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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JACQUELINE STATEN,

Defendant and Appellant.

E053566

(Super.Ct.No. RIF145391)

OPINION

APPEAL from the Superior Court of Riverside County. Larrie R. Brainard, Judge.
(Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and William M. Wood and
Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

On March 29, 2011, a jury found defendant Jacqueline Staten guilty of grand theft (Pen. Code,¹ § 487, subd. (a); count 1), petty theft by embezzlement (§ 484, subd. (a); count 2), unlawful use of an access card in excess of \$400 (§ 484g, subd. (a); count 3), and dissuading a witness (§ 136.1, subd. (c)(1); count 4). The jury further found true the allegation that defendant committed count 4 by an express or implied threat of force or violence upon the victim. Defendant admitted that she committed the charged offenses while “out on bail.” (§ 12022.1.) On April 28, 2011, the trial court suspended the imposition of sentence and granted defendant formal probation for three years on the condition, among others, that she serve 365 days in county jail. She appeals.

I. FACTS

A. Facts as to Grand Theft Count

On March 17, 2008, Helen Johnston retained defendant, an attorney, to handle the custody issue in her dissolution of marriage proceedings. Johnston’s previous attorney, William Bratton, had transferred approximately \$143,000 (proceeds from the sale of the marital home) to defendant. Defendant failed to file any motions to help Johnston obtain custody of the children. On May 28, Johnston rehired Bratton and defendant was ordered to return the client file and the trust monies in the amount of \$143,726 plus interest. In July 2009, the Murrieta Police Department delivered \$132,000 to Bratton.

Bank records of defendant’s trust account showed a starting balance of \$80 on March 1, 2008, and a deposit on March 21 in the amount of \$143,726.30. There was an

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

over-the-counter withdrawal of \$5,000 on March 25. There were two transfers to defendant's other accounts with the same bank, each in the amount of \$2,500. The ending balance in the trust account as of March 31 was \$133,626.30. There were seven withdrawals in April totaling \$13,351.70, leaving a balance of \$114,974.60.

B. Facts as to Petty Theft and Unlawful Use of an Access Card

Susan Brotherton is a professor at California State University San Bernardino. She met defendant around 1994 and they became lovers from approximately 1998 to 1999. When they were not lovers, they remained friends who shared each other's difficulties. Whether friends or lovers, they had disagreements and their relationship was volatile.

In February 2009, Brotherton developed an allergic reaction in her left eye that caused her a lot of pain and prevented her from seeing out of that eye. She gave defendant an automatic teller machine (ATM) card, along with the personal identification number (PIN) access code, and asked defendant to pick up some Benadryl and groceries at the store. While running these errands, defendant called Brotherton and asked to use the ATM card to put gas in the car. Brotherton said yes but did not authorize any other expenditures. According to the records from Community Bank in Redlands, defendant used Brotherton's ATM card to withdraw cash and purchase items not authorized by Brotherton between February 5 and February 9, 2009. The total amount taken from Brotherton's bank was approximately \$791.93. Defendant returned the ATM card with receipts of the transactions. Brotherton became very angry and told defendant that she was not authorized to make those transactions. Defendant became angry and said she

thought she could make the transactions because she had a third party check for \$1,000 that she planned to give to Brotherton. While Brotherton needed the money from the check, she declined it because she could not cash a third party check at her bank. On cross-examination, Brotherton stated she did not think it was necessary to tell defendant that she could not use the ATM card for anything other than what Brotherton had authorized. Brotherton admitted that defendant would usually, but not always, pay back whatever she had taken over a period of time.

Defendant left a message on Brotherton's telephone at approximately 9:45 a.m. on February 12, 2009. A recording of that voicemail was played in court. Defendant said: "Sue, this is Jacque. I've had enough. I've had enough. You called Shawn, and you know what? That's okay. I know who's behind all of this crap. I know who starts it, and I know who runs and hides when it's time for them to be put on the front of line, and you know what, Sue? Bad taste—bad taste in my mouth, and stuff that's done to me will not just be disregarded. Okay? If you think you're gonna destroy me by calling Shawn and making problems for him, keep, keep doing what you're doing. Okay? Keep doing what you're doing, because, um, this is—it's not gonna end like this. Okay? It's not gonna end like this. You place one more call to the Bar or to anybody associated with my job, Sue, I will fucking deal with you, and I swear to God it won't be pretty, but you do—you do that one more time, you call the cops on me, you call my job, you call Shawn, or you make anymore allegations against me about anything, and I will fucking go to the wall. Okay? Put shit on you."

Brotherton felt threatened and intimidated by defendant's voicemail message. She believed it to be a threat of force or violence. Brotherton did not know what defendant would do, because defendant had hurt Brotherton in the past. On one occasion, defendant and another person were at Brotherton's home when defendant did something Brotherton did not like. While defendant was in a bathroom, Brotherton grabbed defendant's arm and told her that she wanted defendant to leave immediately. Defendant used her other arm to push Brotherton against the bathroom counter and crack two of her ribs. Defendant had also made comments that she had represented criminals who could "shoot up the front of people's homes." In addition, defendant had damaged some of Brotherton's property, such as putting holes in walls, throwing chairs, and kicking and breaking a statue that Brotherton had in her front yard. All of these prior acts by defendant factored into Brotherton feeling threatened by defendant's voicemail message.

In the afternoon of February 12, 2009, Brotherton went to the Murrieta Police Department to report defendant's actions. She did not want defendant to be prosecuted; however, the bank would not give Brotherton a new ATM card unless she filed a police report.

Defendant presented a defense. On April 9, 2010, Danny Jones, Sr., a private investigator, interviewed Brotherton at her home. Brotherton acknowledged giving defendant the ATM card in February 2009 to purchase several items. She did not get her card back the same day. Although she had been under the influence of many different medications at that time, she gave defendant permission to use the ATM card and return it the next day. Brotherton also stated she thought she had been mistaken that defendant

had used the ATM card to steal Brotherton's money, and Brotherton attempted to contact the district attorney's office so that no charges would be pressed. Jones testified that Brotherton had told him defendant paid back the amount she had used, along with "several hundred dollars over."

On cross-examination, Jones testified that during the interview with Brotherton, she appeared still "under the influence of medication," and that defendant was at Brotherton's home, upstairs. Jones also testified that when Brotherton asked for her ATM card the next day, defendant said she could not return the card. Brotherton did not use credit cards, only her ATM/debit card.

Theodore Williams, M.D., a psychiatrist, testified that defendant became his patient in February 2007. She had a prior diagnosis of bipolar disorder and had been prescribed antidepressant and anti-anxiety medications for the condition. Defendant was also taking Ativan most nights. Dr. Williams saw defendant 13 times between February 20, 2007, and March 1, 2011. Dr. Williams agreed with defendant's original diagnosis of "Bipolar 1." He explained that having bipolar disorder obscures good judgment. He increased defendant's antidepressant medication when he began seeing her and added a mood stabilizing medication, lithium, in January 2008. In November 2009, Dr. Williams changed the lithium to Lamictal. He also changed the Ativan to Xanax.

On cross-examination, Dr. Williams testified that he believed defendant was mentally stable when he saw her on March 7, 2008. He also testified that a person can be bipolar and know the difference between right and wrong, and decide whether or not to steal something.

II. RIGHT AGAINST SELF-INCRIMINATION

Regarding the theft of monies from the Johnston dissolution, State Bar Court Disciplinary proceedings were held prior to the criminal trial. As a result of the administrative proceedings, defendant admitted her wrongful actions. The criminal trial on the charge of grand theft followed over defendant's objection, based on a violation of her Fifth Amendment right against self-incrimination. On appeal, she contends that because the trial court refused to conduct the criminal trial until after the administrative proceedings, she is entitled to a dismissal of the grand theft charge. Alternatively, she faults the trial court for failing to conduct a *Kastigar*² hearing, in which the prosecution was burdened with establishing that none of its evidence was tainted by the compelled material from the administrative hearing.

A. Background Facts

Prior to the criminal trial on the theft of monies from the Johnston dissolution, defendant appeared before the State Bar Court and "stipulated to everything [she] did wrong." Thus, defendant, who was represented by counsel other than herself, expressed concern that information from her stipulation in the State Bar Court may be used against her by one of the witnesses at trial, in violation of her Fifth Amendment right against self-incrimination. Defense counsel moved that the trial court dismiss the charge of grand theft based on the alleged violation of defendant's right against self-incrimination. The prosecutor informed the court that he was only going to ask witnesses questions they

² *Kastigar v. United States* (1972) 406 U.S. 441.

could answer from direct knowledge, and not from defendant's State Bar Court proceeding. The trial court denied defendant's motion.

B. Analysis

Relying on the holding in *Garrity v. New Jersey* (1967) 385 U.S. 493, 497-498, 500, defendant argues that “neither [her] statements nor documents she was required to produce that are of a testimonial nature . . . may be used against her in the criminal prosecution, nor may the fruits of those items be used.” Because her criminal case followed the State Bar proceedings, and she was not given use or derivative use immunity from any compelled testimony, she argues that the trial court should have dismissed the grand theft charge. The problem with this argument is that defendant has not pointed to any testimony that was derived from the State Bar proceedings. The fact that witnesses may have offered the same testimony in both actions does not mean statements and/or documents offered during the criminal trial were solely obtained in the administrative hearing.

Alternatively, defendant contends the trial court erred in failing to hold a *Kastigar* hearing, which would have required the prosecution to make a “‘showing that all the evidence [it] proposes to use is derived from a legitimate source independent of the compelled testimony.’ [Citation.]” We disagree.

In *Kastigar*, the United States Supreme Court acknowledged that the Fifth Amendment right against self-incrimination may be meaningfully preserved following a compelled disclosure only if both the use and derivative use of the compelled statements in a criminal case is prohibited. (*Kastigar, supra*, 406 U.S. at p. 453.) The prosecution

bears the “affirmative duty to prove that evidence it proposes to use [in a criminal case] is derived from a legitimate source wholly independent of the compelled testimony.” (*Id.* at p. 460.) In a *Kastigar* hearing, once the defendant establishes that he or she has testified under a grant of immunity, the prosecution must prove, by a preponderance of the evidence, that all of the evidence is derived from a legitimate source wholly independent of the compelled testimony. (*People v. Singleton* (2010) 182 Cal.App.4th 1, 13.) The defendant’s right against self-incrimination is not infringed if a witness hears immunized testimony as long as the witness testifies solely to facts within his or her personal knowledge. (*Id.* at p. 14.) “Ensuring that the content of a witness’s testimony is based on personal knowledge . . . meets the *Kastigar* requirement that the defendant’s compelled statements shall not be used against him in subsequent criminal proceedings.’ [Citation.]” (*Ibid.*)

Here, all the witnesses’ testimonies as to the grand theft charge were based solely on their personal knowledge. Clearly, there was no need to rely on defendant’s stipulation and/or admissions to wrongdoing. Johnston testified as to the events surrounding her dissolution and how defendant came into possession of the proceeds from the sale of the marital property. Johnston testified that when she became suspicious that defendant was stealing from her funds, she rehired Bratton, who sought a court order directing defendant to return Johnston’s funds to Bratton immediately. Defendant failed to comply. Johnston’s ex-husband testified that (1) he was represented by separate counsel, Susan Gavigan; (2) defendant’s request to hold the approximately \$143,000 in trust funds at the March 17, 2008, hearing was granted; (3) the court ordered defendant

not to touch the money without a court order; (4) defendant sent only the deposit slip and no account statement after receiving the trust funds; (5) defendant did not comply with the May 28, 2008, court order to turn over the funds to Bratton; and (6) the trust funds that Bratton eventually received were \$13,000 short of the original amount.

Both Bratton and Gavigan testified that defendant had called each of their offices in March 2008, demanding that the trust funds held on behalf of Johnston be sent to defendant without a court order. Bratton and Gavigan both agreed they had never had a fellow attorney be so aggressive about client trust funds. They were present at the March 17 hearing when it was ordered that defendant receive the trust funds; however, defendant failed to provide any bank statements after receiving the trust funds. They were also present at the May 28 hearing when the court ordered the trust funds returned to Bratton.

The assistant vice-president and banking center manager for Bank of America, along with an investigator from the Murrieta Police Department, testified as to defendant's client trust account and bank records. Defendant had \$80 in her trust account prior to the transfer of Johnston's money. Afterwards, the balances in the account were approximately \$133,600, \$114,900, \$102,700, and \$136,600, respectively, at the end of March, the end of April, on May 17, and the end of May 2008. Finally, a supervising trial counsel from the California State Bar testified as to how money resulting from a dissolution of marriage and placed in an attorney's trust account cannot be released without a court order.

The source of the above evidence is the personal knowledge of each witness and/or business records, not any stipulation and/or admissions made by defendant in the State Bar proceeding. More importantly, as the People point out, defendant has never established that she testified under a grant of immunity. Looking at the Decision and Order of the State Bar court filed on December 21, 2010, and comparing it to the testimonies of the witnesses, it is clear the evidence offered in support of the grand theft charge was not derived solely from any stipulation and/or admissions made by defendant in the administrative proceeding. While defendant faults the trial court for failing to properly conduct a *Kastigar* hearing, we note that defendant failed to establish the threshold need for such hearing. Did she enter into any stipulation or admission before the State Bar court under a grant of immunity? The Decision and Order of the State Bar court fail to indicate that she did.

Given the record before this court, we conclude the trial court properly denied defendant's motion to dismiss the grand theft charge or conduct a *Kastigar* hearing. After reviewing the evidence presented at trial, we are not able to discern, nor has defendant directed us to, any evidence which was derived solely from defendant's compelled stipulation and/or admissions. The fact that a percipient witness consulted the State Bar web site does not mean his or her testimony was derived from the information obtained from the web site. Rather, according to the transcript of the testimony, the witnesses testified to the events they witnessed. As previously noted, the defendant's right against self-incrimination is not infringed if a witness hears immunized testimony,

as long as the witness testifies solely to facts within his or her personal knowledge.
(*People v. Singleton, supra*, 182 Cal.App.4th at p. 14.)

III. SUFFICIENCY OF EVIDENCE

Defendant contends the evidence was insufficient to support her convictions for petty theft by embezzlement, unlawful use of an access card, and dissuading a witness from reporting a crime by threats of unlawful injury.

A. *Standard of Review*

“When a defendant challenges the sufficiency of the evidence, “[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]’ [Citations.] ‘Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]’ [Citation.] We ““presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”’ [Citation.]’ [Citation.]”
(*People v. Clark* (2011) 52 Cal.4th 856, 942-943.)

B. *Petty Theft by Embezzlement*

Having taken Brotherton’s ATM card for her own personal use, defendant was charged with theft by embezzlement. Theft includes the crimes of larceny, embezzlement, larceny by trick and device, and obtaining property by false pretenses. (*People v. Creath* (1995) 31 Cal.App.4th 312, 318.) “Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted.” (§ 503.) The

elements of embezzlement are: “1. An owner entrusted his/her property to the defendant; 2. The owner did so because he/she trusted the defendant; 3. The defendant fraudulently converted that property for his/her own benefit; [and] 4. When the defendant converted the property, he/she intended to deprive the owner of its use.” (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 636- 637; CALCRIM No. 1806.)

“The crime of embezzlement requires the existence of a ‘relation of trust and confidence,’ similar to a fiduciary relationship, between the victim and the perpetrator.’ [Citation.]” (*People v. Nazary* (2010) 191 Cal.App.4th 727, 742.) A perpetrator’s intent to temporarily deprive the rightful owner of possession is sufficient and it is no defense that the perpetrator intended, and did, restore the property. (*Ibid.*; *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 813; *People v. Casas* (2010) 184 Cal.App.4th 1242, 1247 [Fourth Dist., Div. Two] [“necessary mental state may be found to exist whenever a person, for any length of time, uses property entrusted to him or her in a way that significantly interferes with the owner’s enjoyment or use of the property”].) However, a person’s good-faith belief that he or she could appropriate property entrusted to him or her is a defense to a charge of embezzlement. (§ 511; *People v. Stewart* (1976) 16 Cal.3d 133, 139.)

Here, the basis for the theft by embezzlement charge was defendant’s use of Brotherton’s ATM card between February 5 and February 9, 2009. The prosecution argued that Brotherton had entrusted the ATM card and its PIN to defendant, but only for the purpose of purchasing groceries, medicine and gas. Because defendant was specifically told what she could use the ATM card for, her retention of the card and

accompanying use of it were sufficient to show there was no good-faith use and that intent to restore was not a defense. In response, defendant argued that she did not intend to permanently deprive Brotherton of her ATM card because she returned it with receipts of the various transactions.

On appeal, defendant contends the evidence is insufficient to show (1) that Brotherton entrusted her ATM card and PIN to defendant while expressly limiting its use, or (2) that defendant possessed a fraudulent intent. According to defendant, her past relationship with Brotherton demonstrated Brotherton's frequent financial assistance to defendant. Specifically, defendant points out that Brotherton had purchased a car for defendant, helped her lease a home, paid \$1,000 to her rehabilitation facility, and loaned her \$3,000. Ultimately, defendant repaid the money and then some. Brotherton acknowledged that defendant "seemed surprised" that Brotherton was upset about defendant's use of the ATM card.

The People respond by pointing out that Brotherton testified she did not think it was necessary to tell defendant not to use the ATM card for anything other than what Brotherton authorized. She had entrusted her ATM card and PIN to defendant to buy groceries and medicine. Defendant asked for permission to use the card to purchase gas, nothing else. Instead of returning the card with the groceries and medicine, defendant kept the card for four days, using it to purchase items and withdraw cash (totaling \$791.93) without Brotherton's knowledge or permission. When she finally returned the card, Brotherton was angry. She told defendant that she was not authorized to use the ATM card and that she (Brotherton) needed it to pay bills. While defendant emphasizes

their relationship and how Brotherton had provided financial assistance in the past, such evidence is irrelevant to defendant's use of the ATM card while Brotherton was ill. Their relationship was described as volatile. Moreover, defendant's emphasis on Brotherton's admission that "she had not told [defendant] that she could use the card to buy only certain things" is misplaced. The fact that defendant asked to use the card to buy gas speaks volumes. Asking for such permission shows that defendant knew she was not authorized to use the card without permission. Furthermore, Brotherton testified that she did not believe it necessary to tell defendant that she could not use the ATM card to buy whatever she wanted. Given the record before this court, there is substantial evidence upon which a reasonable jury could find that defendant fraudulently used Brotherton's ATM card and that such use was beyond Brotherton's authorization.

C. Unlawful Use of an Access Card

Separately, defendant was charged with the unlawful use of Brotherton's ATM card under section 484g, which, in relevant part, provides: "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 . . . that has been . . . obtained, or retained in violation of Section 484e or 484f [i.e., another person's card or account information] . . . is guilty of theft. . . ." Defendant contends the evidence fails to show that she "'used or retained'" Brotherton's ATM card without permission. Defendant points to the conduct between her and Brotherton both prior to and after February 5-9, 2009, and argues she had "every reason to suppose she was authorized to use the card."

Although the record shows there was a relationship between Brotherton and defendant, as noted above, such relationship was volatile. While Brotherton may have provided financial assistance to defendant at different times, there is no evidence that such financial assistance was not based on Brotherton's decision and choice. However, regarding the use of the ATM card, defendant knew to ask for permission to use it to purchase gas. Such knowledge supports a finding that any other use was beyond authorization. Just as the record provides substantial evidence to support the jury's verdict as to the charge of theft by embezzlement, so too does it support their verdict as to the charge of unlawful use of an access card.

D. Dissuading a Witness from Reporting a Crime

Defendant challenges the sufficiency of the evidence supporting the charge of dissuading a witness from reporting a crime by threats of unlawful injury.

Pursuant to section 136.1, it is a felony to knowingly and maliciously attempt to prevent a victim of a crime from making a report of that victimization to any peace officer, when that attempt is accompanied by force or by an express or implied threat of force. (§ 136.1, subds. (b)(1), (c)(1); CALCRIM Nos. 2622 and 2623; *People v. Ortiz* (2002) 101 Cal.App.4th 410, 415-416.) The voice message that constituted the alleged threat was left on Brotherton's telephone at approximately 9:45 a.m. on February 12, 2009. At trial, it was explained that Sean (spelled "Shawn" in the message transcript) was the director of a rehabilitation center called Sober Shores. In February 2009, defendant asked Brotherton to pay Sean \$1,000 so he would write a letter to the State Bar on behalf of defendant. Although Brotherton agreed to do so, she later called Sean and

asked for her money back because defendant had not reimbursed her. Brotherton made the call before defendant's threatening voicemail message.

In the afternoon of February 12, 2009, Brotherton went to the Murrieta Police Department to report defendant's action regarding the ATM card. She did not want defendant prosecuted; however, the bank refused to give her another ATM card unless she filed a police report. Brotherton also reported the threatening voicemail message.

Following the close of the prosecution's case, defendant moved for acquittal on the charge of dissuading a witness from reporting a crime on the ground of insufficient evidence. In deciding whether to grant the defense motion, the trial court noted that the message could apply to either a criminal proceeding or an administrative proceeding; nonetheless, defendant referenced calling the "cops." Thus, the court denied the motion, stating that "a reasonable mind could take . . . those statements as a threat in connection with calling the police."

During closing argument, the prosecutor argued that the voicemail message constituted a threat of unlawful injury to Brotherton in order to stop her from reporting the crime regarding the ATM card. The prosecutor pointed out that defense counsel may argue there was another reason for the threat; however, the jury should "[l]isten to the words. Look at the timing. Listen to when [Brotherton] heard these. Just because there may be other things involved, obviously she's saying the cops in here. She's saying report again. This is related to this case." In response, defense counsel argued that defendant was not guilty because "there is no crime that relates to the intimidation charge." Following argument, the jury found defendant guilty of the charge of

dissuading a witness. On appeal, defendant challenges the evidence supporting the jury's finding. She contends the voicemail message focused on her "anger at Brotherton for calling 'Shawn' and 'making problems for him.'" She notes the message does not identify any crime that Brotherton should not report, nor do the "surrounding circumstances warrant[] the inference that it was the ATM incident to which the message referred." Rather, she argues there were three possible incidents that may have triggered Brotherton to make allegations about defendant, namely, the unauthorized use of the ATM card, Brotherton's discovery that defendant was living with a younger woman in a home that Brotherton helped defendant lease, or Brotherton's feeling she had been "duped into paying \$1,000 to 'Shawn' to write a letter for [defendant] to the State Bar."

Considering the above three possibilities, we conclude there was evidence to support the jury's finding. To begin with, there is no reference in the message to Brotherton's anger over defendant's relationship with a younger woman. Thus, there is no possibility the message was referring to Brotherton's discovery that defendant was seeing another woman. As for the other two possibilities, defendant references Sean, and then adds, "you do that one more time, you call the cops on me, you call my job, you call [Sean], or you make anymore allegations against me about anything, and I will fucking go to the wall. Okay? Put shit on you." The message was left after Brotherton called Sean but prior to her calling the police regarding the ATM incident. It is unclear how Brotherton's payment of \$1,000 to Sean could result in her calling the cops. Rather, given the ATM card incident and the bank's reluctance to issue a new card, it is more probable the threat related to defendant's unauthorized use of Brotherton's ATM card.

As the People point out, when Brotherton reported the unauthorized use of the ATM card, she also reported the voicemail threat. Clearly, Brotherton linked the two together. Based on the record before this court, there was substantial evidence from which the jury could conclude, beyond a reasonable doubt, that defendant attempted to prevent Brotherton from calling the police to report the ATM incident.

IV. INSTRUCTIONAL ERROR

Regarding the charge of dissuading a witness from reporting a crime, the court instructed the jury orally and in writing in terms of CALCRIM No. 2622 [Intimidating a Witness (§ 136.1(a) & (b))] that defendant was charged “with intimidating a witness in violation of Penal Code Section 136.1.” The court further instructed: “To prove that the defendant is guilty of this crime, the People must prove that: Number one, the defendant maliciously tried to prevent Sue Brotherton from making a report that she was a victim of a crime to law enforcement. A person acts maliciously when he or she unlawfully intends to annoy, harm or injure someone else in any way or intends to interfere in any way with the orderly administration of justice. [¶] As used here, witness means someone or a person the defendant reasonably believed to be someone who knows about the existence or nonexistence of facts relating to a crime, or who has reported a crime to a peace officer or prosecutor. [¶] A person is a victim if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her. It is not a defense that the defendant was not successful in preventing or discouraging the victim or witness. It is not a defense that no one was actually physically injured or otherwise intimidated.”

The jury was further instructed with CALCRIM 2623 [Intimidating a Witness: Sentencing Factors (§ 136.1(c))] as follows: “If you find the defendant guilty of intimidating a witness, you must then decide whether the People have proved the additional allegation that the defendant acted maliciously and used or threatened to use force. To prove this allegation, the People must prove that: Number one, the defendant acted maliciously; and number two, the defendant used force or threatened either directly or indirectly to use force or violence on the person or property of a witness or victim or any other person. [¶] A person acts maliciously when he or she unlawfully intends to annoy, harm or injure someone else in any way or intends to interfere in any way with the orderly administration of justice. The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.”

Defendant contends the trial court committed reversible error when it failed to instruct the jurors that section 136.1 requires knowledge and specific intent, and instructed the jury that the crime was “intimidating a witness” and not attempting to dissuade a crime victim. Regarding the court’s identification of the crime as “intimidating a witness” instead of “dissuading a victim from reporting a crime,” the People note the trial court was simply following the standard jury instruction’s use of the title “Intimidating a Witness.” Because the court specifically instructed the jurors they had to find that defendant maliciously attempted to prevent Brotherton from reporting she was a victim of a crime, any mistake in the title of the instruction was not reasonably likely to confuse the jurors. We agree. Regarding the omission of the element relating to

specific intent and knowledge, the People concede error. However, they argue the error was harmless.

Where there is instructional error, our high court has held that reversal of the jury's guilty verdict is not required. "It is appropriate and constitutionally permissible to analyze instructional error with regard to an element of an offense by the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18 [Citations.] This standard has been expressly applied to instructional error on the issue of whether a crime requires general or specific intent. [Citation.]" (*People v. Brenner* (1992) 5 Cal.App.4th 335, 339.)

"An instruction that omits a required definition of or misdescribes an element of an offense is harmless only if 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" [Citation.] 'To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 774.)

Even though the trial court did not instruct the jury that the crime of dissuading a witness from reporting a crime required a finding of specific intent, the court in effect instructed the jury that such a finding was required by giving CALCRIM 3428 [Mental Impairment: Defense to Specific Intent or Mental State], in addition to CALCRIM 2622 and 2623. The jury was told: "You have heard evidence that the defendant may have suffered from a mental disease or disorder. You may consider this evidence only for the limited purpose of deciding whether at the time of the charged crimes the defendant acted

or failed to act with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state or intent specific for each crime that's contained in the jury instructions related to those crimes. If the People have not met this burden, you must find the defendant not guilty of those crimes." CALCRIM 2622 and 2623 instructed that "a person acts maliciously when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice."

"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole." (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80.) Considering the instructions as a whole, together with the evidence and argument of counsel, we conclude the trial court's error in failing to instruct on specific intent and knowledge was harmless. As we noted previously, there was substantial evidence to establish that defendant maliciously intended to prevent Brotherton from reporting the ATM card incident to law enforcement when defendant left a threatening voicemail message if she called the cops. The only incident in which Brotherton could have called the cops was the unauthorized use of her ATM card from February 5-9, 2009. There was no criminal activity involved in defendant's relationship with a younger woman or in Brotherton's payment of \$1,000 to Sean. As the People point out, because defendant's reference to "cops" was unambiguous, the evidence established that defendant intimidated Brotherton from reporting the ATM card crime with the required specific intent and knowledge. (§ 136.1.)

The trial court’s error in omitting the specific intent and knowledge element of the crime was harmless, since “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ [Citations.]” (*People v. Harris* (1994) 9 Cal.4th 407, 424.)

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

KING

J.