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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILIP RON FELIX,

Defendant and Appellant.

F067579

(Super. Ct. No. BF127723A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Gomes, J. and Kane, J.

A jury convicted appellant Philip Ron Felix on two counts of diversion of construction funds (counts 4 & 10/Pen. Code, § 484b).<sup>1</sup> On July 2, 2013, the court suspended imposition of sentence and placed him on probation for five years.

On appeal, Felix contends the court committed instructional error. We affirm.

### **FACTS**

In 2004, Steven Friend was retired and living in a condominium in Long Beach, California with his wife. In June 2004, the Friends received a notice from the City of Long Beach informing them that the city was going to acquire their condominium through eminent domain. In early November 2004, they received the proceeds from the sale of their condominium. After paying their debts, they were left with \$112,000 and they used part of these proceeds to buy a 1.52 acre lot in Bodfish, near Lake Isabella in Kern County. The Friends also were offered a 2,000 square foot, prefabricated house for \$67,000 to put on the lot. However, the house was large for a retirement house so they looked in the phonebook for a general contractor to build them one and wound up contacting Felix in Long Beach. The Friends told Felix they had \$60,000 with which to build a house and no more because they were on a fixed income. Felix told them he might be able to do something for them but first he wanted to see their lot.

In mid-to-late November 2004, Felix met with the Friends and saw the lot. He was so impressed with it that Felix asked the Friends to look for other properties for him to develop because Felix was looking to move into a new market area and he wanted to use the Friends's house as a showcase house. He also agreed to build the Friends a house for \$60,000, which included the materials, labor and the other costs of construction. The agreement also provided that, for tax purposes, Felix would complete the house by the end of 2005.<sup>2</sup> At Felix's request the Friends wrote a check to a title company on a seven-

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> According to the Friends, they had a year to buy a comparable property in order to carry over the tax basis on their condominium to the new property.

and-a-half-acre lot in Felix's name because Felix was going to purchase and develop the lot.

In early 2005, Felix told the Friends that a crew of workers was going to begin working on the property and he asked them to make arrangements to house them. The Friends bought three trailers for a total cost of \$6,000 with the understanding that this money was part of the contract price for building their house. One trailer was to be used as a bunkhouse, another as a kitchen and the third one was for the job boss. Although the Friends were shown a model of the house Felix was going to build for them, they were never shown blue prints or drawings of the house.

On March 18, 2005, at Felix's request, the Friends gave him a \$3,000 check as a down payment.

On May 3, 2005, at Felix's request, the Friends gave Felix's son, Terrence, two checks for \$5,000 each. Felix stated that the money would be used to buy materials.

The Friends next met with Felix on May 30, 2005. No work was performed on the Friends's lot and no materials were delivered to them by that date. Nevertheless, Felix asked the Friends for another \$10,000 for building materials. The Friends gave Felix two checks for \$5,000 each.

After this last meeting, the Friends would call Felix weekly regarding the progress on their house and Felix would tell them he was working on something else and would get to it the following month. Additionally, the Friends would visit the lot but they never saw any workers using the trailers.

On July 30, 2005, during a meeting in the Lake Isabella area, Felix told the Friends that he was going to start work on their lot in a couple of months and, at his request, they gave him a check for \$1,500 for building permits and a check for \$5,000 for school taxes and fees.

On August 12, 2005, Felix, again, met with the Friends in the Lake Isabella area. No work had yet been performed on the lot nor had any materials been placed there.

Nevertheless, Felix proposed to the Friends that they split the lot, build a second house on one part, and sell the second house to help finance the original house. Felix also mentioned that there was a prospective buyer and requested \$3,750. The Friends agreed to the proposal and gave Felix a check for \$3,750 written to International Design Services, Inc., a company owned by Felix's wife.

By October 21, 2005, there still had not been any work done on the lot nor any materials delivered there. On that date, during a meeting in the Lake Isabella area with Felix and his wife, the Friends expressed their concern that they were running out of time with respect to the "tax issue." Felix mentioned something about needing special equipment for concrete work and requested an additional \$3,900. The Friend's gave Felix a check for that amount made out to Felix International, Inc., a company owned by Felix's son.

On November 9, 2005, the Friends met with Felix and his wife in the Lake Isabella area. No building materials had been delivered nor equipment moved to the Friends's lot by that date and the trailers remained unused. When the Friends asked about the lack of materials and equipment, Felix's wife stated that they would provide interior decoration and furnishings for the new house because the delay caused the Friends to miss the 12-month deadline for moving the tax base from their condo to their new property. Additionally, Felix told them that the project had gotten bigger and more lavish, that this compensated for the delay, and that the project would get underway soon. Felix also asked the Friends for an additional \$6,000 for concrete forms. The Friends gave Felix a check in that amount made out to Felix International, Inc.

On November 22, 2005, the Friends met with Felix in the Lake Isabella area and informed him that they were running out of money. Felix told them he was going to start the project soon, and he asked for an additional \$1,000 for concrete forms claiming they were more expensive than he had anticipated. The Friends gave Felix a \$1,000 check made out to Felix International, Inc. and they told Felix that was their last thousand

dollars. Felix never returned to Lake Isabella after that day. He also never delivered building materials, equipment, or laborers to the Friends's lot.

The Friends subsequently made several unsuccessful attempts to contact Felix at his business office in Long Beach. They also called Felix at least once a week and managed to talk to him about once a month. During those conversations Felix told the Friends he had other projects that were paying money and he had to complete them before he could work on the Friends's project.

In 2008, the Friends filed a complaint against Felix with the Contractor's State License Board. However, Felix never refunded any money to the Friends.

### **DISCUSSION**

The court instructed the jury on the offense of diversion of construction funds as follows:

“To prove that the defendant is guilty of [diversion of construction funds], the People must prove that, one, the defendant received money for the purpose of obtaining or paying for services, labor, materials, or equipment; two, the defendant willfully failed to apply such money for such purpose either by, A, willfully fail[ing] to complete the improvements for which funds were provided; or, B, willfully fail[ing] to pay for services, labor, materials, or equipment provided incident to such construction; three, the defendant wrongly diverted the funds [for] a use other than that for which the funds were received; and, four, the amount of the funds diverted was more than \$1,000.”

Felix cites *People v. Butcher* (1986) 185 Cal.App.3d 929, 937-938 (*Butcher*), to contend that the offense of diversion of construction funds has a causation element, i.e., a violation of section 484b requires proof that the diversion of funds was a cause of the failure to complete the construction project or failure to pay for the associated labor, materials or equipment. Thus, according to Felix, the court prejudicially erred by its failure to instruct the jury on this element. We reject these contentions.

“A trial court has a sua sponte duty to instruct the jury on the essential elements of a ... charged offense [citations].” (*People v. Mil* (2012) 53 Cal.4th 400, 409.) “[A]n

instructional error that improperly ... omits an element of an offense ... generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution.’ (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) Instead, an erroneous instruction that omits an element of an offense is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18. (*Neder v. United States* (1999) 527 U.S. 1, 15 (*Neder*); *People v. Prieto* (2003) 30 Cal.4th 226, 256.) In general, the *Chapman* test probes ‘whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” [Citations.]’ (*Neder*, at pp. 15-16.) The high court in *Neder* analogized instructional errors that arguably prevent the jury from finding an element of an offense to the erroneous admission or exclusion of evidence. (*Id.* at pp. 17-18.) In such cases, ‘the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?’ (*Id.* at p. 18.)” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 662-663.)

There is a split in authority on whether causation is an element of a violation of section 484b. In *People v. Worrell* (1980) 107 Cal.App.3d 50, the Third District Court of Appeal held that there is no requirement that the diversion cause harm to the provider of funds to the defendant. (*Id.* at pp. 54-55.) However, in *Butcher, supra*, 185 Cal.App.3d 929 the Third District Court of Appeal reversed itself in concluding “that section 484b is not violated unless the wrongful diversion is a cause of the failure to complete the project or defray its expenses.” (*Id.* at p. 940.)

In *People v. Williams* (2013) 218 Cal.App.4th 1038, this court stated,

“Section 484b is a general intent crime. [Citation.] The elements are satisfied when a wrongful diversion is the cause of the contractor’s failure to complete the agreed-upon work or failure to pay for the associated labor, materials, or equipment. (*Ibid.*) Stated differently, ‘*liability attaches when the contractor fails to either complete the improvements or pay the costs therefor with the money obtained for that purpose.*’” (*Id.* at p. 1064, italics added.)

The second sentence of the paragraph quoted above, does not purport to list the elements of a violation of section 484b. Instead, it merely describes one scenario in which the elements are satisfied, i.e., when a wrongful diversion causes the contractor's failure to complete the agreed-upon work or failure to pay associated expenses of the project. Further, since the paragraph's italicized sentence does not mention causation, it is clear that in *Williams, supra*, we implicitly held that wrongful conversion of construction funds does not have a causation element. It follows from this holding that the trial court, here, did not commit instructional error by its failure to instruct the jury on causation.

In any event, even assuming that causation is an element of a violation of section 484b, the error was harmless beyond a reasonable doubt. As noted in *Butcher*, the court held a violation of section 484b requires that “the wrongful diversion *is a cause of the failure to complete the project or defray its expenses.*” (*Butcher, supra*, 185 Cal.App.3d at p. 940, italics added.) The jury convicted Felix of diverting the \$10,000 he received from the Friends on May 30, 2005, and the \$3,900 he received from them on October 21, 2005. The diversion of these amounts inevitably caused a failure to defray a total of \$13,900 of the project expenses because absent the diversion, this total amount would have been applied to these expenses. Thus, even if the court had instructed the jury on causation in accord with *Butcher*, the jury would have had to conclude that the diversion of these amounts was, at a minimum, a cause of the failure by Felix to defray \$13,900 of project expenses that would have been paid for by the funds he diverted. Accordingly, we conclude that even if instructional error occurred, it was harmless beyond a reasonable doubt.

#### **DISPOSITION**

The judgment is affirmed.