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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.

PAULA RAE DONNELL,

Defendant and Appellant.

G050888

(Super. Ct. No. 12NF3252)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

Janice R. Mazur, 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, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

Paula Rae Donnell appeals from a judgment following a bench trial where Donnell was convicted of grand theft and other white collar offenses. Donnell argues the trial court erred as a matter of law in imposing an aggravated white collar crime enhancement pursuant to Penal Code section 186.11, subdivisions (a)(1) and (a)(3),¹ and that substantial evidence did not support the court's finding the felonies were related for purposes of the enhancement. We disagree with Donnell on both points and affirm the court's judgment.

I

Donnell worked as the controller of Ultimate New Home Sales and Marketing (Ultimate). In this position, she handled all of Ultimate's financial bookkeeping. Ultimate's sole shareholder reviewed company accounts with Donnell, but he trusted her and did not verify their correctness.

In June 2010, Donnell tendered her resignation. Also during the same time frame in early 2010, Donnell submitted a claim for unemployment, claiming she had been laid off from Ultimate and that her last day of work was March 17, 2010.

After Donnell resigned, Ultimate audited its books and discovered that at some point in early 2010, she had begun paying herself as a 1099 independent contractor rather than a W-2 employee. This resulted in Donnell's wages no longer being reported to the Employment Development Department (EDD), so that she was able to file multiple fraudulent unemployment insurance claims. Donnell also used her position with Ultimate to try and coerce other employees into filing false unemployment claims. Ultimate discovered a large amount of transactions indicating money had been inappropriately

¹ All further statutory references are to the Penal Code, unless otherwise indicated. Hereafter, we refer to section 186.1, subdivisions (a)(1) and (a)(3), as sections 186(a)(1) and 186(a)(3).

taken from the company. Ultimate reported the discrepancies to the Anaheim Police Department and several agencies investigated the claims.

The Orange County District Attorney's (the district attorney) forensic accountant analyzed Ultimate's financial records along with Donnell's personal bank records. The forensic accountant concluded Donnell had made unauthorized direct deposits of Ultimate funds into her personal bank account. According to this analysis, the total amount overpaid to Donnell was \$373,379.73.

The California Franchise Tax Board (FTB) conducted a joint investigation with the district attorney of Donnell's income. Based upon the FTB's analysis, Donnell underreported \$13,002 of her income from 2005-2009. The cost of the FTB's investigation was \$8,667, for a total loss of \$21,669.

The EDD's criminal investigator reviewed Donnell's claim for unemployment benefits starting on March 17, 2010. After investigating, EDD determined Donnell was overpaid the entire amount of unemployment benefits, totaling \$36,475.

An amended information charged Donnell with one count of grand theft in violation of section 487, subdivision (a) (count 1), two counts of willful failure to file or make fraudulent tax return in violation of Revenue and Taxation Code section 19706 (counts 2-3), three counts of filing a fraudulent tax return in violation of Revenue and Taxation Code section 19705, subdivision (a)(1) (counts 4-6), and seven counts of filing a false statement in violation of Unemployment Insurance Code section 2101, subdivision (a) (counts 7-13).² The amended information alleged the statute of limitation as to count 1 was tolled pursuant to section 803, subdivision (c). The amended information also alleged two enhancements, as to count 1 a property loss of over \$200,000, pursuant to

² The initial information charged embezzlement by an employee under section 508, but that charge was deleted from the operative amended information. There is no explanation for this change.

section 12022.6, subdivision (a)(2), and as to all counts, an aggravated white collar crime enhancement under section 186.11(a)(1) and (a)(3). After a bench trial, the trial court found Donnell guilty of all counts and made true findings as to all allegations and enhancements. The court sentenced Donnell to a total term of six years: two years for count 1 plus two additional years for the section 186.11(a)(1) enhancement; eight months each for counts 2, 4, and 7. The court imposed concurrent terms on the remaining counts and stayed the punishment on the section 12022.6, subdivision (a)(2) enhancement.

II

Donnell contends the trial court erred by finding true the section 186.11 enhancement because of the following: fraud or embezzlement was not a material element of count 1, grand theft; and her conviction for grand theft was not part of a pattern of related felony conduct. We review the first question of statutory interpretation *de novo* (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919), and the second factual issue for substantial evidence (*People v. Petronella* (2013) 218 Cal.App.4th 945, 953, 960-961). We discuss each argument in turn.

The aggravated white collar crime enhancement is found in section 186.11. This enhancement provides for an additional term of punishment for “[a]ny person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars (\$100,000)” (§ 186.11(a)(1).) Under the statute, a “‘pattern of related felony conduct’ means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events.” (§ 186.11(a)(1); *People v. Frederick* (2006) 142 Cal.App.4th 400, 420 [“the phrases ‘pattern of related felony conduct’ and ‘related felonies’ have no

peculiar technical meaning, and are phrases commonly understood without further definition”].)

Donnell argues the phrase “material element” in section 186.11(a)(1) should be strictly construed to mean an element of the charged grand theft offense. The Attorney General disputes that interpretation, and advocates for a broader interpretation of the term, including the manner in which the defendant committed the offense. We find the Attorney General’s argument persuasive.

The legislative history of section 186.11 does not specifically define the term “material element.” The word “element” is often a legal term of art, referring to the specific elements of an offense. Under a strict legal definition of “element,” a grand theft charge does not always involve an element of fraud or embezzlement. (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 635 (*Fenderson*).) However, “[s]ince the amendment in 1927 to section 484 . . . , an accused may be convicted of grand theft upon proof showing either larceny, embezzlement or obtaining money by false pretenses [citation], and it is unnecessary to specify in the accusatory pleading the kind of grand theft with which the defendant is charged [citation].” (*Ibid.*) Statutes are generally interpreted to give effect to every word. (*People v. Victor* (1965) 62 Cal.2d 280, 301.) The Legislature did not refer to “elements of the offense” in section 186.11(a)(1), but rather chose the term “material element.” This choice indicates the term “material” means something more than the traditional definition of elements of an offense. In order to give effect to the term “material element,” the statute must refer to thefts that involve fraud and embezzlement, even if the fraud or embezzlement is not an element of the charged crime. Since embezzlement is not always an element of grand theft in the traditional sense, it is only when theft is prosecuted on an embezzlement theory that

embezzlement is “material” to the crime and thus eligible for a section 186.11 enhancement.³

The record shows the prosecutor tried the case on an embezzlement theory of grand theft.⁴ The trial court found Donnell guilty of the grand theft charge, and specifically agreed with the embezzlement theory. In its holding, the court specified: “[Donnell] is charged in a 13-count information with one count of theft. I’ll say embezzlement. And that is count 1.” The trial court went on to quote from the Penal Code and jury instructions for embezzlement (§ 508) and larceny (§ 487, subd. (a)). We determine the “material element” requirement of section 186.11 is met by a conviction for grand theft under a theory of embezzlement. On the facts of this case, the grand theft perpetrated by Donnell was done by way of embezzling funds from her employer. The embezzlement was thus a material element of the offense because the grand theft was carried out by an embezzlement of funds. Section 186.11 does not require a strict test of the elements of the offense for the enhancement to apply. Instead, this penalty applies to crimes where fraud or embezzlement are materially involved.

Donnell also attacks the true finding of the white collar enhancement by arguing her conviction for grand theft was not related to counts 2 through 13 so it was not part of the “pattern of related fraudulent felony conduct” within the meaning of section 186.11. In making its true finding on the aggravated white collar crime enhancement, the court specifically found Donnell “engaged in a pattern of related fraudulent felony conduct involving the taking of more than \$100,000 but less than \$500,000.” The court

³ The court also determined the statute of limitations was tolled for count 1 (§ 803, subd. (c)), a finding only appropriate where count 1 involved a “material element” of fraud or embezzlement.

⁴ Donnell concedes the prosecutor argued an embezzlement theory, but argues she was not charged with embezzlement. Because “it is unnecessary to specify in the accusatory pleading the kind of grand theft with which the defendant is charged,” Donnell’s argument is irrelevant. (*Fenderson, supra*, 188 Cal.App.4th at p. 635.)

considered and determined the offenses constituted a “pattern of related felony conduct” for purposes of imposing the enhancement. The distinguishing characteristic of the crimes was her employment with Ultimate and each count had the same or similar purpose of fraudulently obtaining money while employed at Ultimate and directly after quitting there.

Count 1 involved Donnell embezzling money from Ultimate through five different methods of embezzlement. Counts 2 through 6 involved Donnell wrongfully obtaining money through avoiding taxes by falsely reporting her Ultimate wages. Counts 7-13 involved Donnell fraudulently obtaining unemployment benefits by claiming she was fired from Ultimate, and later lying about quitting. She also used her position at Ultimate to intimidate and panic her coworkers and attempted to coerce them to also file false unemployment claims. While counts 2-13 may have involved other agencies separate from Ultimate, that does not preclude them from being part of the same “pattern of related fraudulent felony conduct” under section 186.11. The crimes shared the same purpose of fraudulently obtaining money to which Donnell was not entitled, and they all were interrelated with Donnell’s position and employment at Ultimate. We determine substantial evidence supported the trial court’s true finding on the white collar enhancement.

III

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.