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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

MYRON WAYNE DANIEL,

Defendant and Appellant.

C063859

(Super. Ct. No.
72-005202)

A jury found defendant Myron Wayne Daniel guilty of fraudulent use of an access card to obtain cash in excess of \$400 (Pen. Code, § 484g)¹ and grand theft (§ 487, subd. (a)). The trial court also found true allegations that defendant was twice previously convicted of a serious felony pursuant to sections 1170.12, subdivisions (a) through (d), and 667 subdivisions (b) through (i).

¹ Further statutory references are to the Penal Code unless otherwise indicated.

Defendant raises numerous issues on appeal. He contends his convictions for grand theft and fraudulent use of an access card violate the prohibition against dual convictions for the same crime. He further contends that his convictions for grand theft and fraudulent use of an access card should be reversed based on insufficient evidence.

Defendant claims the trial court erred in failing to instruct the jury to view his out-of-court statement with caution. And, he claims his out-of-court statement was not an "admission" and thus the trial court erred in instructing the jury that it could convict the defendant based upon that statement and "slight other evidence."

Finally, defendant claims the trial court's order compelling him to reimburse Placer County for attorney fees should be stricken because the court failed to determine whether he had the present ability to pay those fees. For the reasons discussed below, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

In 1972, Helen Elmer (Elmer) purchased a home in Tahoe City, California, along with her daughter, Wendy Parkman (Parkman), and Parkman's siblings. Elmer lived in the home for a period of time, then moved to Florida where she currently resides. Parkman, who lives in San Francisco, then took over maintenance of the home.

In February 2007, the sewer line under the house backed up into the toilet and through the shower drain. "Roto-Rooter" was hired to clear the line; they cleared the line but recommended

Parkman replace it. Roto-Rooter estimated it would cost between \$8,000 and \$10,000 to replace the sewer line.

Parkman sought a second bid for replacing the sewer line. Parkman contacted defendant's company, Mountain Plumbing, whom she had used in the past for smaller plumbing jobs. Parkman went to defendant because she had worked with him in the past, thought defendant "was a nice guy," and she wanted to get an estimate from a small business.

Sometime between February and June 2007, defendant and Parkman met to discuss the job. Defendant told Parkman "he could probably do it for . . . 6 to 8 thousand, but rather than making a commitment to a certain price, because of the unknown issues, [Parkman] agreed that [they] would do it for . . . time and materials." The price did not include the cost of a "street dig." If a street dig were required, that was to be paid according to "time and materials."

Parkman wrote defendant a check for \$2,000 to begin the work. They made no arrangements for regular invoicing and no completion date was set. Parkman just assumed it would go forward as a "step-by-step, see what happened, day-by-day kind of process." They agreed defendant would use Elmer's credit card to pay for materials and Parkman would write defendant checks for his time.

In July 2007, defendant called Parkman and "asked permission to withdraw some money from [Elmer's credit card] account" to cover some additional expenses. Parkman agreed he could withdraw \$2,000 and gave him Elmer's credit card number

over the phone. Parkman assumed she would receive an accounting of the money taken and how it was used, but she did not discuss that with defendant. Defendant contacted Parkman again in August 2007 and asked for permission to withdraw more money from Elmer's credit card account. Parkman thanked defendant and told him to "get what you need," which defendant indicated was \$2,500.

During the course of the project, defendant also suggested Parkman have the water shut-off valve replaced. Parkman agreed to the additional work and defendant told her it would cost an additional, \$500 to \$1,000. Defendant also told Parkman that large boulders were blocking the sewer's path and would need to be removed, and the line would have to veer around trees.

In September 2007, defendant called Parkman and told her the project was essentially done but he needed to withdraw another \$2,500 from Elmer's credit card account in order to complete the job. Defendant indicated the only thing left to do was to use gravel or dirt to level out the ditch he dug for the sewer line. Parkman assumed the cost to level the ditch was included in the \$2,500 he was asking for, or she would receive an invoice for any additional cost. Because, according to defendant, the project was now over, Parkman asked defendant to send her a final invoice.

Parkman never received a final invoice. She attempted to contact defendant but "didn't get any response." She continued leaving messages for defendant until October, when she "shrugged [her] shoulders and went on with life."

In January 2008, Elmer contacted Parkman and asked if the job was finished. Parkman, who still had not been to the Tahoe City house since defendant told her the job had been completed, told Elmer the job was finished in September 2007. Elmer told Parkman that defendant had taken more money from Elmer's credit card account in November and December 2007. Parkman told Elmer she had not given defendant permission to make those withdrawals. Parkman contacted the Placer County Sheriff's Department.

Meanwhile, Elmer contacted her credit card company and disputed the charges. Elmer's credit card company then requested a "chargeback" from defendant's bank, Wells Fargo. Wells Fargo notified defendant of the impending chargeback and gave him a deadline to challenge the disputed amount. Defendant never responded. And, while defendant's bank statement did not show any chargebacks, attempted chargebacks, or claims of fraud, his account was terminated by Wells Fargo in February 2008 because of an outstanding "collections" balance.

Investigating Elmer's claims, Detective Brian Carmazzi contacted defendant on the telephone and told defendant he was investigating a "fraud case." Detective Carmazzi said he needed documentation from defendant "to support his defense," and indicated he wanted to hear defendant's "side of the story." Defendant said he would gather the documentation and call the detective back. Defendant never called him back. Detective Carmazzi attempted to find defendant at the business address for Mountain Plumbing but it was only a post office box. Detective

Carmazzi also tried to find defendant at his home address, but the home was unoccupied and there was a letter on the door from an insurance company indicating "no one could enter the home."²

Defendant was subsequently charged with use of a forged, expired, or revoked access card or card account information (§ 484g), and grand theft (§ 487, subd. (a)). It was further alleged that defendant was twice previously convicted of a serious or violent felony pursuant to sections 1170.12, subdivisions (a) through (d), and 667 subdivisions (b) through (i). Defendant entered not guilty pleas to the charges and denied the enhancement allegations.

The jury trial began in November 2009. Defendant did not testify but his brother Dallas, who worked on the project with defendant, did. Dallas remembered that the project involved replacing the sewer line "until it was clear," connecting the toilet and maybe the shower, and "a whole bunch of work underneath the house."

Dallas recalled the project was fraught with complications from the beginning. The locations of the sewer line, water line, and gas line, as marked by the city, were wrong. Because the gas line was not where it was supposed to be, all the initial digging had to be done by hand and outside contractors were hired to help with the job. There were also large roots

² According to defendant's brother, the insurance company had to "gut" the house because it had flooded in early 2008 and everything was moved into storage.

from trees and "huge bushes" and boulders that had to be dealt with. Dallas described the job as "almost like a nightmare."

As anticipated, the sewer line also had to be connected at the city sewer line under the street, not on the Elmer property. As a result, the street had to be blocked off and the "city was out there for days." Dallas also testified that Parkman agreed to replace the badly deteriorated water line at a cost of not less than \$1,500.

Dallas indicated the water line was connected at the end of the project, before he left to live in Southern California. He estimated the job ended in November, but "it could have been the end of October." Dallas remembered defendant renting a backhoe during the project. An invoice showed defendant rented a backhoe in November. Dallas also testified that after the water line was replaced, defendant brought in more dirt from a company named "Trout Creek." The invoices from Trout Creek show the dirt was delivered in August.

The jury found defendant guilty on both counts. The trial court subsequently found true the allegations that defendant was twice previously convicted of a serious or violent felony, but chose to strike one of the prior convictions.

Defendant was sentenced to an aggregate term of four years in state prison: the middle term of two years on the charge of using a revoked access card, doubled for the prior strike conviction. The court stayed the sentence on the grand theft conviction. The court also awarded defendant a total of 807 days of custody credit (539 actual and 268 conduct).

DISCUSSION

I

Defendant's Convictions for Grand Theft and Fraudulent Use of an Access Card Violate the Prohibition Against Dual Convictions for the Same Crime

Defendant contends that by convicting him of both grand theft and fraudulent use of an access card for taking the same money, he was twice convicted for the same crime and thus, one of his convictions must be reversed. We agree.

A defendant may be charged with "different statements of the same offense" and "may be convicted of any number of the offenses charged." (§ 954.) "[M]ultiple convictions[, however,] may not be based on necessarily included offenses.'" (*People v. Ortega* (1998) 19 Cal.4th 686, 692, italics omitted.) "The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." [Citations.]" (*Ibid.*)

Section 484g states: "Every person who, with the intent to defraud, (a) uses, for the purpose of obtaining money, goods, services, or anything else of value, an access card or access card account information that has been altered, obtained, or retained in violation of Section 484e or 484f, or an access card which he or she knows is forged, expired, or revoked, or (b) obtains money, goods, services, or anything else of value by representing without the consent of the cardholder that he or she is the holder of an access card and the card has not in fact

been issued, *is guilty of theft*. If the value of all money, goods, services, and other things of value obtained in violation of this section exceeds four hundred dollars (\$400)^[3] in any consecutive six-month period, the same *shall constitute grand theft*." (Italics added.)

By its very terms, one who commits the crime of fraudulent use of an access card is committing a theft. Thus, more than a crime necessarily included in theft, fraudulent use of an access card *is* a theft. Accordingly, unless the charge for fraudulent use of an access card arose from a different act or course of conduct than the charge for grand theft, defendant cannot be convicted of both charges. (*People v. Ortega, supra*, 19 Cal.4th at pp. 699-700.)

Here, as noted by defendant, defendant "charged Elmer's account four times using the same account information, with the intent to obtain money or payment, using the same merchant account and method." Defendant was convicted of grand theft and fraudulent use of an access card on those same four charges. Because it is the same crime arising from the same course of conduct, this was error and one of the convictions must be reversed.

Both of defendant's convictions are for grand theft; neither is a lesser included offense and the punishment for each is the same. Accordingly, either conviction can be reversed.

³ Since defendant committed his crime, that amount has been increased to \$950. (§ 484g.)

(Cf. *People v. Moran* (1970) 1 Cal.3d 755, 763 [if convicted of both the lesser included and the greater offense, the lesser included must be reversed].) We reverse the conviction for fraudulent use of an access card.

II

There was Sufficient Evidence to Convict Defendant of Grand Theft⁴

Defendant contends there was insufficient evidence he intended to steal from Elmer, and thus his conviction for grand theft must also be reversed. We disagree.

In reviewing the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Reversal on the basis of insufficient evidence is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

"Grand theft is theft committed . . . [w]hen the money, labor, or real or personal property taken is of a value exceeding four hundred dollars (\$400)" (Former § 487, subd. (a); Stats. 2002, ch. 787, § 12.)

⁴ Because we reverse defendant's conviction for fraudulent use of an access card on other grounds, we need not address defendant's claim there was insufficient evidence to support the conviction.

In order to convict defendant of grand theft, the prosecution was required to prove: "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 owner took the property he intended to deprive the owner of it permanently;

"AND

"4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief."

(CALCRIM No. 1800.)

Defendant argues on appeal that, according to the terms of their "time and materials contract," he had Elmer's consent to charge her credit card account for all time and materials needed to complete the job, including the cost overruns.

Accordingly, defendant contends, while his failure to contact Elmer before withdrawing money from her credit card account in November and December may have shown "either an actual or a mistaken, claim of right," there was no evidence he intended to steal Elmer's money. We are not persuaded.

Parkman testified that, contrary to his claim, defendant was not given unlimited access to Elmer's credit card account. Their agreement was that defendant would use Elmer's account to pay for materials, but it was expected that defendant would contact Parkman and obtain her permission before doing so.

This explanation of the agreement between Parkman, Elmer, and defendant was supported at trial by the parties' course of

conduct prior to November 2007. The first three times defendant withdrew money from Elmer's credit account, he did not do so until after he spoke with Parkman and obtained her consent. Then, after telling Parkman the job was essentially completed in September 2007, defendant made four more withdrawals from Elmer's credit card account without obtaining Parkman's consent. At the same time defendant stopped asking Parkman for permission to withdraw money from Elmer's credit card account, defendant's account at Wells Fargo had a negative balance and he was making cash withdrawals at a local casino.

Then, when defendant was notified by his bank that Elmer was disputing the November and December charges to her account, defendant failed to respond to the claim of fraud. Defendant's bank soon closed his account because there was no money in his account to cover the fraudulent charges.

Defendant also was contacted by law enforcement during their investigation of the fraudulent charges. Defendant told law enforcement he would gather documentation and respond to the allegations with "his side of the story." He never did.

In sum, there was sufficient evidence from which the jury could conclude that when defendant charged Elmer's credit card account in November and December 2007, he did so without Elmer's consent and with the intent to permanently deprive Elmer of her money. In other words, that he intended to steal from her.

III

*Any Error in Failing to Instruct the Jury that
Defendant's Out-of-Court Statement Should be Viewed
With Caution was Harmless*

Defendant also argues the trial court erred in failing sua sponte to instruct the jury with the second paragraph of CALCRIM No. 358, which tells the jury to "[c]onsider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded." We conclude and the People concede it was error not to give the cautionary instruction. However, defendant has failed to show he would have obtained a better result had the cautionary instruction been given.

"In determining whether the failure to instruct requires reversal, '[w]e apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' (*People v. Carpenter* (1997) 15 Cal.4th 312, 393; see *People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) "'Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]'" (*People v. Dickey, supra*, 35 Cal.4th at p. 905, quoting *People*

v. Pensinger (1991) 52 Cal.3d 1210, 1268.) [The Supreme Court] has held to be harmless the erroneous omission of the cautionary language when, in the absence of such conflict, a defendant simply denies that he made the statements. (See *People v. Dickey, supra*, 35 Cal.4th at p. 906.) Further, when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, [the Supreme Court has] concluded the jury was adequately warned to view their testimony with caution. (*Id.* at pp. 906-907.)" (*People v. McKinnon* (2011) 52 Cal.4th 610, 679-680.)

"Here, there was no conflict in the evidence about the precise words used, their meaning, or whether the admissions were repeated accurately." (*People v. McKinnon, supra*, 52 Cal.4th at p. 680.) Indeed, defendant did not even testify. Rather, defendant's brother Dallas testified the job was finished in October or November 2007. The implication being that defendant would not have told Parkman the job was finished in September because it was not. The issue was then one of credibility and the jury was properly instructed on determining the credibility of witnesses.

Moreover, whether the job was completed in September 2007 or not, Elmer did not give defendant unlimited access to her credit card account. Although this was not a written term of the agreement, defendant's own conduct established he was expected to discuss the charges with Parkman and obtain her consent before withdrawing money from Elmer's account. He failed to do that on four occasions in November and December.

This evidence, combined with failing to respond to inquiries by his bank and by law enforcement, gambling, and cash flow problems were sufficient to convict defendant, even without the statement he made to Parkman. Accordingly, defendant failed to show he would have received a better result if the court had given the cautionary instruction.

IV

The Court Correctly Instructed the Jury that Defendant's Out-of-Court Statement Could be Substantiated by Other Evidence and Relied Upon to Convict Him

Defendant objects to CALCRIM No. 359, delivered to the jury as follows: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed. [¶] That *other evidence may be slight* and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." (Italics added.)

Defendant argues "[h]ere, where the admission is barely inculpatory, particularly in light of the contract between the parties and the other evidence, charging the jury with the unmodified instruction could easily result in conviction of [defendant] on insufficient evidence." We disagree.

"The corpus delicti rule requires some evidence that a crime occurred, independent of the defendant's own statements." [Citation.] (*People v. Ledesma* (2006) 39 Cal.4th 641, 721.) The rule, as embodied in CALCRIM No. 359, instructs the jury as to how it should use the defendant's out-of-court statements. The rule requires the jury to take a preliminary step before using the defendant's out-of-court statements in considering whether the prosecution has proven guilt beyond a reasonable doubt. That is, the jury must first determine whether a crime was committed, "i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) "This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]" (*Id.* at p. 1169.) In making this determination, a jury cannot rely solely on a defendant's extrajudicial statements; there must also be some independent proof of the crime. "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full

value to strengthen the case on all issues. [Citations.]” (*Id.* at p. 1171.)

Thus, CALCRIM No. 359 correctly instructs the jury on the corpus delicti rule, as laid out in *Alvarez*, that it “may only rely on the defendant’s out-of-court statements to convict him if [it] conclude[s] that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.” The instruction then goes on to expressly reinstruct the jury that it cannot convict defendant, unless the People have proven their case beyond a reasonable doubt.

This instruction does not lessen the prosecution’s burden of proof. As demonstrated above, the instruction guides the jury’s use of a defendant’s out-of-court statements. Nor does the “slight evidence” language in the instruction contradict the “reasonable doubt” language. The “slight evidence” language and the “reasonable doubt” language address different points. One is a preliminary finding the jury must make, that a crime was committed before utilizing defendant’s inculpatory statement, and one is the ultimate finding, that defendant was the perpetrator of the crime.

Here, defendant’s out-of-court statement to Parkman, was that the job was completed in September 2007. That statement, while not an unequivocal admission of theft, supports a conclusion that when defendant continued to charge Elmer’s charge account after September 2007 without obtaining Parkman’s consent, defendant was not charging the account to cover labor

or materials but was in fact stealing from Elmer. The statement is, therefore, more than "marginally inculpatory."

Moreover, the court correctly instructed the jury with CALCRIM No. 220, properly defining reasonable doubt and the requirement that the People prove each element of the offense to that standard. On this record, we conclude the jury could not have misunderstood the requisite burden of proof.

V

*The Court Erred in Ordering Defendant to Reimburse
Placer County for Attorney Fees Without First Determining
Defendant's "Present Ability to Pay" Those Fees*

Defendant contends the trial court erred in ordering him to reimburse Placer County \$1,250 for attorney fees without first determining defendant had the present ability to pay those fees. We conclude and the People concede the trial court erred.

DISPOSITION

The defendant's conviction for fraudulent use of an access card and the trial court's order compelling defendant to pay \$1,250 in attorney fees to Placer County are reversed. The judgment is affirmed in all other respects. The trial court is directed to resentencing defendant, prepare a corrected abstract

of judgment, and forward a copy to the Department of Corrections and Rehabilitation.

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

MAURO, J.