordingly, the trial court did not abuse its discretion in limiting discovery of the victims' tax history to the tax return summaries, and thereafter excluding evidence of the clinics' specific tax liability during trial.

Bui's claim that the trial court's exclusion of evidence violated her constitutional rights to due process and to present a defense likewise fails. As our Supreme Court has long observed, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834; see also *People v. Snow* (2003) 30 Cal.4th 43, 90 ["[a]pplication of the ordinary rules of evidence, such as Evidence Code section 352, generally does not deprive the defendant of the opportunity to present a defense"].) Rather, a trial court retains "a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]" (*People v. Hall, supra*, at p. 834.) In this case, Bui was able to present her defense that the diversion of funds from the business into her personal bank account was part of a tax avoidance scheme devised by Nownejad. Because the evidence of Nownejad's corporate and individual tax returns would not show whether he actually consented to Bui's diversion of funds, its exclusion did not impermissibly infringe on her right to present her defense. Consequently, there was no constitutional violation in excluding such evidence.

II. Review of the In-Camera Proceedings

As reflected above, there were two in-camera proceedings held to review the corporate and individual tax returns produced by Nownejad in response to Bui's subpoena. On August 18, 2011, Judge Bacigalupo conducted an in-camera review of the produced records and ordered the disclosure of the tax returns filed on behalf of Superior. On August 29, 2011, Judge Patrick Connolly conducted an in-camera review of the tax returns filed on behalf of Total Urgent Care, and following ex parte hearings with defense counsel, ordered the production of the tax summaries for each of those returns. Bui has

asked this Court to review the sealed records of the in-camera proceedings to determine whether any documents material to her defense were not disclosed. Based on our independent examination of the sealed records, we conclude that the trial court properly exercised its discretion in ordering the disclosure of documents to Bui and that no documents material to the defense were improperly withheld.⁵

III. Jury Instructions on Grand Theft

Bui also contends that the trial court violated her constitutional right to due process when it instructed the jury on the elements of theft by larceny rather than theft by embezzlement. Bui asserts that, if the jury had been properly instructed on the charged offense of theft by embezzlement with CALCRIM No. 1806, the instruction would have included more favorable language on a good faith defense to the alleged theft. We conclude that there was no prejudicial instructional error in this case.

A. Relevant Background

During a discussion of the proposed jury instructions, the prosecutor requested that the trial court instruct the jury on the elements of grand theft with CALCRIM No. 1800 defining theft by larceny rather than CALCRIM No. 1806 defining theft by embezzlement.⁶ The trial court noted that the amended information charged Bui with

⁵ We note that the sealed records consist of the reporter's transcript of the in-camera proceedings held before Judge Connolly on August 29 and 30, 2011, and do not include any transcripts of the in-camera proceedings held before Judge Bacigalupo.

⁶ CALCRIM No. 1800 defining theft by larceny provides, in relevant part: "The defendant is charged [in Count ____] with [grand/petty] theft [by larceny] [in violation of Penal Code section 484]. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took possession of property owned by someone else; [¶] 2. The defendant took the property without the owner's [or owner's agent's] consent; [¶] 3. When the defendant took the property (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property); [¶] AND [¶] 4. The defendant

grand theft by embezzlement and that the instructions were not precisely the same. The prosecutor responded that, although the charging document referred to theft by embezzlement, it cited to section 487, which defines the crime of larceny, rather than section 503, which defines the crime of embezzlement. Defense counsel agreed with the trial court that CALCRIM No. 1806 contained language not included in CALCRIM No. 1800, but did not object to an instruction on theft by larceny or offer any argument as to which theft instruction was proper in this case.

Defense counsel did, however, specifically request that the trial court instruct the jury on the claim-of-right defense with CALCRIM No. 1863. The trial court stated that if an instruction on the defense was warranted, it would either give the bracketed portion of CALCRIM No. 1806 or the separate instruction of CALCRIM No. 1863.⁷ Defense

moved the property, even a small distance, and kept it for any period of time, however brief.”

CALCRIM No. 1806 defining theft by embezzlement states, in pertinent part: “The defendant is charged [in Count _____] with [grand/petty] theft by embezzlement [in violation of Penal Code section 503]. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. An owner [or the owner’s agent] entrusted (his/her) property to the defendant; [¶] 2. The owner [or owner’s agent] did so because (he/she) trusted the defendant; [¶] 3. The defendant fraudulently (converted/used) that property for (his/her) own benefit; [¶] AND [¶] 4. When the defendant (converted/used) the property, (he/she) intended to deprive the owner of (it/its use). [¶] A person acts *fraudulently* when he or she takes undue advantage of another person or causes a loss to that person by breaching a duty, trust or confidence.”

⁷ The bracketed portion of CALCRIM No. 1806 that was referenced by the trial court provides as follows: “[A good faith belief in acting with authorization to use the property is a defense.] [¶] [In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.]”

counsel argued that there was sufficient evidence to support a claim-of-right defense based on Bui’s testimony that the diverted funds were used to compensate her for her employment and to cover business expenses for the clinics. The prosecutor asserted that the defense did not apply because Bui admitted that the diversion of funds was for an illegal purpose and she never openly claimed a right to such funds.

The trial court ruled that an instruction on the claim-of-right defense was appropriate and that it would instruct the jury on the defense with CALCRIM No. 1863. The trial court also ruled that it would instruct the jury on the elements of grand theft with CALCRIM No. 1800 defining theft by larceny rather than CALCRIM No. 1806 defining theft by embezzlement. The defense did not object to the trial court’s use of CALCRIM Nos. 1800 and 1863, nor did it request that the jury instead be instructed with CALCRIM No. 1806. In its verdict, the jury found Bui guilty of the crime of “GRAND THEFT, in violation of Penal Code section 487(a).”

CALCRIM No. 1863 defining the claim-of-right defense states as follows: “If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery). [¶] The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it. [¶] In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith. [¶] [The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.] [¶] [The claim-of-right defense does not apply to offset or pay claims against the property owner of an undetermined or disputed amount.] [¶] [The claim-of-right defense does not apply if the claim arose from an activity commonly known to be illegal or known by the defendant to be illegal.] [¶] If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of _____.”

B. Legal Analysis

“It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’ [Citation.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154; see also *People v. Blair* (2005) 36 Cal.4th 686, 744-745 [“[a] trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request”].) The sua sponte duty to instruct extends to defenses that are supported by substantial evidence and that are not inconsistent with the defendant’s theory of the case. (*People v. Breverman, supra*, at p. 157; *People v. Montoya* (1994) 7 Cal.4th 1027, 1047.)

Nominally, a defendant who fails to object to a proposed jury instruction forfeits the right to challenge that instruction on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 326; *People v. Stone* (2008) 160 Cal.App.4th 323, 331.) However, an appellate court may review any claim of instructional error that affects a defendant’s substantial rights without an objection in the trial court. (§ 1259 [“appellate court may also review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby”]; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [defendant did not waive right to object to instruction given in violation of right to due process of law].) “[A] claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. [Citation.]” (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)⁸

⁸ The People urge us not to consider the contention because Bui did not object to the instruction at trial and thus has forfeited it. We have repeatedly rejected this forfeiture argument, which appears to have been made more reflexively than reflectively. As noted above, we review any claim of instructional error that affects a defendant’s substantial rights whether or not trial counsel objected. (§ 1259; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; *People v. Smithey, supra*, 20 Cal.4th at p. 976, fn. 7.) Whether the defendant’s substantial rights were affected, however, can only be determined by

In California, all theft offenses have been consolidated in section 484 as the single crime of “theft.” (§ 484, subd. (a).) “Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an ‘unlawful taking’ has been proved. [Citations.]” (*People v. Ashley* (1954) 42 Cal.2d 246, 258.) Because a defendant may be convicted of grand theft upon proof showing either larceny, embezzlement or obtaining money by false pretenses, “it is unnecessary to specify in the accusatory pleading the kind of grand theft with which the defendant is charged.” (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 635.) However, “the combination of ‘several common law crimes under the statutory umbrella of “theft” did not eliminate the need to prove the elements of the particular type of theft alleged [Citations.]’ [Citation.]” (*People v. Nazary* (2010) 191 Cal.App.4th 727, 741.) Therefore, “[t]he elements of the former offenses of embezzlement and larceny and the distinction between them’ continue to exist. [Citations.]” (*Ibid.*)

Bui was charged in an amended information with “GRAND THEFT BY EMBEZZLEMENT, in violation of PENAL CODE SECTION 487(a).” Section 487, subdivision (a), however, defines theft by larceny. A theft by larceny “is committed by every person who (1) takes 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.]” (*People v. Fenderson, supra*, 188 Cal.App.4th at p. 636.) Section 503, on the other hand, defines theft by embezzlement. “The elements of theft by embezzlement are the owner entrusted property to the defendant, the owner did so because he or she trusted the defendant, the defendant fraudulently converted the property for his or her own benefit and, in doing so, the defendant intended to deprive the owner of its use.” (*People v. Beaver* (2010) 186 Cal.App.4th 107, 121.)

deciding if the instruction as given was flawed and, if so, whether the error was prejudicial. That is, if Bui’s claim has merit, it has not been forfeited. Thus, we must necessarily review the merits of her contention there was instructional error.

Several cases have considered whether a trial court's failure to instruct on the applicable theory of theft constitutes reversible error. In *People v. Beaver*, for instance, the Third District held that it was reversible error to instruct the jury on theft by larceny where the evidence could only support a conviction of theft by false pretenses. (*People v. Beaver, supra*, 186 Cal.App.4th at p. 125.) The appellate court reasoned that "the instructions read to the jury did not include all the elements necessary for a charge of theft by false pretenses," and "[t]hus, even if there was evidence in the record to support these elements, the jury was never called upon to determine if they had been established beyond a reasonable doubt." (*Ibid.*; see also *People v. Curtin* (1994) 22 Cal.App.4th 528, 531 [defendant's conviction of theft by trick could not be upheld on ground that evidence established his guilt of theft by false pretenses on which the jury was not instructed].)

The First District reached a contrary conclusion in *People v. Fenderson* where the jury was instructed and reached a verdict on theft by larceny and the defendant contended on appeal the evidence only supported a conviction of theft by embezzlement. (*People v. Fenderson, supra*, 188 Cal.App.4th at pp. 636-637.) In holding that any error in failing to instruct the jury on theft by embezzlement was harmless, the appellate court explained that "a theft conviction may be upheld as long as there is sufficient evidence, under any theory of theft, to support the conviction, even if the jury was not instructed on the relevant theory of theft." (*Id.* at p. 637; see also *People v. Counts* (1995) 31 Cal.App.4th 785, 793 ["[i]t would obviously be very hard to explain why a theft conviction should be reversed on the grounds that the evidence showed the defendant was indeed guilty of theft, but would have been guilty of a differently denominated type of theft under a common law system which has been repealed by statute"].)

While there is some conflict among the appellate courts on this issue, the courts consistently have recognized that a theft conviction must be affirmed where the type of theft shown by the evidence is one on which the jury was instructed and thus could have reached its verdict. (*People v. Fenderson, supra*, 188 Cal.App.4th at pp. 639-641; *People v. Beaver, supra*, 186 Cal.App.4th at pp. 123-125.) That is the case here.

As discussed, Bui was charged with and convicted of grand theft in violation of section 487, subdivision (a). Although the amended information described the charged offense as grand theft by embezzlement, it specifically cited to section 487, subdivision (a), which defines theft by larceny. At trial, the jury was instructed on the elements of grand theft by larceny with CALCRIM No. 1800 and returned a guilty verdict on grand theft by larceny that was supported by substantial evidence. Bui does not contend that she lacked actual notice of the charges against her, nor does she challenge the sufficiency of the evidence supporting her conviction on appeal.

Instead, Bui's argument on appeal is that the trial court erred in failing to instruct the jury on theft by embezzlement with CALCRIM No. 1806 because "this was clearly an embezzlement type of case." While we do not doubt that the evidence could have supported a conviction of grand theft by embezzlement had the jury been instructed on that theory, there was substantial evidence supporting Bui's conviction of grand theft by larceny on which the jury was instructed. Based on the evidence presented at trial, the jury reasonably could have found that Bui diverted the funds belonging to the clinics to her personal bank account with the intent to permanently deprive the clinics of those funds and did so without the consent of the clinics' owners, Nownejad and Hoegel. Such evidence was sufficient to establish the elements of grand theft by larceny.

Bui nevertheless asserts that she was prejudiced by the trial court's failure to instruct the jury on theft by embezzlement with CALCRIM No. 1806 because the embezzlement instruction included language on a good faith defense which the jury could have found applied in this case. Bui reasons that the good faith defense language in CALCRIM No. 1806 was more favorable to her than the claim-of-right defense language in CALCRIM No. 1863 because the claim-of-right instruction required the jury to find that Bui made no attempt to conceal the taking and that the taking did not arise from activity commonly known to be illegal. However, defense counsel specifically requested that the trial court instruct the jury on the claim-of-right defense with CALCRIM No. 1863. Defense counsel never asked the court to instruct on theft by embezzlement with CALCRIM No. 1806 or to modify the theft instructions that were given to

incorporate the good faith defense language from CALCRIM No. 1806. As the Attorney General notes, when the trial court discussed whether to give CALCRIM No. 1863, as requested by the defense, or the bracketed language of CALCRIM No. 1806, defense counsel remained silent. When the trial court stated that it would give CALCRIM Nos. 1800 and 1863 and not CALCRIM No. 1806, defense counsel again remained silent. Given that CALCRIM No. 1863 was specifically requested by the defense and correctly set forth the claim-of-right defense, Bui's claim that the trial court erred in giving such instruction lacks merit.

In sum, we conclude that the trial court properly instructed the jury on grand theft by larceny with CALCRIM No. 1800 and on the claim-of-right defense with CALCRIM No. 1863. Because the jury's verdict was supported by substantial evidence and was consistent with both the charging allegations and the instructions given, Bui has failed to show any prejudicial instructional error⁹

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.

⁹ In light of our conclusion that the trial court properly instructed the jury with CALCRIM Nos. 1800 and 1863, we need not address Bui's alternative argument that her trial counsel rendered ineffective assistance by failing to object to the instructions given.