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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE RAY TAYLOR,

Defendant and Appellant.

G046333

(Super. Ct. No. 11NF0664)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

David Andreasen, 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, Steve Oetting, Scott C. Taylor and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

Defendant Jesse Ray Taylor raises an interesting problem of criminal law in this appeal: May one spouse be convicted of robbery based on a violent taking of community property from the other spouse? Unfortunately for defendant, a California appellate court has already answered this question in the affirmative with regard to theft crimes, so long as there is substantial evidence that the larcenous lover intends to permanently deprive his spouse of her interest in the community property. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1739-1740 (*Llamas*)). We reject defendant's invitation to part ways with *Llamas* and additional cases providing the theoretical underpinnings for the holding in *Llamas*. One spouse can rob another spouse of community property if he or she takes community property from the possession of the other spouse with the intent to permanently deprive the other spouse of his or her interest in the community property. We also find no merit in defendant's related assertions of instructional error in connection with his robbery conviction.

## FACTS

As of February 2011, defendant and his wife had been married for five years. They lived with their two children in an apartment in Anaheim. On the morning of February 1, 2011, defendant and wife argued about defendant allegedly having sex with other women. Wife's friends, present in the apartment, called 911. On the 911 call, one of wife's friends stated defendant was "choking" his wife, who was "screaming." Wife's friend stated defendant was "hurting [wife] bad" and threw her down the stairs. Wife's friend stated that defendant threw wife into a television. Wife's friend asked the police to hurry because defendant was hitting wife with a stick. Wife's friend noted on the call that defendant had been gone for weeks and wife had accused him of returning to take her money. When the police arrived, wife told an officer that she regularly keeps money in her bra. After wife refused to provide this money to defendant, defendant

pinned her on the bed and forcibly removed the money. The police returned \$120 to wife from defendant; wife told police it was her money. A photo of wife was introduced into evidence showing her face with a scratch and swelling under her eyes; wife complained of pain to her eye. Wife's shirt and bra were ripped when police arrived.

Wife and her friends recanted at trial. According to wife, she was angry with defendant because she found evidence defendant was engaging in an affair with another woman. Wife was trying to "really do some damage to him." Wife took the money from defendant's car and put it in her bra. She then confronted defendant and struck him with her hand. Defendant never threatened or touched wife. The photo depicting injuries to wife's face was "altered" (presumably by the police or prosecutor). Wife accidentally ripped her shirt and bra on a handrail in the stairwell when she was chasing defendant. Defendant did not take the money from wife's bra. The money fell out of wife's bra and she did not know how it got into defendant's boxer shorts by the time the police arrived. Both of wife's friends denied they had any knowledge of what had occurred beyond the fact that defendant and wife were yelling at each other. Defendant did not testify.

The jury, which was entitled to believe the statements of wife and the witnesses on the date of the incident rather than their trial testimony, convicted defendant of both robbery (Pen. Code, §§ 211, 212.5, subd. (a)) and domestic battery causing injury (Pen. Code, § 273.5, subd. (a)). Both convictions arose out of the same February 1, 2011 incident. Taking into consideration defendant's prior criminal history (and striking one prior strike), the court sentenced defendant to a total of 13 years in prison, including eight years for robbery, a concurrent six year term for domestic battery, and a consecutive five-year enhancement under Penal Code section 667, subdivision (a).

## DISCUSSION

Defendant raises four issues on appeal, all relating to his robbery conviction: (1) there is insufficient evidence to support the judgment because one spouse cannot steal community property from another spouse; (2) if defendant is right that a spouse cannot rob another spouse of community property, the court improperly instructed the jury on this point by utilizing CALCRIM No. 1600; (3) the court committed prejudicial error by failing, sua sponte, to instruct the jury with a “claim-of-right” defense; and (4) the court committed prejudicial error by failing, sua sponte, to instruct the jury on theft as a lesser included offense of robbery. Defendant does not assert error with regard to his domestic battery conviction or his sentence.

### *Robbery of Community Property by Spouse*

“In resolving sufficiency of the evidence claims, ‘an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.’” (*People v. Gomez* (2008) 43 Cal.4th 249, 265.) Here, the question is more one of law than facts. Clearly, there is substantial evidence that defendant took \$120 from wife’s bra by force. Defendant’s intent to permanently deprive wife of the \$120 is perhaps less clear, but it is not actually contended that the jury could not infer from the circumstances that defendant had the requisite intent. Instead, it is asserted by defendant that these facts cannot constitute robbery regardless of defendant’s intent.

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (Pen. Code, § 211.) Robbery is, in essence, a theft plus a contemporaneous assault. Thus, to constitute robbery, the feloniously taken property

must belong to someone other than the defendant. (Pen. Code, § 484, subd. (a) [defining theft as the felonious taking of “the personal property of another”]; *People v. Tufunga* (1999) 21 Cal.4th 935, 946-948 (*Tufunga*) [tracing case law interpreting Pen. Code, § 211 to include requirement that property stolen be that “of another” as in theft].)

“At common law, the concept of unity of husband and wife precluded any separate possession; hence, no conviction for larceny could be had when one spouse took the other’s property. However, statutes that have significantly altered the status of women [citation] have largely abrogated this rule. [Citation.] In California it is settled that either spouse may be convicted of larceny against the property of the other.” (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 18, p. 44.)

If the record showed wife’s cash was her separate property, defendant could be convicted of robbing wife. (See *People v. Green* (1980) 27 Cal.3d 1, 50, fn. 37 (*Green*), overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 and *People v. Martinez* (1999) 20 Cal.4th 225, 233-237 [for purposes of special circumstance charge that husband murdered wife during commission of robbery, it was reasonable to assume rings, purse, and clothing of wife were separate property of wife]; *People v. Graff* (1922) 59 Cal.App. 706, 707, 711-713 [wife can be convicted of embezzlement and forgery in connection with property of husband].) But there is no evidence in the record to support the conclusion that the money was wife’s separate property.

Instead, the cash taken from wife’s bra was community property. “Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.” (Fam. Code, § 760.) “The respective interests of the husband and wife in community property during continuance of the marriage are present, existing, and equal interests.” (Fam. Code, § 751.) Spouses have equal management and control of

community property, subject to specific statutory limitations on unilateral gifts or other divestments. (See Fam. Code, § 1100, subd. (a).) Ordinarily, questions pertaining to spouses' abuse of their partners' community property interests are dealt with in civil cases. (See, e.g., *In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1257-1258 [spouse that exercised sole control over community assets during separation period has burden of proof to account for missing assets in dissolution proceedings]; *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1475-1477 [describing fiduciary obligations between spouses].)

Defendant's appeal is based on the "commonsense notion that someone cannot steal his own property." (*Tufunga, supra*, 21 Cal.4th at p. 948.) But, of course, the cash was not *solely* defendant's property. Wife also had a present, existing, and equal interest in the cash. One can imagine problematic hypothetical questions on both sides of this issue. On the one hand, it is troublesome to think the state might bring the power of criminal law to bear on simple marital disagreements as to appropriate spending habits (e.g., is it theft or embezzlement every time one spouse spends money at the local bar over the objection of the other spouse?). On the other hand, certain acts reeking of criminal intent might escape appropriate punishment with a bright line rule forbidding theft crimes by a spouse when community property is at issue (e.g., a spouse facing an imminent divorce who empties community bank accounts and loads a moving truck with the rest of the community property with the intent to permanently deprive the other spouse of his or her property interest).

A single published case specifically states that "a spouse may be criminally liable for the theft of community property." (*Llamas, supra*, 51 Cal.App.4th at p. 1739-1740 [ultimately holding a spouse cannot be held criminally liable for intending to *temporarily* deprive other spouse of community property].) In *Llamas*, husband drove away in an automobile over wife's objection. (*Id.* at p. 1734.) Wife reported the vehicle stolen. (*Ibid.*) The evidence suggested the automobile was community property, despite

statements by both spouses that it belonged (in the colloquial rather than legal sense) to wife. (*Id.* at pp. 1734-1735, 1737.) Defendant was arrested while in possession of the vehicle, a handgun, and methamphetamine; he was subsequently convicted of several crimes, including vehicle taking pursuant to Vehicle Code section 10851, subdivision (a). (*Llamas*, at pp. 1733-1736.)

In reaching its conclusion that community property could be stolen by one spouse, the *Llamas* court looked to precedent answering analogous questions. First, in a case in which a “partner was charged with grand theft based on the embezzlement of partnership funds,” the court held that “theft occurs when a co-owner takes jointly held property with the intent to permanently deprive other owners of their interest in that property.” (*Llamas, supra*, 51 Cal.App.4th at p. 1738, citing *People v. Sobiek* (1973) 30 Cal.App.3d 458, 463-469.) Second, in a case in which a wife tossed a beer bottle through the window of a community property vehicle, her conviction for vandalism (Pen. Code, § 594, subd. (a))<sup>1</sup> was affirmed despite the contention that one cannot vandalize one’s own property. (*Llamas, supra*, 51 Cal.App.4th at pp. 1738-1739, citing *People v. Kahanic* (1987) 196 Cal.App.3d 461, 463-467.) The *Kahanic* court observed that when criminal statutes refer “to property ‘not his own,’ or ‘property of another,’ the sense of the descriptive words excludes criminality only when the actor-defendant is involved with property wholly his or her own.” (*Kahanic*, at p. 466.) And in the case of community property, “[e]ach community property owner has an equal ownership interest and, although undivided, one which the criminal law protects from unilateral nonconsensual damage or destruction by the other marital partner.” (*Ibid*; see also *People v. Wallace* (2004) 123 Cal.App.4th 144, 147-151 [defendant guilty of vandalizing community property at his residence].)

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<sup>1</sup> “Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own . . . is guilty of vandalism: [¶] . . . [¶] (2) Damages.” (Pen. Code, § 594, subd. (a).)

Defendant concedes that a straightforward application of *Llamas* to the instant case results in a rejection of his position. Defendant contends we should part ways with *Llamas* and instead find community property cannot be stolen by a spouse as a matter of law. Defendant cites several out-of-state authorities for this proposition. (See, e.g., *People v. Brown* (N.Y.Crim.Ct. 2000) 711 N.Y.S.2d 707, 710 [“The general rule in New York (and elsewhere) is that a joint or common owner of property cannot be guilty of larceny for taking commonly held property. He may be liable for civil damages for conversion or the like, but he is not criminally liable”]; but see *LaParle v. State* (Alaska Ct.App. 1998) 957 P.2d 330, 334 [spouse can commit theft of marital property]; *Com. v. Mescall* (Pa.Super.Ct. 1991) 592 A.2d 687, 690-691 [same].)

While we acknowledge the theoretical difficulty of the question, we choose not to depart from the rule established in 1997 by *Llamas, supra*, 51 Cal.App.4th at page 1738. *Llamas* is doctrinally consistent with the line of cases it cited in support of its rulings. *Llamas* has not been overruled or criticized since its publication. Moreover, the policy concerns expressed by defendant are not likely to arise in reality, as prosecutorial discretion will be exercised to avoid the filing of criminal charges based on run-of-the-mill marital squabbles. The absence of an extant case in which such charges were brought is a testament to the truth of this observation. And were such a case to be brought, both juries and courts would be loath to find evidence of the necessary felonious intent, as everyday disputes over the use and management of community property do not usually entail a criminal intent to permanently deprive the community of property. Because theft/robbery can apply to one spouse taking community property from another spouse, there is substantial evidence supporting defendant’s conviction of robbery.

*Instruction with CALCRIM No. 1600*

The jury was instructed with a modified version of CALCRIM No. 1600, which we quote in relevant part: “The defendant is charged in Count 1 with robbery . . . .

[¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took property that was not his own; [¶] 2. The property was taken from another person's possession and immediate presence; [¶] 3. The property was taken against that person's will; [¶] 4. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND [¶] 5. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently. [¶] . . . [¶] The property taken may be joint property, but the person who takes the property must have the intent to deprive the other owner of the property permanently." The final quoted sentence of the instruction is based on *Llamas, supra*, 51 Cal.App.4th at pages 1739-1740, which held both "legal analysis" and "social policy" precludes a criminal violation when one spouse merely intends to temporarily deprive the other spouse of community property.

Defendant's second argument is as follows: *If* this court concludes there was substantial evidence that the cash was wife's separate property *and if* this court concludes community property cannot be stolen by one spouse, then the jury was improperly instructed with CALCRIM No. 1600 because the instruction did not differentiate between separate property and community property. Because neither condition came to pass, we reject defendant's second argument.

#### *Claim-of-right Defense Instruction*

Defendant next contends the court should have, on its own motion, provided a "claim-of-right" affirmative defense instruction. (See CALCRIM No. 1863.) "The claim-of-right defense developed in the common law as a defense to larceny or robbery." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1427.) A good faith, mistaken belief that one has a right to property negates the intent necessary to commit certain property crimes, including robbery. (*Id.* at pp. 1427-1428; *Tufunga, supra*, 21 Cal.4th at pp. 943-945.)

“In criminal cases, even in the absence of a request, 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.” (*People v. Anderson* (2011) 51 Cal.4th 989, 996.) A sua sponte instructional duty with regard to defenses arises if either the defendant is relying on such a defense or if there is substantial evidence supporting a defense that is not inconsistent with defendant’s theory of the case. (*Ibid*; *People v. Stewart* (1976) 16 Cal.3d 133, 138-140 [sua sponte duty to instruct on claim of right when appropriate].) But there is no sua sponte duty to provide pinpoint instructions that simply amount to contesting one of the elements of the offense. (*Anderson*, at pp. 996-997.)

The court did not commit error because there is no substantial evidence to support a claim-of-right instruction, and any potential error was necessarily harmless. Defendant did not testify and there is no other direct evidence of his subjective knowledge or intent. As to circumstantial evidence of defendant’s knowledge or intent, there are two factual scenarios supported by the evidence: (1) defendant forcibly removed the cash from wife’s bra; and (2) wife removed the cash from husband’s vehicle, then the money later fell out of her bra when the handrail ripped her clothing (leaving the inference that defendant picked up the money from wherever it fell). The second scenario, if believed, would not constitute robbery, as there is insufficient evidence suggesting defendant took property from wife’s possession by force or fear. As to the first scenario (which the jury obviously believed), there is no evidence suggesting the property at issue was the separate property of defendant or that he believed it to be so. As explained above, the only available evidence suggests the cash was community property. It is undisputed that defendant had an actual community property right to the cash, not just a subjective claim of right. The factual question of intent at issue was whether defendant intended to permanently deprive wife of her interest in the cash. To

the extent defendant is simply arguing the intent element of robbery, he was not entitled to a sua sponte pinpoint instruction.

*Theft as Lesser Included Offense Instruction*

Finally, defendant posits the court erred by failing (again, sua sponte) to instruct the jury that it was entitled to find theft as a lesser included offense of robbery. Theft is a lesser included offense of robbery. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1331.) “[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present.” (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) The Attorney General agrees the court should have instructed the jury that it could convict defendant of the lesser included offense of theft, based on evidence that wife dropped the cash and defendant was found with the cash in his boxer shorts.

“[R]eversal [for failure to instruct on a lesser included offense] is required only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the instructional error.” (*People v. Cheaves* (2003) 113 Cal.App.4th 445, 455.) Here, assuming the court erred, the error was nonprejudicial. Wife’s testimony at trial was implausible. It is clear the jury accepted the version of the facts ascertained by the police at the scene of the crime. It is not reasonably probable that the jury would have come to a different result had they been properly instructed.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.