

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MCKINLEY KINNARD KEKONA,

Defendant and Appellant.

E061905

(Super.Ct.No. FSB1303769)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed.

Joshua M. Mulligan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr. and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

A jury convicted defendant and appellant, McKinley Kinnard Kekona, of the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a), count 1), but acquitted him of receiving a stolen vehicle (Pen. Code, § 496d, subd. (a), count 2). The trial court found defendant had one prior strike conviction (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and one prison prior (Pen. Code, § 667.5, subd. (b)), and sentenced defendant to seven years in prison.

On this appeal, defendant contends the trial court prejudicially erred in failing to instruct the jury *sua sponte* on mistake of fact. (CALCRIM No. 3406.) He also claims his trial counsel rendered ineffective assistance in failing to request the instruction, and he has petitioned this court for a writ of habeas corpus on the same ground. (*In re McKinley Kekona*, case No. E063770.)<sup>1</sup> For the reasons we explain, we affirm the judgment.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. Prosecution Evidence

Two days after Jesika Gastelum reported her 1996 tan Honda Accord stolen, a police officer received a sheriff's dispatch regarding a stolen vehicle in the area where he was patrolling. The officer made visual contact with the vehicle and confirmed that it matched the description of Gastelum's vehicle. The officer followed the vehicle to the

---

<sup>1</sup> We ordered the writ petition considered with (but not consolidated with) this appeal for the purpose of determining whether an order to show cause should issue. We will rule on the petition by separate order.

valet drop-off area at the San Manuel Indian Bingo & Casino and pulled the vehicle over. A female passenger exited the front passenger seat of the vehicle and disappeared into the casino. The female passenger was never identified or arrested.

The officer ordered the driver (defendant) out of the vehicle and placed him in handcuffs without incident. The officer inspected the car and found the engine running without a key in the ignition. At trial, the officer testified that, based on his law enforcement experience, a shaved key may have been used to start the vehicle. Once the vehicle's ignition had been bypassed, the shaved key may have been discarded. No key was ever found, and the officer found no key on defendant. Gastelum testified that she did not give anyone permission to drive her car. When the vehicle was returned to Gastelum, the windshield was cracked and the ignition was in an unusual position, although Gastelum was able to place her key in the ignition and start the car.

#### *B. Defense Evidence*

Defendant did not testify, and the defense presented no other affirmative evidence. The defense claimed defendant was not guilty of unlawfully taking or driving Gastelum's vehicle because the prosecution did not show that defendant intended to deprive Gastelum of possession of or title to her vehicle. The defense also claimed that defendant was not guilty of receiving stolen property because there was no evidence he knew Gastelum's vehicle was stolen.

### C. *Jury Question*

After the matter was submitted to the jury, the jury asked: “Does the defendant have to have knowledge that the car was a stolen car to be guilty of count 2? Please elaborate.” Shortly after the trial court responded yes, the jury acquitted defendant of the count 2 charge of receiving a stolen vehicle, but it found defendant guilty in count 1 of unlawfully driving or taking a vehicle.

## III. DISCUSSION

### A. *The Trial Court Did Not Have a Duty to Instruct on Mistake of Fact Sua Sponte*

Defendant contends the trial court prejudicially erred in failing to instruct the jury on the defense of mistake of fact sua sponte.

In criminal proceedings, “a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury’s understanding of the case. [Citation.] ‘A trial court’s duty to instruct, sua sponte, on particular defenses arises ““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. Martinez* (2010) 47 Cal.4th 911, 953.) Substantial evidence of a defense is evidence, which, if believed, would be sufficient for a reasonable jury to find reasonable doubt of the defendant’s guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) “Doubts as to the sufficiency of the evidence should be resolved in the accused’s favor.” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) However, “[a] jury instruction need not be given whenever *any* evidence is

presented, no matter how weak. [Citation.] Rather, the accused must present ‘evidence sufficient to deserve consideration by the jury, i.e., evidence from which a jury composed of reasonable men could have concluded that the particular facts underlying the instruction did exist. [Citation.]’” (*People v. Strozier* (1993) 20 Cal.App.4th 55, 63.)

“A ‘mistake of fact’ defense negates an element of the charged crime because it disproves criminal intent. (Pen. Code, § 26, par. Three; . . .)” (*People v. Givan* (2015) 233 Cal.App.4th 335, 345.) A mistake of fact defense “requires, at a minimum, an actual belief ‘in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act . . . .’ [Citations.]” (*People v. Lawson* (2013) 215 Cal.App.4th 108, 115 [Fourth Dist., Div. Two].) Mistake of fact is an affirmative defense in which the defendant bears the burden of proof. (*In re Jennings* (2004) 34 Cal.4th 254, 280.) Specific intent crimes, such as a violation of Vehicle Code section 10851, subdivision (a)<sup>2</sup> (*People v. Howard* (1997) 57 Cal.App.4th 323, 327), require only an actual mistaken belief, not a reasonable one (*People v. Lawson, supra*, at p. 115).

Courts do not have a duty to instruct on mistake of fact sua sponte “even if substantial evidence supports the defense . . . provided the jury is properly instructed on the mental state element of the charged crime.” (*People v. Lawson, supra*, 215 Cal.App.4th at p. 117.) Here, the jury was properly instructed on the mental state

---

<sup>2</sup> Vehicle Code section 10851, subdivision (a) makes it a crime for “[a]ny person [to] drive[] or take[] a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . .”

element of violating Vehicle Code section 10851, subdivision (a). The jury was given CALCRIM No. 1820, which instructed that, in order to convict defendant of the crime, the jury had to find “he intended to deprive the owner of possession or ownership of the vehicle for any period of time.” Because the jury was properly instructed on the mental state element of the crime, the court was not required to instruct the jury on mistake of fact sua sponte.

Furthermore, defendant did not testify and did not present any other evidence to support the defense theory that he actually but mistakenly believed he or his unknown female companion had Gastelum’s consent to operate her vehicle. Thus, there was insufficient evidence to support an instruction on mistake of fact.

Defendant argues the trial court had a duty to instruct on mistake of fact sua sponte because such an instruction would not have negated the intent required to violate Vehicle Code section 10851, subdivision (a). He claims the crime *has no mental state or intent element* because, “any time a person drives a car belonging to somebody else they intend [to] temporarily deprive the owner of possession of the vehicle,” and he claims that reasonable jurors could have interpreted CALCRIM No. 1820 in such a way that “negates the *mens rea* of the crime entirely.” We disagree. A violation of Vehicle Code section 10851, subdivision (a) is a specific intent crime (*People v. Howard, supra*, 57 Cal.App.4th at p. 327), and CALCRIM No. 1820 clearly instructed the jury that in order to convict defendant of unlawfully taking or driving Gastelum’s vehicle, it had to

conclude he *intended* to deprive Gastelum of title or possession of her vehicle, without her consent.

Defendant further argues that, based on CALCRIM No. 1820, the jury could have convicted him of the offense even if it believed he did not know Gastelum's vehicle was stolen. We agree, because *knowledge* is not an element of unlawfully driving or taking a vehicle. (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574.) Instead, the defendant must have *intended* to deprive the vehicle's owner of title or possession, for any length of time, and this intent may be inferred from all the facts and circumstances of the particular case. (*People v. Green* (1995) 34 Cal.App.4th 165, 181.) Here, the jury could have properly convicted defendant in count 1 *without concluding* he knew Gastelum's vehicle was stolen. Substantial evidence shows defendant intended to deprive Gastelum of possession or title of her vehicle without her consent, because he was driving the vehicle without a key in the ignition, the ignition appeared to have been tampered with, there was a crack in the windshield, and Gastelum testified she did not give anyone permission to take or drive her car.

Defendant also relies on *People v. Russell* (2006) 144 Cal.App.4th 1415 for the proposition that courts have a duty to instruct on mistake of fact sua sponte, where the defendant is relying on such a defense, or if there is substantial evidence in support of the defense. As this court explained in *Lawson*, however, "*Russell* . . . is apparently no longer good law to the extent it held that the trial court had a duty to instruct sua sponte on the defense of mistake of fact" (*People v. Lawson, supra*, 215 Cal.App.4th at p. 118,

italics omitted), as a mistake of fact defense only negates the intent element of the crime. In concluding that *People v. Anderson* (2011) 51 Cal.4th 989, which held that trial courts do not have a duty to instruct sua sponte on the defense of accident, applied “with equal force to the defense of mistake of fact” (*People v. Lawson, supra*, at p. 117), the *Lawson* court explained that a “trial court’s sua sponte instructional duties do not apply to defenses that serve only to negate the mental state element of the charged offense when the jury is properly instructed on the mental state element . . .” (*id.* at p. 119; *People v. Hussain* (2014) 231 Cal.App.4th 261, 269-270, fn. 4 [agreeing with *Lawson* that *Russell* is no longer good law on this point]).

In any event, the failure to instruct on mistake of fact was harmless. “Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . . [Citation.]’ [Citation.] Under this standard, a conviction ‘may be reversed in consequence of this form of error only if, “after an examination of the entire cause, including the evidence” [citation], it appears “reasonably probable” the defendant would have obtained a more favorable outcome had the error not occurred [citation].’” (*People v. Hanna* (2013) 218 Cal.App.4th 455, 462-463.)

Defendant points out that the “core” of his defense, and his trial counsel’s closing argument, was that he actually but mistakenly believed he had permission to drive Gastelum’s vehicle. But as discussed, CALCRIM No. 1820 fully and properly instructed the jury on the intent element of unlawfully driving or taking a vehicle. In light of this

instruction, it was unnecessary to further instruct the jury on mistake of fact, specifically, that if the jury found defendant actually believed Gastelum's vehicle had not been stolen and he had Gastelum's permission to drive it, he was not guilty in count 1. Because the jury was fully and properly instructed on the mental state element of the crime, it is not reasonably probable defendant would have realized a more favorable result had a mistake of fact instruction been given.

*B. Defendant's Ineffective Assistance Claim is Without Merit*

Defendant next claims his trial counsel provided ineffective assistance of counsel in failing to request a mistake-of-fact instruction. He argues the failure to request the instruction was prejudicial because it was reasonably probable he would have been acquitted of the unlawful taking charge in count 1 had the jury been instructed on mistake of fact.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.

(*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

Defendant has failed to demonstrate either that his counsel rendered ineffective assistance in failing to request a mistake-of-fact instruction, or that he was prejudiced by counsel's omission. As discussed, CALCRIM No. 1820 properly instructed the jury on the intent element of unlawfully taking or driving a vehicle. In light of CALCRIM No. 1820, it was reasonable for trial counsel not to request a mistake-of-fact instruction. Further, and for the reasons explained, it is not reasonably probable that defendant would have realized a more favorable result in count 1, either by being acquitted of the charge or by being convicted of the lesser included offense of attempted unlawful driving or taking a vehicle, had a mistake-of-fact instruction been given. CALCRIM No. 1820 was given, defense counsel argued, and the jury rejected defendant's mistake-of-fact defense.

#### IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.