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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.

GLORIA CARRASCO,

Defendant and Appellant.

E054770

(Super.Ct.No. FVA801897)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed.

James R. Bostwick, Jr., 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, Barry Carlton, Garrett Beaumont, and Julianne K. Reizen, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Gloria Carrasco appeals from judgment entered following jury convictions for grand theft (Pen. Code,¹ § 487, subd. (a); counts 1-4). The convictions arose from four catering contracts in which defendant agreed to provide catering services at El Imperio Restaurant (El Imperio). Then, at the last minute, right before the date of each party, defendant notified her clients that they could not use the restaurant and did not refund any of their money. The trial court sentenced defendant to three years formal probation and 90 days in jail.

Defendant contends the trial court erred in granting the prosecution's *Batson-Wheeler* motion and denying defendant's related motion for mistrial. Defendant also asserts there was insufficient evidence to support her four grand theft convictions and the trial court committed instructional error by not sua sponte instructing the jury on the contract defenses of frustration of purpose and failure of consideration. Defendant additionally argues the trial court erred in failing to instruct the jury that it must deduct the value of defendant's contract expenditures from any sums defendant received from the victims. Finally, defendant argues the trial court committed prejudicial error by incorrectly instructing the jury that the threshold amount for grand theft was in excess of \$400.

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

We conclude there was no prejudicial error or cumulative error, and therefore affirm the judgment.

II

FACTS

Pete Romero

On July 29, 2007, Pete Romero met with defendant to discuss plans for defendant to cater a Quinceanera party for his daughter on August 23, 2008, at El Imperio. Romero intended to invite 200 to 300 guests. Defendant told Romero that she was the owner of El Imperio and had hosted many parties at the restaurant. She said she could handle all aspects of the event, including providing catering, decorations, and a stage for a deejay. Defendant also said she had an Alcoholic Beverage Control liquor license (ABC license).

In a written contract, Romero agreed to pay \$8,500 for defendant's catering services and use of El Imperio. Romero made an initial \$1,000 down payment, and paid the balance in installments. Romero paid \$5,000 on July 8, 2008, and the final payment of \$2,500 on July 13, 2008. On August 20, 2008, Romero's children rehearsed their dance at El Imperio, and the next day, on August 21, 2008, Romero made an additional payment of \$500 for margaritas to be served at the party.

Late in the afternoon on August 22, 2008, defendant called Romero and told him he could not hold his daughter's Quinceanera party at El Imperio because the fire department closed the restaurant because of the presence of carbon monoxide. Defendant told Romero he would have to hold the party at El Sombrero, another nearby banquet hall in Colton. Romero met defendant at El Sombrero at 6:30 p.m. that same day. Romero

was disappointed with the facility and asked for his money back but defendant said it was too late. El Sombrero looked like a warehouse, with no windows and a low ceiling, and was dark, hot, and muggy. Defendant promised to decorate the large room, and said the room would be air conditioned and very comfortable. It was agreed each table would have 14 chairs, linen napkins, silverware, toasting glasses, a table with cake, waiters to serve the guests a sit-down dinner, and three workers at El Imperio to direct guests to the new location. Romero felt he had no choice but to agree to holding the party at El Sombrero, since 200 to 300 people would be arriving for the party at 5:00 p.m. the following day.

When Romero and his family arrived at El Sombrero at 5:30 p.m., on August 23, 2008, defendant was not there. It was very hot. Workers were covering the tables with cloth and there were only 10 chairs per table. Food was to be served from 5:00 p.m. to 7:00 p.m. under the contract but no food was being served when Romero arrived. Also in violation of the contract terms, there were no linen napkins, no cider for the toast, no toast glasses, no salads, no flower vases on most of the tables, no flowers, and no balloons or ribbon decorations. Paper napkins and plastic cups were used. Defendant did not arrive until 6:45 p.m. She did not start serving the salads until 6:45 p.m. Bread was served instead of flour tortillas specified in the contract. Margaritas were not served.

Romero believed the value of what he received was \$4,000, rather than the \$9,000 he paid defendant. The day after Romero's party, Romero asked defendant to refund some of his money. Defendant said she could not refund the money but offered to plan another Quinceanera party for Romero's daughter. When Romero requested defendant

put the offer in writing, she became hostile and told Romero he could sue her. Several days later, Romero went to El Imperio and saw a posted notice stating that El Imperio had been shut down. When Romero drove by again, at 10:00 p.m., six days after his daughter's Quinceanera party, El Imperio was set up for a party. Romero then drove over to El Sombrero and saw people unloading deejay equipment from a truck. Romero introduced himself to Citlali Valdez and her family. While Romero hid outside, behind an open door, Romero overheard defendant tell Valdez that defendant had cancelled Romero's daughter's Quinceanera party because Romero would not pay her. Defendant then came out from behind the door and said to defendant, "What did you say?" Defendant told Valdez, "Don't listen to this guy. He's just a drunk."

Citlali Valdez

Valdez testified that in October 2007, she met with defendant at El Imperio and signed a contract to hold a Quinceanera party for her niece at El Imperio on August 30, 2008. Defendant agreed to provide waiters, invitations, music, a Quinceanera dress, and food and drinks for 300 people for \$10,500. Valdez paid defendant a \$500 deposit, with additional payments made thereafter. The last payment on the contract was made on August 7, 2008. Valdez later paid an additional \$1,800 for videos and photographs. Valdez also had to pay the photographer \$1,000 because defendant did not pay him, plus an additional \$1,300 for the photographs. Despite repeated requests, defendant did not provide a Quinceanera dress or invitations, as agreed.

When Valdez arrived at El Imperio on August 28, 2008, for a dance rehearsal, Valdez discovered a city notice on the door stating that the fire department had closed the

restaurant. Defendant did not show up for the scheduled dance rehearsal. The following day, Valdez went to defendant's home and defendant told Valdez El Imperio was closed because it did not pass a fire inspection. Therefore Valdez could not use the restaurant. Defendant said she had just found out the night before. Defendant also mentioned she did not have a permit for live music at the restaurant or an ABC license. Later in the day, defendant met Valdez at El Sombrero and said it was the best she could do for Valdez. Valdez agreed to hold the party there because there was insufficient time to make other arrangements. The guests had been told the party would be held at El Imperio. Only 120 to 150 guests of the anticipated 300 guests attended the party. The food was supposed to be served at 5:00 p.m. but was not served until 6:30 p.m. No alcohol was served, contrary to the contract, and many of the decorations, including the flowers and candles, were not provided as agreed. The hall was not well lit or air conditioned. There were no speakers, sound equipment, or lights for the band. In Valdez's opinion, defendant provided only \$5,000 in services and goods.

Andrea Torres Carbajal

On September 6, 2007, Andrea Torres Carbajal met with defendant to plan her wedding party on September 27, 2008. Carbajal signed a contract agreeing to pay defendant \$7,500 for her wedding reception, to be held at El Imperio. Carbajal made a \$500 down payment, with the balance paid in installments. Carbajal planned to have 250 guests at the reception. Carbajal and defendant met several times to plan the menu and decorations. Carbajal did not receive invitations, as agreed. Defendant claimed the

invitations were damaged in a car accident and told Carbajal she would have to provide her own invitations.

On September 20, 2008, defendant phoned Carbajal and told her Carbajal's reception could not be held at El Imperio because the city had closed down the restaurant. Defendant told Carbajal she would call her back regarding alternative plans for the reception. After a couple of days, Carbajal called defendant and asked what could be done. Defendant again said she would call back. She never did, and did not hold Carbajal's wedding reception or refund Carbajal's money (\$7,500).

Rocio Palacios

Rocio Palacios met with defendant on July 16, 2008, to plan her daughter's Quinceanera, scheduled for October 18, 2008, at El Imperio. Palacios signed a contract agreeing to pay defendant \$14,500, for a package that included decorations, food, music, pictures, cake, invitations, a dress, and a limousine. Palacios planned to have 400 guests. She made a \$500 down payment, and by October 12, 2008, had paid defendant \$9,000.

When Palacios made a payment on October 9, 2008, defendant told Palacios her party could not be held at El Imperio because of permit problems but the party could be held at El Sombrero. When on October 16, 2008, Palacios brought defendant the final payment of \$5,500, defendant told Palacios that, because the payment was late, there would be no music, pictures or limousine, and the food and decorations would have to be simpler than planned. Defendant said she could not do anything further but she was willing to schedule the party for a later date. Palacios asked for her money back.

Defendant said she no longer had the money but she could get it later from proceeds from another party for someone else. Palacios never got her money back (\$9,000).

Defendant's Testimony

Defendant testified that she had intended to fulfill the four contracts signed by Romero, Valdez, Carbajal, and Palacios (the victims). Between 2007 and when the city closed her business, defendant had catered about 50 parties and was working for the restaurant owner, Mr. Hernandez.

When she told Romero the Quinceanera could not be held at El Imperio, defendant told Romero he could cancel the party and receive a refund or find another location.

Romero agreed to hold the party at El Sombrero. Everything agreed upon for the party at El Imperio, took place at El Sombrero, including serving Margaritas at the party.

Defendant made no profit from the party because of the additional rental fees for using El Sombrero.

Defendant testified that on August 24, 2008, the Sunday after Romero's party, she told Valdez and her other clients that El Imperio was no longer available. On cross-examination, defendant stated she first found out she could no longer use El Imperio on August 21, 2008. She did not tell Romero until the afternoon on August 22, 2008.

Defendant also gave Valdez the option of getting her money back or holding the party elsewhere. Valdez decided to hold her party at El Sombrero. Defendant claimed the contract did not include centerpieces, candles, flowers, invitations, a band, lighting, speakers, a Quinceanera dress, a photographer, beer or alcohol. Defendant paid to rent El

Sombrero for Valdez. The rent exceeded defendant's profits. The rent for El Sombrero was \$5,500, \$2,500 more than El Imperio.

According to defendant, Carbajal did not receive the agreed upon invitations because Carbajal never stopped by to pick them up and, when defendant was delivering them, she got into a car accident and was unable to deliver them as planned. Defendant intended to refund Carbajal's money but did not tell Carbajal this or call her when defendant notified her other customers El Imperio was not available, because defendant did not have Carbajal's telephone number or address. Defendant had all of Carbajal's centerpieces, had ordered a cake, and had all the decorations, including table clothes, chair covers, and bows for the chairs. The food had been prepared the day before the party. Carbajal did not cancel the contract. There was no party because Carbajal did not have the money to pay the outstanding balance.

Defendant testified that Palacios also did not cancel her contract with defendant. Instead, Palacios offered defendant title to her car to pay the outstanding contract balance. But defendant could not pay for renting El Sombrero with the car. Defendant told Palacios that if she could find a house to hold the party, defendant would provide tables, chairs, tablecloths, and dinnerware for the party. Defendant had already paid for fabric, bows, centerpieces, cake, a band, and a limousine.

III

BATSON-WHEELER MOTION

Defendant challenges the trial court's rulings granting the prosecution's *Batson-Wheeler* motion and denying defendant's related motion for mistrial. Defendant asserts

that the trial court erred in rejecting her peremptory challenge to prospective Juror No. 43, because the court did not make a sincere and reasoned attempt to evaluate whether defense counsel's reasons for the challenge were nondiscriminatory.

A. Applicable Law

Both the United States and the California Constitutions prohibit the exercise of peremptory challenges based solely on group bias. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266 (*Wheeler*); *People v. Johnson* (2006) 38 Cal.4th 1096, 1098.) Instead, peremptory challenges must be based on specific bias-on individual biases related to the peculiar facts or the particular party at trial. (*Wheeler, supra*, 22 Cal.3d at pp. 274, 276-277, fn. 17; *People v. King* (1987) 195 Cal.App.3d 923, 931; see *People v. Fuentes* (1991) 54 Cal.3d 707, 713.) To do otherwise violates a party's federal constitutional right to equal protection and state constitutional right to a jury drawn from a representative cross-section of the community. (See *Batson, supra*, 476 U.S. at p. 89; *Wheeler, supra*, 22 Cal.3d at pp. 265-266, 272; *People v. Turner* (1986) 42 Cal.3d 711, 715-717; see also U.S. Const., 14th Amend.; Cal. Const., art. I, § 16.)

Although there are some variations, the analysis used to detect a constitutional violation is substantially the same whether the federal equal protection right or the state jury trial right underlies the claim of error. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 193, cert. den. *sub nom. Alvarez v. California* (1997) 522 U.S. 829; *People v. Clair* (1992) 2 Cal.4th 629, 652, cert. den. *sub nom. Clair v. California* (1993) 506 U.S. 1063.) Courts use a three-step process to determine whether a defense attorney used peremptory

challenges in an improper manner. Proof of a pattern or practice is not required because a single challenge for a discriminatory purpose is not immunized by the absence of other similar challenges. (*Johnson v. California* (2005) 545 U.S. 162, 169, fn. 5; *People v. Avila* (2006) 38 Cal.4th 491, 553.)

We begin with the presumption that defense counsel exercised the peremptory challenge on a constitutionally permissible basis. If the prosecutor makes a prima facie case of discrimination, that presumption is rebutted and the burden of proof shifts to the defense at the second stage to show, if possible, that the racial exclusion was *not* predicated on group bias. (*Johnson v. California, supra*, 545 U.S. at p. 168; *People v. Johnson, supra*, 38 Cal.4th at p. 1099.) At this step, the defense must offer a permissible race-neutral basis for exercising a peremptory challenge against that juror. (*Johnson v. California, supra*, 545 U.S. at p. 168; *People v. Johnson, supra*, 38 Cal.4th at p. 1099.) Third, the trial court must determine whether the prosecution has met the ultimate burden of proving that defense counsel engaged in purposeful discrimination. (*Johnson v. California, supra*, 545 U.S. at p. 168; *People v. Johnson, supra*, 38 Cal.4th at p. 1099.) The trial court must determine whether defense counsel's race-neutral reasons are genuine or sham. (See *People v. Fuentes, supra*, 54 Cal.3d at p. 718; see also *People v. Avila, supra*, 38 Cal.4th at p. 541.) If defense counsel cannot show an absence of purposeful discrimination, then the prosecution's prima facie showing becomes conclusive and the presumption of constitutionality is deemed to be rebutted. (*People v. Alvarez, supra*, 14 Cal.4th at p. 193.) If defense counsel does establish an absence of purposeful discrimination, the presumption of constitutionality is deemed to be reinstated,

the prosecution's *Batson-Wheeler* motion is denied, defendant's peremptory challenge is sustained, and the prospective juror is removed from the panel. (See *People v. Alvarez, supra*, 14 Cal.4th at pp. 198-199.)

On appeal, we review a trial court's ruling on the issue of purposeful racial discrimination for substantial evidence. If the trial court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, then we defer to the trial court's ability to distinguish bona fide reasons from sham excuses. (*People v. Lenix* (2008) 44 Cal.4th 602, 627; *People v. Avila, supra*, 38 Cal.4th at p. 541.)

B. Procedural Background

In order to determine whether the trial court erred in granting the prosecution's *Batson-Wheeler* motion based on race discrimination, we set out the facts as they arose at voir dire. During voir dire, defense counsel exercised five peremptory challenges. Defense counsel's first peremptory strike was against Ms. Martinez. Defense's second peremptory strike was against Mr. Santiago. Thereafter the prosecution waived his right to exercise peremptory challenges and accepted the jury as constituted. Defense counsel exercised additional peremptory challenges against Mr. Wren, Mr. Patzold, and Juror No. 43. Defense counsel made a peremptory challenge to Juror No. 43. The prosecutor then made a *Batson-Wheeler* motion on the ground defendant was systematically challenging Latino jurors. The prosecutor argued defendant had already challenged two prospective jurors who had Hispanic surnames (Martinez and Santiago), and had just challenged a third Latino juror, Juror No. 43. The court acknowledged uncertainty as to whether Juror No. 43 was Latino or Filipino.

When asked why defendant excused Juror No. 43, Santiago, and Martinez, defense counsel explained that Juror No. 43 was very soft-spoken and shy and, based on his demeanor and manner of answering voir dire questions, he did not appear to be the type of juror who would stand up for his convictions. Defense counsel said she excused Santiago because of his hunched posture and opinions regarding the burden of proof. Martinez was challenged because she appeared not to want to participate or listen. She had not responded or reacted to questions unless specifically asked and therefore defense counsel concluded Martinez did not seem fully committed to serving as a juror. When defense counsel, however, was asked to state specific examples demonstrating defense counsel's reasons for challenging Martinez and Juror No. 43, defense counsel was unable to do so. The trial court found defendant's objection to Santiago was not based on race but also found that defense counsel's reasons for excusing Martinez and Juror No. 43 were implausible, pretextual justifications.

The court suggested asking Juror No. 43 to state his ethnicity. The prosecutor indicated this was not necessary since systematically challenging prospective jurors because they appear Hispanic was discriminatory regardless of whether they were in fact Hispanic. The court did not inquire further of Juror No. 43's ethnicity. The trial court noted defense counsel could not excuse Martinez and Juror No. 43 based on a lack of leadership skills. The court further noted that defense counsel would not have reason to excuse Hispanic jurors based on the improper race-based reason that Hispanics might be more sympathetic to the victims, who were also Hispanic. The court stated that defense counsel, as a relatively new lawyer, did not appear to have had tainted or underhanded

motives when inappropriately exercising peremptories based on the jurors' lack of leadership skills or being inarticulate. The court suggested defense counsel simply may have been unaware it was not proper to exercise peremptories based on these grounds or based on race. The court concluded defense counsel had not met defendant's burden of showing that her peremptory against Juror No. 43 was not predicated on race.

The court granted the prosecution's *Batson-Wheeler* motion and, as a consequence, Juror No. 43 remained on the jury panel over defendant's objection. Following defendant's conviction, the trial court also denied defendant's motion for a mistrial motion challenging the trial court's ruling allowing Juror No. 43 to serve on the jury. Defense counsel's supporting declaration stated that it was her "understanding" that Juror No. 43 was not of Hispanic origin.

C. Discussion

Defendant contends the trial court erred in evaluating defense counsel's reasons for peremptory challenges based on an objective standard of reasonableness, instead of applying the proper standard of subjective reasonableness. (*People v. Reynoso* (2003) 31 Cal.4th 903, 925.) We disagree. The trial court properly evaluated the reasons for defendant's peremptory challenges, using the proper standard. We also conclude substantial evidence supports the court's findings that defendant's peremptory challenge to Juror No. 43 was based on race.

The prosecution met its initial burden of producing evidence sufficient to permit the trial court to draw an inference that discrimination occurred. Three of the five jurors defendant challenged had Hispanic surnames. It was reasonable to infer that, even

though defendant was Hispanic, the defense did not want Hispanics on the jury because the jurors would sympathize with the Hispanic victims. (*People v. Clark* (2011) 52 Cal.4th 856, 905-906.) Three of the four victims had relied on defendant to provide food and a banquet facility for their Quinceanera celebrations. Hispanics would likely empathize with the victims who suffered emotional and financial loss because of defendant's failure to provide the promised facility and services for their special celebrations.

There was also substantial evidence supporting the trial court's finding that defendant failed to offer a permissible race-neutral basis for exercising a peremptory challenge against Juror No. 43. Defense counsel's stated reasons were that Juror No. 43 was soft-spoken and shy, and Martinez did not seem to want to participate or listen. Defense counsel elaborated that Martinez had not responded or reacted to questions unless specifically asked, and seemed not fully committed to serving as a juror. Defense counsel also noted Martinez appeared to lack leadership abilities. Yet defense counsel was unable to state any specific instances in which Martinez had demonstrated these shortcomings. The trial court appropriately concluded these reasons were not valid reasons for removing Martinez and Juror No. 43 from the jury. Because defense counsel failed to show an absence of purposeful discrimination, the prosecution's prima facie showing of discrimination became conclusive and the presumption of constitutionality was rebutted. (*People v. Alvarez, supra*, 14 Cal.4th at p. 193; *People v. Clair, supra*, 2 Cal.4th at p. 652; see *Wheeler, supra*, 22 Cal.3d at p. 282.)

Defendant argues the prosecution's claim that defendant was systematically exercising peremptory challenges against Hispanics was undermined by the court not knowing whether Juror No. 43 was Hispanic. The trial court acknowledged that, although Juror No. 43 had a Spanish surname, the court did not know whether Juror No. 43 was Latino or Filipino. The uncertainty as to whether Juror No. 43 was Latino is not dispositive here because Hispanic-surnamed jurors are a cognizable class under *Batson* and *Wheeler*, when it is unknown at the time of the challenge whether a prospective juror with a Spanish surname is actually Hispanic. (*People v. Davis* (2009) 46 Cal.4th 539, 584; *People v. Trevino* (1985) 39 Cal.3d 667, 686.)

We likewise reject defendant's contention that the trial court erred in denying her motion for mistrial, which was based on the trial court granting the prosecution's *Batson-Wheeler* motion and leaving Juror No. 43 on the jury panel. On appeal, a denial of a mistrial motion is reviewed under the abuse of discretion standard. (*People v. Williams* (1997) 16 Cal.4th 153, 210.) "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 565, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Defendant was required to show that the trial court erred in leaving Juror No. 43 on the jury and this was prejudicial to the outcome of his case.

In ruling on defendant's motion for mistrial, the trial court found that defendant's justifications proffered by defense counsel for the peremptory challenges were a pretext

for defendant's true motive to remove jurors based on their Hispanic ethnicity. The court also found that granting a mistrial would inappropriately award defendant for discriminating against Hispanics, and there was no reason to believe that the selected jurors would not be fair and impartial.

Defendant argues her mistrial motion should have been granted on the ground that erroneously granting the prosecution's *Batson-Wheeler* motion led defense counsel to believe she could not exercise any additional peremptory challenges. As discussed above, the trial court appropriately granted the prosecution's *Batson-Wheeler* motion and defendant has not shown that the trial court improperly dissuaded defense counsel from exercising proper, neutral-based peremptory challenges.

Defendant further asserts her motion for mistrial should have been granted on the ground that, after the trial court granted the prosecution's *Batson-Wheeler* motion, the court gave the prosecution an additional peremptory challenge as a sanction for asserting the improper peremptory challenge against Juror No. 43. But giving the prosecution an additional peremptory challenge, instead of dismissing the panel or imposing monetary sanctions, was a proper remedy within the trial court's discretion, particularly since, "[o]n balance, it seems more appropriate, and consistent with the ends of justice, to permit the complaining party to waive the usual remedy of outright dismissal of the remaining venire." (*People v. Willis* (2002) 27 Cal.4th 811, 823; see also *People v. Muhammad* (2003) 108 Cal.App.4th 313, 321-323.)

Defendant argues the trial court was required to grant her motion for mistrial on the ground that leaving Juror No. 43 on the panel after defense counsel had exercised a

peremptory challenge against the juror tainted the juror and other jurors who were aware of defendant's request to remove the juror from the panel. Defendant has not established that Juror No. 43 or the other jurors were actually tainted, such that they could not be fair and impartial jurors. No juror bias is apparent from the record. In giving deference to the trial court's determination that Juror No. 43 and the other jurors could be fair and impartial, we reject defendant's contention that the trial court abused its discretion in denying her motion for mistrial.

IV

SUFFICIENCY OF EVIDENCE

Defendant contends there was insufficient evidence to support her four convictions for grand theft by false pretenses (§ 487, subd. (a)). “The standard of review for sufficiency of the evidence has been repeatedly stated. “[T]his inquiry does not require a court to ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’ [Citation.] Instead the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.]’ [Citation.] We examine the record in a light most favorable to the prosecution to determine if any trier of fact could rationally find the elements of grand theft.” (*People v. Gentry* (1991) 234 Cal.App.3d 131, 138.) “Simply put, if the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citations.]” (*People v. Farnam* (2002) 28 Cal.4th 107, 142.)

“Grand theft by false pretenses “consists of three elements: (1) the making of a false pretense or representation by the defendant, (2) the intent to defraud the owner of his property, and (3) actual reliance by the owner upon the false pretense in parting with his property.” [Citation.]’ [Citation.]” ““It is well established that criminal intent may be inferred from the general circumstances surrounding the transactions, and that other similar transactions carried on by a defendant are sufficient to prove guilty knowledge and criminal intent.” [Citations.]’ [Citation.]” (*People v. Gentry, supra*, 234 Cal.App.3d 131, 138; see also § 532.)

The jury found defendant guilty of grand theft under section 487, subdivision (a), which is the unlawful taking of another’s property with the intent permanently to deprive the owner of the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258; *People v. Creath* (1995) 31 Cal.App.4th 312, 318.) Defendant was prosecuted under the theory of theft by false pretenses. Defendant argues there was insufficient evidence of intent to defraud the victims. She claims the evidence established that her ability to perform the catering contracts was frustrated or made impossible by the city and fire department’s unexpected closure of El Imperio.

Under contract law, the obligation to perform under a contract is excused by impossibility, impracticability, or frustration of purpose. “A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.’ [Citation.]” (*Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289, 293.) This does not mean that a party can avoid performance simply because it is more costly than anticipated or results in a loss. (*Ibid.*)

Impracticability does not require literal impossibility but applies when performance would require excessive and unreasonable expense. (*City of Vernon v. City of Los Angeles* (1955) 45 Cal.2d 710, 717.) Similarly, where performance remains possible, but the reason the parties entered the agreement has been frustrated by a supervening circumstance that was not anticipated, such that the value of performance by the party standing on the contract is substantially destroyed, the doctrine of commercial frustration applies to excuse performance. (*Lloyd v. Murphy* (1944) 25 Cal.2d 48, 53.) “In applying the frustration excuse courts look to see if “‘the *fundamental reason of both parties* for entering into the contract has been frustrated,’ [citations].” (*Waegemann v. Montgomery Ward & Co., Inc.* (9th Cir. 1983) 713 F.2d 452, 454.)

Here, there was substantial evidence from which the jury could reasonably find that defendant intended to defraud the victims of their money, and the closing of El Imperio by the city and fire department did not excuse defendant’s criminal acts of taking the victim’s money under false pretenses, when she never intended to comply fully with the terms of the contracts. A reasonable inference could be made that defendant knew all along, or at least when accepting payments from the victims, that the victims’ parties would not be held at El Imperio. It also could be reasonably inferred from the evidence that, when defendant entered into the contracts with the victims, and thereafter when she accepted payments from the victims, she knew she did not have a business license to conduct parties at El Imperio. The previous owner, Robert Hernandez, had a business license for El Imperio, which expired on December 31, 2007. Defendant and her husband applied for a business license in February 2008, as owners of El Imperio. Their

application states that, if it was not approved within 90 days, the application became void. On August 25, 2008, the city posted a “correction notice” on El Imperio, notifying the owners that they were required to obtain a business license and could not conduct any business at El Imperio until doing so. This indicates that the application was not approved within 90 days and defendant never obtained the necessary business license, or it was revoked.

The absence of a business license would have precluded defendant from holding the victims’ parties at El Imperio. A reasonable inference could be made that defendant promised to cater the victims’ parties at El Imperio, knowing she did not have a business license allowing her legally to do so. For this reason, she may have planned all along not to hold the parties at El Imperio and then, at the last minute, offer to hold them at El Sombrero, a far less desirable location.

Additional evidence of theft by false pretenses as to Romero included defendant’s testimony that she first found out about the restaurant closure on August 21, 2008, yet did not tell Romero until the afternoon of August 22, 2008, the day before Romero’s party. Yet on August 21, 2008, Romero signed a contract for margaritas and paid defendant an additional \$500 for the margaritas. Defendant made no mention that the party could not be held at El Imperio. Furthermore, in addition to not providing many of the catering services agreed to, defendant did not even provide the margaritas at the alternative party site. When Romero stopped by El Imperio the weekend after his party, he discovered it was set up for a party and suspected defendant had defrauded another customer. Romero went to El Sombrero and confirmed his suspicions. Defendant had forced another

customer, Valdez, to change the venue of her party from El Imperio to El Sombrero at the last minute. Romero further heard defendant lie to Valdez that defendant had cancelled Romero's party because he had not paid her.

As to Valdez, a reasonable inference could also be made that, when defendant promised Valdez a Quinceanera dress and invitations as part of the contract package, defendant never intended to actually provide them. Defendant continually made excuses to Valdez for not providing either the dress or invitations, even though they were included in the package. There was also evidence that, when defendant contracted to provide Valdez with photos and a video for an additional \$1,800, and received payments for these items on August 7, 2008, and August 30, 2008, defendant did not intend to pay the photographer, resulting in Valdez being forced to pay the photographer \$1,000. In addition, there was evidence that, contrary to what defendant had promised Valdez as part of the package, there was no equipment for entertainment or lighting, no DJ, and the band played only 40 minutes, which was less time than agreed. There was also no liquor at the party, even though defendant agreed to provide it as part of the package, according to Valdez. Defendant later told Valdez on August 28, 2008, the day before the party, that she did not have a liquor license or a permit for live music.

Carbajal also never received any invitations, even though defendant agreed to provide them as part of the contract package. A reasonable inference could be made that, when defendant entered into the contract and accepted payments from Carbajal, defendant never intended to provide the invitations.

As to Palacios, there was evidence that on October 9, 2008, defendant told Palacios she needed to pay the outstanding balance soon but, when Palacios attempted to pay the \$5,500 balance a week later on October 16, 2008, defendant told her the final payment was too late. Palacios had already paid defendant \$9,000. A reasonable inference could be made that defendant used the late payment as an excuse to back out of holding the party at El Imperio and not provide the items included in the contract package, such as music, photos, limousine service, and the agreed upon decorations. The jury could find that, when defendant led Palacios to believe these items were part of the contract package, defendant never intended to actually provide them, yet accepted \$9,000 in payments from Palacios.

An intent to defraud could also be inferred from defendant's refusal to refund any of the victims' money, which she claimed to have spent before notifying them that their parties could not be held at El Imperio. Defendant persuaded Romero and Valdez to agree to holding their parties at an alternative inferior location, El Sombrero, under the false promise that defendant would provide the same services and catering at El Sombrero as originally promised. The victims did not receive anywhere near what defendant had agreed to provide under their contracts, as if defendant had not fully prepared for the parties and had not intended to provide all of the services she had originally promised. Defendant then refused to refund any of Romero and Valdez's money. Even worse, Carbajal and Palacios received nothing under their contracts, yet received no refund of any of their money (\$7,500 as to Carbajal and \$9,000 as to Palacios).

We conclude the totality of the evidence was sufficient to support a finding that defendant was operating an illicit scheme of entering into contracts by promising to cater parties at El Imperio and then, at the last minute, notifying her clients that the restaurant was unavailable and offering to hold the parties at El Sombrero. By this time, defendant had taken the victims' money. Defendant argues there was evidence she was unable to comply with the contracts because the restaurant was unavailable but a reasonable inference could be made that defendant never intended to hold the parties at El Imperio or fully perform the terms of the contracts. There was more than sufficient evidence that defendant made a false pretense or representation to the victims and defendant intended to defraud the victims of their money. The general circumstances surrounding the victims' similar transactions with defendant further supported defendant's convictions for committing grand theft by false pretenses. (*People v. Gentry, supra*, 234 Cal.App.3d at p. 138.)

V

INSTRUCTION ON CONTRACT DEFENSES

Defendant contends the trial court erred in not instructing sua sponte on the contract defenses of frustration of purpose and failure of consideration (BAJI Nos. 10.80, 10.81, and 10.82). Defendant argues that, even though she did not request these instructions, the court was required to give them because there was evidence that defendant's failure to perform three of the catering contracts was because the city closed down El Imperio. There was also evidence defendant did not comply with the terms of the fourth contract because Palacios failed to pay the agreed upon consideration.

In general, a trial court has a sua sponte duty to instruct on a defense ““only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant’s theory of the case.’ [Citation.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Restatement Second of Contracts, section 265, defines the frustration of purpose defense as follows: “Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.” In applying the frustration excuse courts look to see if “the *fundamental reason of both parties* for entering into the contract has been frustrated,” *Cutter Laboratories, Inc. v. Twining* (1963) 221 Cal.App.2d 315, 324 (emphasis in original). *See also, e.g., Lloyd v. Murphy* (1944) 25 Cal.2d 48, 52-53 (quoting 6 Williston, Contracts (rev. ed. 1938) § 1955, pp. 5485-5487, for the proposition that applicability of the doctrine depends on the near total destruction of ““the purpose for which, in the contemplation of both parties, the transaction was entered into””); *20th Century Lites, Inc. v. Goodman* (1944) 64 Cal.App.2d Supp. 938, 943 (the doctrine applies in cases of frustration of “the primary and principal purpose” for which the contract was made).

Here, frustration of purpose may have been a defense to a breach of contract claim but it was not a defense to the crime of theft by false pretenses. The crime of theft by false pretenses was committed at the time the contracts were executed and when defendant received money from the victims. This occurred as to all four victims before

El Imperio was closed down. There was substantial evidence showing that, regardless of whether defendant was ultimately able to comply fully with the terms of the contracts, defendant took the victims' money under false pretenses and did not return the money. Therefore the trial court did not have a sua sponte duty to instruct on the contract defense of frustration of purpose. In fact, such an instruction arguably would have been inappropriate and confusing for the jury. We note that the only authority defendant cites in support of her contention that instruction on the frustration of purpose defense was required, is civil case law on breach of contract. Defendant has not cited any criminal case law in which the defense is relied upon in refuting criminal theft charges based on false pretenses.

We also conclude the trial court did not have a sua sponte duty to instruct on the defense of a failure of consideration. Palacios was the only victim who did not pay the full amount agreed to under her contract. Palacios did, however, pay defendant \$9,000, and the jury could reasonably find that this was done under false pretenses. Palacios also offered to pay the remaining balance of \$5,500, although under the terms of the contract, she should have paid that amount sooner. Nevertheless, by the time Palacios attempted to make the final payment, defendant had already committed the crime of theft by false pretenses, when she executed the catering contract and received \$9,000 from Palacios under false pretenses. The trial court was therefore not required to give sua sponte instruction on the contract defense of lack of consideration.

Furthermore, if there was any error in not instructing sua sponte on the contract defenses of frustration of purpose and lack of consideration, the error was harmless.

Even if the trial court had instructed the jury on the contract defenses, it is not reasonably probable the jury would have reached a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The convictions reflect that the jury found that defendant's business dealings with the victims were a sham and deceitful. The jury likely would have reached the same conclusion even if the instructions were given.

VI

DEDUCTING CONTRACT EXPENDITURES

Defendant argues that, because she was charged with theft by false pretenses based on entering into contracts she did not intend to perform, the trial court should have instructed the jury to deduct from the amount the victims paid defendant, the value of defendant's expenses and services incurred in complying with the contract terms.

Defendant asserts that in most instances the value of defendant's material and labor costs exceeded the amount of the payments received from the victims. Defendant concludes that deducting her contract expenses from the amount received from the victims would have resulted in a negative balance or a minimal loss that was less than the threshold amount required for a grand theft conviction.

We conclude the trial court was not required to instruct the jury *sua sponte* on deducting defendant's contract expenses from the amount the victims paid defendant. Such an instruction would have been inappropriate since the amount defendant spent was irrelevant to whether she took the victims' money under false pretenses. Regardless of whether defendant ultimately spent more than she took from the victims, she committed grand theft by false pretenses when she took in excess of \$950 from the victims with

intent to defraud. (§ 487, subd. (a).) The evidence shows defendant received in excess of \$950 from each of the four victims. Defendant received \$5,000 from Romero; \$9,000 from Valdez; \$7,500 from Carbajal; and \$9,000 from Palacios. Even if defendant ultimately spent more than she received from the victims, this would not have converted the unlawful act of theft by false pretenses to a legal act. There was therefore no error in the trial court not instructing the jury to deduct defendant's actual expenses from the amounts she received from the victims.

VII

ERRONEOUS INSTRUCTION ON GRAND THEFT AMOUNT

Defendant correctly asserts that the trial court erroneously instructed the jury that the threshold amount for a grand theft conviction was at least \$400, rather than \$950, under the current version of section 487, subdivision (a). At the time defendant committed the grand theft crimes in 2007 and 2008, the threshold amount under section 487, subdivision (a), was at least \$400. It was not until 2010, that the Legislature increased the threshold amount for grand theft under subdivision (a) of section 487, from \$400 to \$950. (Stats. 2010, ch. 693, § 1 (Assem. Bill No. 2372, eff. Jan. 1, 2010).)

In *People v. Wade* (2012) 204 Cal.App.4th 1142, 1152, the court held that the Legislature intended the amendment to section 487 increasing the threshold amount be applied retroactively, because there was no express statement to the contrary. This retroactive effect is because the increase in the threshold amount to \$950 decreased the punishment for a theft offense by requiring a higher threshold amount. When the Legislature amends a statute to decrease punishment after the charged crime has been

committed but before final judgment, the new statute applies. (*In re Estrada* (1965) 63 Cal.2d 740, 744.)

In the instant case, defendant was tried and the final judgment was entered in 2011, after the amendment increasing the threshold amount. The trial court therefore should have instructed the jury that the threshold amount for a grand theft conviction was at least \$950, the amount required under the statute in effect at the time of trial.

Defendant argues this instructional error was prejudicial because the jury could have based its convictions on only one of the victim's payments, some of which were under \$950, or the jury could have concluded the victims' actual losses, when deducting the value received from defendant, were less than \$950. We conclude there was no prejudicial error. As explained above, the jury was not required to deduct the value of goods and services received from defendant from the amount she received from the victims under false pretenses. In addition, it is highly unlikely that, had the jury been instructed the threshold amount was \$950, rather than \$400, the jury would have found defendant not guilty of grand theft. It was undisputed defendant received \$5,000 from Romero; \$9,000 from Valdez; \$7,500 from Carbajal; and \$9,000 from Palacios. Since defendant's convictions reflect the jury found defendant committed grand theft by taking in excess of \$400 from each victim based on false pretenses, it is probable that the jury would have likewise found that defendant took in excess of \$950 from the victims by false pretenses. The erroneous instruction on the threshold amount for a grand theft conviction was therefore harmless error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

VIII
DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

KING
Acting P. J.

MILLER
J.