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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK JOSEPH LEDESMA,

Defendant and Appellant.

2d Crim. No. B247700  
(Super. Ct. No. BA379888-01)  
(Los Angeles County)

Frank Joseph Ledesma appeals a judgment following his conviction for embezzlement by a public officer (Pen. Code, § 504),<sup>1</sup> a felony. The jury found he embezzled a fire department automobile worth in excess of \$950. The trial court sentenced him to 16 months in state prison. We conclude, among other things, that: 1) providing jurors with a transcript of a pre-trial interview containing matters that were not admitted into the evidence was not reversible error, and 2) the trial court erred by sentencing Ledesma to state prison because he did not commit a state prison offense under the Realignment Act. We order the abstract of judgment corrected to reflect that his felony falls within the jurisdiction of the county jail. In all other respects, we affirm.

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<sup>1</sup> All statutory references are to the Penal Code.

## FACTS

Ledesma was a Los Angeles County Fire Department (Department) captain. He worked in the fire prevention petro chemical unit in the City of Industry.

Captains and Department employees who conduct inspections are assigned a car. They must obtain permission from their supervisors before they take these vehicles home. In addition to these assigned vehicles, the Department has "reserve vehicles." Ledesma was "in charge of the reserve vehicles" in his area.

The Department chief requested Ledesma to send the reserve vehicles to the City of Commerce so the chief could supervise these cars. Ledesma "was upset" about this new policy. He felt this change was "taking away the vehicles that he had worked to get." Ledesma told another fire captain that he "was going to move" one of those vehicles because he expected the chief "to come by looking for [it]."

Department Battalion Chief Jim Enriquez testified Ledesma received permission on specific occasions to take a Department vehicle home because Ledesma had to attend late night community meetings for the Department. As an explosives expert, there were times when Ledesma needed a car for a 10-day period. He was required to return the vehicle to "his county facility" when he completed the night meetings or when he completed the 10-day period for explosive-related work.

Enriquez supervised Ledesma between March 2008 and "the middle" of 2010. Ledesma did not "ask [Enriquez's] permission" to store a Department reserve vehicle or any other Department car at his home. Ledesma needed Enriquez's permission to do so. He had no permission to remove license plates, Department decals, or vehicle identification numbers from any Department vehicle.

Rodney Morris worked in the Department's "fleet services" division. In April 2009, he received a call from a lady who said Ledesma parked a Department car at her condominium complex--Cypress Place. The car was towed away, but she said it was now parked at Cypress Place again. The car had no license plates, the vehicle identification number was "obscured" so it was not visible, and there were no Department

decals on it. Morris checked with the company that had previously towed this vehicle. He determined the car belonged to the Department. It should have been returned to the Department's headquarters in the City of Commerce. It was a "reserve vehicle" assigned to "the fire prevention division." It was not assigned to any individual.

David Wolf, an investigator with the Los Angeles District Attorney's Office, testified the Department's car, a "champagne" colored Ford Taurus, was towed from Cypress Place on December 30, 2008. Ledesma lived at Cypress Place. The car was released by the towing company to Ledesma on December 31, 2008. Ledesma signed the "release document." The tow company documents reflected that Ledesma provided his business card and his driver's license. The company made a copy of that license and kept his business card in their records. Wolf examined the car. Inside the vehicle he found the car's license plates and an envelope addressed to Ledesma. On February 8, 2011, Wolf conducted a lengthy tape-recorded interview with Ledesma.

Danny Green was Ledesma's next door neighbor. He testified that in 2007 the Department's champagne Ford Taurus was parked "every day" in the condominium complex in front of Ledesma's residence. In 2008, Ledesma parked it "in different places" in "the complex." Green saw Ledesma drive that car a "half a dozen times" in 2007. When he drove it, he was not in uniform; he was in "plain clothes." As president of the condominium association's board, Green received complaints by residents that the car "wasn't being moved" and that it took up space needed by others for their vehicles.

In 2008, Waine Stanfield, Ledesma's former mother-in-law, took pictures of the champagne Ford Taurus and a white Department Ford Taurus Ledesma parked at Cypress Place. She did this "to get him in trouble" because "they're not supposed to take their vehicles home."

In the defense case, Ledesma testified that in 2004 or 2005 he was asked to place the champagne Ford Taurus as "a reserve" car in the Department's "fire prevention fleet." He complied with that request. He did not see or use that vehicle after September

2006. He did not bring it to his home or to the Cypress Place Condominium Association. He did not retrieve that car from the towing company.

*The Transcript of the Interview with Investigator Wolf*

Ledesma testified that in 2006 he drove the champagne Ford Taurus to Montebello Ford for repairs. The prosecutor asked whether he told Wolf during a recorded interview that the car "went for repairs, that was the last [he] had seen of it and that [he] didn't know how it got to the repair shop." Ledesma said he did not recall. The prosecutor played an audio tape of that part of the interview. The jurors received a 49-page transcript of the entire interview. The prosecutor asked jurors to read page 7 of the transcript.

The trial court told jurors, "You're going to hear a tape recording, and it's the words on the tape or CD that control, not the words in the transcript. The transcript exists only to assist you." On page 7, Ledesma said that the car "had gone in for repairs, and that was the last [he] had seen of it." Wolf asked, "[H]ow did it get there?" Ledesma responded, "I have no idea."

The prosecutor asked Ledesma, "[D]id you ever tell investigator Wolf that the champagne Ford Taurus was assigned to you to drive while your white Taurus was in the shop for repairs?" Ledesma said, "I don't recall specifically saying that." The prosecution introduced an audio tape recording of the part of an interview Ledesma had with Wolf where Ledesma said, "[I]t was a vehicle that I was assigned to drive while my white one was in for service." The prosecutor asked the jurors to turn to page 23 of the transcript where Ledesma made that statement to Wolf. The court told jurors, "I'm going to ask you not to go through the transcript until we have a specific part that I've allowed in."

Ledesma testified he could not remember whether he told Wolf that he had parked the champagne Ford Taurus at his residence. The prosecutor told him to refer to pages 33 to 34 of the transcript to refresh his recollection. The prosecutor asked, "[D]id you ever see the champagne Ford Taurus parked in the guest parking lot?" Ledesma:

"Not consciously, no." The prosecutor: "Did you ever tell . . . Wolf that you thought that perhaps somebody that looks like you went and retrieved the champagne Taurus from the tow yard and brought it back to your complex?" Ledesma: "Yes."

Ledesma's counsel told the court, "[M]y concern right now is the jurors have the entire transcript. . . . And they're flipping through the transcripts as they're listening to testimony. I think the prosecutor and I are in agreement that perhaps the transcript should be taken back out of their hands." The court ordered the transcripts to be taken from the jurors.

Defense counsel: "[T]hen I'll just make a very brief record for the purpose of their distraction that they're looking at things they may . . . ." The court: "I couldn't agree more. You don't have to make a record. I've been concerned about this since the beginning."

## DISCUSSION

### *Providing Jurors with a Transcript Containing Matters Not in Evidence*

Ledesma contends the trial court erred by giving jurors the full transcript of the interview with Wolf containing statements by Ledesma that were inadmissible as evidence. He suggests jurors *may* have been "conducting their own impeachment by 'flipping through' portions of the transcript that they weren't supposed to see." He argues this constitutes reversible error.

The People contend Ledesma forfeited this issue because: 1) he did not raise the specific objection he is now raising on appeal, and 2) he did not preserve an adequate record to support his claims of jury misconduct. We agree.

Where a defendant claims the jury considered inappropriate matters during trial, he or she must object in the trial court. "[F]ailure to raise the issue of juror misconduct and seek relief from the court on that basis results in a forfeiture of the issue on appeal." (*People v. Dykes* (2009) 46 Cal.4th 731, 808, fn. 22.) The trial court may hold an evidentiary hearing to make fact findings on the allegations of jury misconduct. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415 .) Appellate courts may not assume

facts or presume error where the appellant has not preserved an adequate factual record. (*People v. Tillis* (1998) 18 Cal.4th 284, 292.)

Ledesma's trial counsel objected that jurors were "flipping through the transcripts" as they were "listening to testimony" and the transcripts were a "distraction." The People claim Ledesma's trial counsel made no specific claim of jury misconduct and did not assert that jurors were using the transcript to impeach Ledesma. They are correct. Defense counsel was interrupted by the trial judge who said, "You don't have to make a record." The trial court saw what the jury did and believed the transcripts were a distraction. It ordered the transcripts collected from the jury. Consequently, it saw no need for a further record on the distraction issue.

But the trial court did not prevent Ledesma from making a record to support a claim that the jury misused the transcripts for impeachment or had engaged in other misconduct. Ledesma's trial counsel did not request a hearing or findings by the court on these issues. Consequently, Ledesma did not preserve a factual record to support his claim of jury misconduct. Instead, he relies on speculation about what the jury might have seen from transcript pages. But speculation is not a substitute for a factual record he could have created in the trial court to support his claims on appeal. (*People v. Tillis, supra*, 18 Cal.4th at pp. 292-293.) Yet even on the merits, the result is the same.

Ledesma contends it was error for the trial court to allow jurors to have access to the full interview transcript that contained inadmissible statements that could impeach his trial testimony. He claims reversal is mandatory.

But this is not structural error that automatically requires a reversal. (*People v. Gamache* (2010) 48 Cal.4th 347, 396.) Where the jury "inadvertently [has] access to never-admitted evidence," this constitutes "trial error." (*Ibid.*) In cases involving such error, "[w]e meaningfully may ask whether, in light of all the other evidence properly admitted, the verdict this jury reached would have been the same absent exposure to the [inadmissible matter]." (*Id.* at p. 397.)

Here the answer is "yes." The prosecution presented compelling evidence of guilt. Ledesma was impeached on cross-examination. Towing company records, including his license and business card, refuted his claim that he did not retrieve the car from the towing company. He made prior inconsistent statements that undermined the defense case. In addition, there is no evidence jurors reviewed the unauthorized parts of the transcript. As the People note, "[J]urors may have been flipping through the transcript simply because the portions they were permitted to read" were in different parts of that document. The prosecution cited parts of the transcript it believed involved the most damaging impeachment of Ledesma's trial testimony. Had jurors read the remaining portions of the transcript, they would find a series of self-serving answers and explanations to Wolf's questions. Ledesma's claims of innocence in the interview are not the type of material a prosecutor would introduce to help the People's case. Ledesma's trial counsel did not claim that any portion of the transcript the jury might have improperly considered contained prejudicial information or statements that would impeach Ledesma's testimony.

Moreover, the trial court properly instructed the jury that the words they heard on the audio tape "control, not the words in the transcript." It advised them the only parts of the transcript to be considered were the parts the court identified. It said, "You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence." We presume the jury followed these instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 745.) There is no showing that any juror disobeyed these instructions or treated the unauthorized part of the transcript as evidence.

#### *Sentencing*

Ledesma was sentenced to 16 months in state prison for embezzlement of a car worth in excess of \$950. He claims the trial court should have sentenced him to county jail under the Realignment Act. (§§ 17.5, subd. (a)(5); 1170, subd. (h)(1), (2) & (6).) The People agree. So do we.

The Realignment Act requires trial courts to sentence "low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs." (§ 17.5, subd. (a)(5); *People v. Clytus* (2012) 209 Cal.App.4th 1001, 1004.) Section 514 provides that embezzlement of "public funds" is a felony "punishable by imprisonment in the state prison." But embezzlement of a publicly owned automobile worth more than \$950 is not embezzlement of "public funds." (*People v. Redondo* (1993) 19 Cal.App.4th 1428, 1437-1439.) Public funds refers to "cash and negotiable paper that can be converted to cash at any time without loss." (*Id.* at p. 1437.) The embezzlement of a publically owned automobile falls within the alternative punishment provision of section 514 and consequently "is punishable in the manner prescribed for theft of property." (§ 514; *Redondo*, at p. 1439.) Grand theft involves taking of property worth more than \$950 or the taking of an automobile. (§ 487, subd. (a) & (d).)

The punishment for grand theft of a car is "imprisonment *in a county jail* not exceeding one year or pursuant to subdivision (h) of Section 1170." (§ 489, italics added.) Section 1170, subdivision (h)(1) provides, in relevant part, "a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment *in a county jail for 16 months*, or two or three years." (Italics added.) Subdivision (h)(2) provides, in relevant part, "a felony punishable pursuant to this subdivision shall be punishable by imprisonment *in a county jail* for the term described in the underlying offense." (Italics added.) The trial court erred by sentencing Ledesma to state prison.

The People note that Ledesma has served his sentence and was released from state prison. But they claim the sentencing issue is not moot because there are different consequences following the release of state prison felons and county jail felons. (§ 3000.) Moreover, because the sentence was incorrect, the abstract must be corrected to reflect that Ledesma should have served his sentence in a county jail.

Because of our decision, Ledesma is not subject to post-prison release consequences such as parole supervision. He may be subject to any consequences flowing from post-county jail release.

DISPOSITION

The abstract of judgment is ordered corrected to reflect that Ledesma's felony conviction falls within the jurisdiction of the county jail, not state prison. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Henry J. Hall, Judge  
Superior Court County of Los Angeles

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David Cohen, 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, Victoria B. Wilson, Supervising Deputy Attorney General, Idan Ivri, Deputy Attorney General, for Plaintiff and Respondent.