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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY SMITH,

Defendant and Appellant.

D059303

(Super. Ct. No. SCD208823)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed.

Larry Smith appeals from a judgment convicting him of two conspiracy counts and numerous grand theft counts arising from a fraudulent "land patent" scheme targeting distressed-mortgage homeowners. He argues the judgment must be reversed because the trial court failed to properly instruct the jury on the defense of mistake of fact or law. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of reviewing Smith's claim of instructional error, we need only briefly summarize the factual background of the case. The prosecution's evidence showed that Smith and his associates convinced numerous homeowners facing foreclosure to pay money for the creation of purported land patents on their property, which Smith falsely claimed would save their homes from foreclosure and allow them to renegotiate their mortgages. The defrauded homeowners paid Smith and his associates thousands of dollars to produce documents that turned out to be worthless.

To effectuate the scheme, Smith conducted seminars during which he described how the creation of a land patent on the owner's property would help the owner avoid foreclosure and force the bank to negotiate. Interested owners then paid money to have this purported land patent program implemented on their property through the recording and filing of various documents. The prosecution's evidence (including expert testimony) showed the land patent documents created by Smith and his associates had no legal effect and provided no assistance to the homeowners. The affected homeowners testified the banks continued to pursue foreclosure against their property notwithstanding the land patents they thought they had created. There was no showing the purported land patents helped the homeowners, and the jury was instructed that as a matter of law the recording, filing or lodging of land patent documents as described at trial "do not affect the legal

rights of a mortgage holder to foreclose on real property or prevent the eviction of residents after a trustee's sale or at any time thereafter."

The defense theories included a claim that Smith "really believe[d]" that land patents could be created to protect the homes, and thus he did not have the specific intent to commit the charged crimes.

Smith was charged with 24 counts of grand theft in excess of \$400 against distinct victims; one count of prohibited practices by a foreclosure consultant; and two counts of conspiracy to commit these offenses. The jury convicted Smith of these charged offenses, except for six of the grand theft charges.¹ The jury found true several enhancement allegations, including an aggravated white collar crime enhancement for a pattern of fraudulent conduct involving a taking of more than \$100,000.² The court sentenced Smith to 20 years four months in prison.

DISCUSSION

Smith argues the trial court failed to properly instruct the jury on the defense of mistake of fact or law, which was relevant to negate specific intent based on his claim that he "sincerely believed land patents could work" to stop foreclosure proceedings.

¹ The jury acquitted Smith of one of the grand theft charges, and was deadlocked on another grand theft charge. Four additional grand theft charges were dismissed before the case was submitted to the jury.

² The jury was deadlocked on an enhancement alleging an aggregate loss to the victims in excess of \$200,000.

I. Overview

The charged theft and conspiracy offenses were specific intent crimes. (*People v. Mumm* (2002) 98 Cal.App.4th 812, 817 [theft requires specific intent to permanently deprive]; *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399 [conspiracy requires specific intent to agree and to commit the offense].) The trial court drafted a special instruction to inform the jury that the required specific intent could be negated by Smith's mistaken belief about land patents. The written instruction (which we set forth below) was entitled "Mistake of Law" and was described as a "modified copy of CALCRIM 3407." Smith challenges the special instruction claiming his mistaken belief about the land patents was a mistake of fact, not law, and the court should have instructed the jury on mistake of fact as set forth in CALCRIM No. 3406. Further, he argues the instruction was incorrect and misleading because it suggested that his mistaken belief had to be objectively reasonable, whereas the only requirement is that it had to be subjectively genuine.

A mistake of fact occurs when a person understands the facts to be other than what they are, whereas a mistake of law occurs when a person knows the true facts but is mistaken as to their legal consequences. (*People v. LaMarr* (1942) 20 Cal.2d 705, 710.) Both a mistake of law and a mistake of fact are required to be in *good faith*. (*People v. Lucero* (1988) 203 Cal.App.3d 1011, 1016-1017; *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.) As we shall explain below, a mistaken belief about the facts may

be a defense to a crime, whereas a mistaken belief that an act is lawful is typically not a defense. However, in some circumstances a mistake of law may be presented as a defense to negate a specific mental state.

Further, when a mistake of fact is offered as a defense to a general intent crime, the mistake must be objectively reasonable. In contrast, when a mistake of fact or law is offered to negate a *specific mental state*, there is *no* requirement that the belief be objectively reasonable. However, this does not preclude the jury from considering the reasonableness of the belief when deciding whether the belief was in good faith—that is, a highly unreasonable belief can support an inference of bad faith. In other words, when a mistaken belief is offered to refute specific intent, the objective reasonableness factor is not a *requirement* to establish the defense, but it can be a *relevant consideration* on the subjective issue of *good faith*. The mistaken belief instruction in this case did not state there was a distinct objective reasonableness requirement, and it properly told the jury that it could consider the reasonableness factor when deciding good faith.

We first summarize the relevant law on these points, and then set forth and analyze the mistaken belief instruction provided to the jury.

II. *Governing Law*

A. *No Objective Reasonableness Requirement for Mistake*

Negating Specific Mental State

It has long been recognized that mistake of fact is a defense if the mistaken belief was in good faith and reasonable. (*People v. Lucero, supra*, 203 Cal.App.3d at pp. 1016-

1017.) " "[A]n honest and reasonable belief in the existence of circumstances, which, if true, would make the act . . . an innocent act, has always been held to be a good defense." ' ' (*Id.* at p. 1016.) The question of reasonableness is resolved under an objective standard; i.e., whether in the context presented an ordinary person could have honestly entertained the mistaken belief. (*Id.* at p. 1017.) This objectively reasonable standard has been applied to such factual mistakes as the belief that the defendant was authorized by the police to commit drug-related offenses and hence immune from prosecution (*id.* at pp. 1015-1018), and the belief that a rape victim consented (*People v. Williams* (1992) 4 Cal.4th 354, 361 [objective reasonableness requirement requires evidence that the mistake was "reasonable under the circumstances"]).

However, when a mistake of fact is offered to negate a *specific intent element* of an offense, the defense may be established based merely on a showing of good faith, regardless of the objective reasonableness of the mistake. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1426-1427; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 7-11.) " 'If no specific intent or other special mental element is required for guilt of the offense charged, a mistake of fact will not be recognized as an excuse unless it was based upon reasonable grounds"; however, " 'an honest mistake of fact or law is a defense when it negates a required [specific] mental element of the crime'. . .'even though the circumstances would [not] have led a prudent man' " to entertain the mistaken belief. (*People v. Navarro, supra*, at p. 10.)

For example, if a defendant in good faith, but mistakenly, believed he had the right to take property because it was abandoned, his mistake can negate specific intent to steal "even though such belief was unreasonable as measured by the objective standard of a hypothetical reasonable man" (*People v. Navarro, supra*, 99 Cal.App.3d Supp. at pp. 3, 11.) Using the example of intent to steal for theft, the *Navarro* court explained that the objective reasonableness requirement is not imposed when the mistake negates specific intent, because the specific intent element turns on the defendant's, not a reasonable person's, mental state: "[B]ecause of the requirement of a specific intent to steal there is no such thing as larceny by negligence. One does not commit this offense by carrying away the chattel of another in the mistaken belief that it is his own, no matter how great may have been the fault leading to this belief, if the belief itself is genuine." (*Id.* at p. 10.)

In contrast to mistake of fact, a mistake of law is typically not a defense when it is based on a claim the defendant did not realize his or her conduct was prohibited by the law. (*People v. Hagen* (1998) 19 Cal.4th 652, 660, fn. 4 ["malefactors cannot be permitted to redefine the criminal law by their own subjective misconceptions of that law"]; *People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661-1663; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 776; *People v. Young* (2001) 92 Cal.App.4th 229, 234; *People v. Costa* (1991) 1 Cal.App.4th 1201, 1211 ["It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. . . . The

rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement.' "].)³

However, in some circumstances mistake of law can be a defense when it negates a specific mental element of the crime. (*People v. Hagen, supra*, 19 Cal.4th at p. 660, fn. 4; *People v. Urziceanu, supra*, 132 Cal.App.4th at p. 776; *People v. Vineberg, supra*, 125 Cal.App.3d at p. 137.) For example, the *Hagen* court stated a taxpayer's mistaken belief about allowable deductions could negate the willfulness element of a charge of understatement of income. (*People v. Hagen, supra*, 19 Cal.4th at p. 660, fn. 4 ["taxpayer may defend against a . . . charge [prohibiting willful filing of false tax return] on the basis, for example, that he mistakenly believed certain deductions were proper under the tax laws, but not on the basis that he was unaware it was a crime to lie on one's tax return"]; see also *Cheek v. U.S.* (1991) 498 U.S. 192, 200.) Similarly, in *Urziceanu*, the court concluded the defendant's mistaken belief that his marijuana clinic complied with the Compassionate Use Act was a defense to a conspiracy charge which required the specific intent to violate marijuana laws. (*People v. Urziceanu, supra*, 132 Cal.App.4th at pp. 776, 779.)

³ For example, in *Young*, the court concluded the defendant could not present a mistake of law defense based on his erroneous belief that his drug activity was legal under the Compassionate Use Act. (*People v. Young, supra*, 92 Cal.App.4th at p. 235.) Similarly, in *Costa*, the court concluded the defendant could not present a mistake of law defense based on his incorrect belief that immunity statutes extended to persons who helped police informants manufacture drugs. (*People v. Costa, supra*, 1 Cal.App.4th at pp. 1211-1212.)

As with mistake of fact, when a mistake of law defense is permitted to negate a specific mental state element of the crime, there is no requirement that the mistaken belief be objectively reasonable. (See *People v. Hagen, supra*, 19 Cal.4th at p. 660 [good faith belief that conduct was lawful negates willfulness element of tax violation, even though objectively unreasonable]; *People v. Navarro, supra*, 99 Cal.App.3d Supp. at p. 10; see also *Cheek v. U.S., supra*, 488 U.S. at p. 201.)

B. Reasonableness of Belief Is Relevant to Subjective Good Faith Evaluation

To support a mistake of fact or law defense, the defendant must subjectively hold the belief in good faith; i.e., the defendant's belief must be honest and genuine. (See *People v. Lucero, supra*, 203 Cal.App.3d at pp. 1016-1017; *People v. Vineberg, supra*, 125 Cal.App.3d at p. 137; see also *People v. Williams, supra*, 4 Cal.4th at pp. 360-361; *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1142.)

To make the good faith determination, the courts have repeatedly recognized that the jury may properly consider the reasonableness of the belief even when objective reasonableness is not a requirement to establish the mistake defense. In *Navarro*, the court stated that although the "hypothetical reasonable [person]" standard did not apply to a mistake of fact negating specific intent to steal, "[i]t is true that if the jury thought the defendant's belief to be unreasonable, it might infer that he did not in good faith hold such belief." (*Navarro, supra*, 99 Cal.App.3d Supp. at p. 11, italics added.) Similarly, in *Vineberg*, the court stated that when evaluating whether a mistake of law was in good

faith, " ' "the circumstances in a particular case might indicate that although defendant may have 'believed' he acted lawfully, he was *aware of contrary facts which rendered such a belief wholly unreasonable, and hence in bad faith.*" ' " (*People v. Vineberg, supra*, 125 Cal.App.3d at p. 137, italics added, fn. omitted.)

In like fashion, the United States Supreme Court in *Cheek* recognized that, even though a good faith mistaken belief about the duty to file taxes did not need to be objectively reasonable, a jury could properly consider the reasonableness of the belief when deciding if the defendant's claimed belief was in good faith because he truly lacked knowledge of his legal duty. (*Cheek v. U.S., supra*, 498 U.S. at pp. 203-204.) The *Cheek* court stated, "*Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws*" (*Ibid.*, italics added.) Lower federal courts have interpreted *Cheek* to sanction an instruction telling the jury that although a good faith mistaken belief need not be objectively reasonable, the jury "*may consider whether the defendant's belief about the [law] was actually reasonable as a factor in deciding whether he held that belief in good faith.*" (*U.S. v. Dean* (11th Cir. 2007) 487 F.3d 840, 850-851, italics added; *U.S. v. Hilgeford* (7th Cir. 1993) 7 F.3d 1340, 1344 [" 'the reasonableness of a belief is a factor for the jury to consider in determining whether a defendant actually believed and acted on it. The

more farfetched a belief is, the less likely it is that a person actually held or would act on that belief "].)⁴

III. *Mistaken Belief Instruction Provided to the Jury*

The jury was provided with an instruction which was described as a modified version of CALCRIM No. 3407, which pertains to mistakes of law. CALCRIM No. 3407 states: "It is not a defense to the crime . . . that the defendant did not know [he] was breaking the law or that [he] believed [his] act was lawful." The use note, however, states that mistake of law may be a defense for specific intent crimes "if the mistake is held in good faith." (CALCRIM No. 3407.)

The jury was instructed as follows:

"[T]he defendant is not guilty of grand theft, conspiracy to commit grand theft or conspiracy to commit deceitful practices while acting as a mortgage consultant, if he did not have the intent or mental state required to commit the crimes because he believed in good faith that the land patent and secured interest processes described by him were legal.

"You must determine if the defendant believed in good faith that the land patent and secured interest processes he presented were legal. *Whether a claim is advanced in good faith does not depend solely upon whether the defendant believed he was acting lawfully; the circumstances must be indicative of good faith. For example, the circumstances in a particular case might indicate that although the defendant may have 'believed' he acted lawfully he was aware of contrary facts which rendered such a belief*

⁴ The instruction approved by these federal courts was as follows: "A defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. *This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith.*" (*U.S. v. Dean, supra*, 487 F.3d at p. 850, italics added; *U.S. v. Hilgefurd, supra*, 7 F.3d at p. 1343.)

wholly unreasonable and, hence, in bad faith. You are the judges of whether such a belief was reasonably held.

"If you have reasonable doubt about whether the defendant had the specific intent or mental state required for specific intent crimes charged in this case; namely, conspiracy to commit grand theft, conspiracy to commit deceitful practices while acting as a mortgage consultant and/or grand theft, you must find the defendant not guilty of these crimes." (Italics added.)

IV. Analysis

Smith contends his mistaken belief that land patents could work to forestall foreclosure necessarily involved a mistake of fact, and therefore the trial court was required to sua sponte instruct on mistake of fact.⁵ We are not persuaded. The courts recognize that in some circumstances it is difficult to distinguish between a mistake of law and a mistake of fact, and the characterizations may overlap. (*People v. Meneses, supra*, 165 Cal.App.4th at p. 1662.) Here, the court fashioned a special instruction entitled "Mistake of Law" that told the jury that if Smith mistakenly believed land patents were legal, this could negate specific intent. Smith's claim that he thought land patents could be created to assist distressed-mortgage homeowners focuses on the *legal effect* of the purported land patent documents, which can properly be characterized as a mistake of law. Because the trial court (with the parties' concurrence) reasonably construed Smith's mistaken belief claim as a mistake of law, Smith has not shown the trial court was

⁵ The mistake of fact instruction set forth in CALCRIM No. 3406 states the defendant is not guilty of the crime if he or she reasonably did not know a fact or reasonably and mistakenly believed a fact. The use note states the reasonableness requirement should not be inserted if the mental state at issue is specific criminal intent or knowledge.

required to sua sponte construe the mistaken belief defense as a mistake of fact.⁶ If Smith's mistaken belief could also reasonably be construed as a mistake of fact, it was incumbent upon Smith to present this point to the trial court. However, he may not seek relief on this ground for the first time on appeal. (See *People v. Farnam* (2002) 28 Cal.4th 107, 165.)

We are also unpersuaded by Smith's argument that the mistaken belief instruction provided to the jury incorrectly suggested that a mistake offered to negate specific intent must be objectively reasonable. In reviewing a claim the court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury misunderstood and misapplied the instructions. (*People v. Mayfield* (1997) 14 Cal.4th 668, 777; *People v. Kelly* (1992) 1 Cal.4th 495, 525.) We consider the instructions as a whole, and we assume the jurors are intelligent persons and capable of applying and correlating the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

The mistaken belief instruction provided to the jury states the defendant must have entertained the belief about the patents in good faith; i.e., "the circumstances must be indicative of good faith." The instruction then provides an example of how the circumstances might support an inference of bad faith if the belief was entirely

⁶ Smith notes that the use note to the mistake of law instruction set forth in CALCRIM No. 3407 states: "Although concerned with knowledge of the law, a mistake of fact about legal status or legal rights is a mistake of fact, not a mistake of law." However, in *People v. Hagen*, the California Supreme Court characterized a mistake about the "nonpenal legal status of a person, thing, or action" as a mistake of law. (*Hagen, supra*, 19 Cal.4th at p. 660, fn. 4, italics omitted; see also *People v. Meneses, supra*, 165 Cal.App.4th at p. 1662.)

unreasonable, stating: "For example, the circumstances in a particular case might indicate that although the defendant may have 'believed' he acted lawfully he was aware of contrary facts which rendered such a belief wholly unreasonable and, hence, in bad faith." There is nothing in the instruction stating that the mistaken belief defense *required* a showing that the defendant subjectively held the belief in good faith *and that his belief was objectively reasonable*; rather, the jury was merely told the reasonableness of the belief was a *relevant factor* that it could consider when deciding the good faith issue. It was not improper to tell the jury that—when considering all the circumstances relevant to good faith—it could draw an inference of bad faith based on the defendant's knowledge of facts that were contrary to his belief so as to make his belief entirely unreasonable. (See *People v. Navarro, supra*, 99 Cal.App.3d Supp. at p. 11; *People v. Vineberg, supra*, 125 Cal.App.3d at p. 137; *U.S. v. Dean, supra*, 487 F.3d at pp. 850-851; *U.S. v. Hilgefurd, supra*, 7 F.3d at p. 1344.)

In support of his claim of instructional error, Smith also notes the portion of the instruction which states, "You are the judges of whether such a belief was *reasonably held*." (Italics added.) When the instruction is read as a whole, there is no reasonable likelihood the jurors thought this language imposed an objective reasonableness requirement on the mistaken belief claim. The instruction directed the jurors to determine if Smith's belief was in good faith, and stated they could draw an inference of bad faith if he was aware of facts contrary to his belief that made his claimed belief wholly unreasonable. In this context, telling the jurors they were the judges of whether

the belief was "reasonably held" underscored their discretion to consider the reasonableness factor when deciding whether to reject or accept his claim of bona fide mistake. Because the instruction is framed in terms of a permissible inference concerning good or bad faith that can be drawn from the reasonableness factor, there is no reasonable likelihood the jurors viewed objective reasonableness as a mandatory prerequisite to the mistaken belief defense.

Smith's claim of instructional error fails.⁷

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.

⁷ Although we find no instructional error, in cases where a trial court instructs the jury that it may consider the reasonableness factor when evaluating good faith, it would be helpful to include additional language clarifying that objective reasonableness is not a mandatory requirement to establish the defense for a specific mental element. (See fn. 4, *ante*.) However, the trial court had no sua sponte duty to provide such a clarifying instruction. (See *People v. Sanders* (1995) 11 Cal.4th 475, 533-534 [when trial court correctly instructs on the law, it need not sua sponte provide clarifying instructions].)