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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARTHA VILLAGRAN HERNANDEZ, Defendant and Appellant.	B235538 (Los Angeles County Super. Ct. No. MA048669)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Reversed in part and remanded for resentencing.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Martha Villagran Hernandez guilty of issuing a nonsufficient funds check, of defrauding an innkeeper, and of grand theft of labor. We reduce the grand theft to petty theft, reverse the convictions on the remaining counts, and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

Common Bond Charities owned a bingo hall in Antelope Valley. Shirley Banham Renkema rented the hall to raise money for the charity. In September 2009, Hernandez and Renkema agreed that Hernandez could hold three events at the hall. Hernandez paid $1,400 in cash for each event. Although the first event went smoothly, the hall was damaged during the second. The damages cost $1,872.33 to repair, and Renkema asked Hernandez to pay for the damage, and she agreed.

Hernandez wanted to hold another event on December 5, 2009. Because December was a prime month, the hall would cost $2,300. There were additional costs for centerpieces, security, equipment, and set up, as well as an 18 percent gratuity.

On October 26, 2009, Hernandez gave Renkema check No. 99 in the amount of $1,125 as partial payment for the December event. Hernandez postdated the check October 28, 2009 and asked Renkema to hold it until then because Hernandez was waiting on payment from another client. Renkema agreed, as she was busy and probably couldn't get to it for a week anyway.

Renkema tried to cash the check on November 6, 2009 but was told there were insufficient funds. Renkema called Hernandez, who told Renkema there wasn't enough money in her account to cover the check but if she gave it a few more days, it would be fine. On November 14, Renkema again tried to cash the check at Hernandez's bank, but again she was told there were insufficient funds. Hernandez asked Renkema to work with her and said there would be sufficient funds the next day, November 15. The next day, however, Renkema did not try to cash the check because she was busy.

Although the check had not been cashed, the party went forward on Sunday, December 5, 2009. Renkema spoke to Hernandez at the party, and Hernandez told her the check would be good on Monday, because she was being paid that night. About an hour and a half into the party, Renkema asked Hernandez if she had the money, and Hernandez said she did, but she'd left her pocketbook at home. Hernandez said she would get it, but Hernandez did not return.

Hernandez's daughter, Julie, instead came and told Renkema that Hernandez was at home, hysterical because she did not have the money. Julie told Renkema, " 'I don't know what [to] tell you. I think she's waiting on [the] money, and it should be okay by Monday.' " Hernandez, however, didn't show up that Monday, December 7, and she didn't return Renkema's calls.

Renkema tried to cash the check on December 14, 2009, but again there were insufficient funds.

A representative of the bank where Hernandez had the account on which the check was drawn testified that the account was opened on October 20, 2009. At no time during these events were there sufficient funds to cover the $1,125 check.

Hernandez also told the investigating officer that she never had funds to cover the check. She said she hadn't been paid for certain jobs, and that was why she didn't have sufficient funds.

II. Procedural background.

On May 10, 2011, a jury found Hernandez guilty of count 1, issuing a nonsufficient funds check (Pen. Code, § 476a, subd. (a));[1] count 2, defrauding an innkeeper (§ 537, subd. (a)(2)); and count 3, grand theft of labor (former § 487, subd. (a)).

On June 24, 2011, the trial court sentenced Hernandez to three years formal felony probation and one day in county jail. She was also ordered to complete 450 hours of community service. The parties agreed to restitution and a payment plan.

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[1] All further undesignated statutory references are to the Penal Code.

DISCUSSION

III. There is insufficient evidence Hernandez issued a nonsufficient funds check.

There is insufficient evidence to support the judgment on count 1, issuing a nonsufficient funds check.

Under a sufficiency of the evidence standard of review, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; see also *People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 476a, subdivision (a), provides that it is a crime for any person to willfully, with intent to defraud, make or draw or utter or deliver a check for the payment of money, knowing at the time of doing so that the person does not have sufficient funds.[2]

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[2] On count 1, the jury was instructed: "Every person who for herself, with the specific intent to defraud, willfully makes, draws, utters, or delivers any check upon any person for the payment of money, knowing that at the time of the making, drawing, uttering or delivering that the maker or drawer has not sufficient funds in said bank for the payment in full upon its presentation of the check and all other checks then outstanding upon those funds, is guilty of" violating section 476a. The jury was further instructed that the elements of the crime were:

"[1.] A person, acting for herself, made, drew, uttered, or delivered the check in question;

"[2.] The person acted willfully and with the specific intent to defraud;

"[3.] At the time the check was made[,] drawn, uttered, or delivered, there was not sufficient funds in the bank upon which it was drawn to pay in full upon its presentation the check and all other outstanding checks[;]

The section "is directed at the specific representation, implicit in the making, drawing, uttering, or delivering of a check . . . that at the time of making, drawing, uttering, or delivery the maker *then* has sufficient funds in or credit with the bank for payment of that check or draft and all other checks or drafts then outstanding." (*People v. Poyet* (1972) 6 Cal.3d 530, 536.) Therefore, if the maker discloses an insufficiency at the time she makes, draws, utters, or delivers the check, "the essential underlying misrepresentation no longer exists and the crime cannot be committed." (*Ibid.*; see also *People v. Pugh* (2002) 104 Cal.App.4th 66, 73 (*Pugh*).) The maker may be guilty of another crime, but not of a crime under section 476a. (*Poyet*, at p. 537.)

Here, when Hernandez gave Renkema the check on October 26, 2009,[3] she told her to hold it until October 28, because she had insufficient funds in her account to cover it. Hernandez therefore could not be guilty of violating section 476a on October 26. (*Pugh*, *supra*, 104 Cal.App.4th at p. 73.) The People concede the point, but argue that Hernandez is still guilty of violating section 476a based on her subsequent "re-utterings" of the check.

In *Pugh*, the defendant, in February, gave the victim a postdated check for $10,000 and asked the victim to wait until March 10 to deposit it. (*Pugh*, *supra*, 104 Cal.App.4th at pp. 69-70.) On March 10, however, there were insufficient funds in the defendant's account to cover the check. Defendant told the victim he needed a few more days, but when the victim called the bank over the next few days, there continued to be insufficient funds. As to the uttering of the check in February, the defendant could not be convicted of violating section 476a because he told the victim there were insufficient funds at that time to cover it. But, according to the victim, the defendant, after March 10, told the

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"[4.] That the person knew of its insufficiency of funds when she made, drew, uttered, or delivered the check; and

"[5.] That the amount of the check in question exceeded $200."

[3] There is a dispute on what date Hernandez gave Renkema the check, October 26 or December 4. The dispute is irrelevant to this issue, because it is undisputed that when Hernandez gave Renkema the check she told her she had insufficient funds in her account to cover it.

victim she could resubmit the check for payment. (*Pugh*, at p. 73.) At that time the defendant did not again tell her there were insufficient funds to cover the check. *Pugh* therefore held that when the defendant told the victim to resubmit the check, "he uttered it," and therefore the evidence was sufficient to convict him of fraudulently uttering a check. (*Ibid.*)

Pugh reached its conclusion because there was evidence the defendant told the victim to resubmit the check without concurrently telling her there were insufficient funds to cover it; hence, he could be guilty of fraudulently "re-uttering" a check. The People argue that Hernandez gave a similar unqualified directive to resubmit the $1,125 check to Renkema under the facts here. Those facts, according to Renkema, are that Hernandez gave her the check on October 26, 2009, and told her to hold it until October 28 because she was waiting on payment from another client. Renkema first tried to cash the check on November 6, but was told there were insufficient funds. These events, as we have said, do not give rise to a violation of section 476a.

Renkema then called Hernandez, who told her there wasn't enough money in her account to cover the check but if she gave it a few more days, it would be fine. On November 14, 2009, Renkema again tried to cash the check at Hernandez's bank, but again she was told there were insufficient funds. The People again concede that this event does not give rise to a violation of section 476a.

It is the next turn of events that the People contend—in an argument never made in the trial court or presented to the jury[4]—that give rise to a violation of section 476a. After Renkema was unable to cash the check on November 14, 2009, she spoke to Hernandez, who asked Renkema to work with her and said there would be sufficient funds the next day, November 15. The People argue: "At that point, [Hernandez] fraudulently represented that in the normal course of business, the check would be fully funded and would be honored the next day. She placed no conditions on her

[4] The prosecutor did not argue that Hernandez "re-uttered" the check on November 14 or December 5. As Hernandez points out in her reply brief, had this been argued to the jury, a unanimity instruction would have been required.

representations and did not tell Renkema that there would be any further delays in funding the check." The People add that Hernandez, on Sunday, December 5, again "re-uttered" the check. On that day, Renkema spoke to Hernandez at the party, and Hernandez told her the check would be good on Monday.

We fail to see how Hernandez's representations on November 14 and December 5 are substantively different than her representations on October 26 and on or about November 6. On all days, Hernandez was saying, in different but clear ways, that she did not *then* have the money. On November 14, when Hernandez and Renkema spoke, there were insufficient funds in the account. Renkema could not cash the check that day and was told to wait until the next day, November 15. On December 5, at the party, Hernandez told Renkema the check would be good on Monday, because she was being paid that night. Later, Hernandez's daughter told Renkema that her mother was at home, hysterical, because she didn't have the money, but that " 'it should be' " fine Monday.

These are hardly unqualified directives to resubmit the check as were before the court in *Pugh*. Hernandez could have told Renkema on November 14 and December 5 that the money was in the bank, but she didn't. Instead, she again said Renkema had to wait. Therefore, at the time Hernandez "re-uttered"[5] the check on November 14 and December 5, there were insufficient funds in the account and Hernandez made that fact known to Renkema by telling her to wait to cash it. That is no different than the representations made on October 26 and on or about November 6, which the People concede cannot be the basis for the violation.

Hernandez's conviction of count 1 must be reversed.

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[5] The jury was instructed with CALJIC No. 15.25 as follows: "The word 'utter' means to use or attempt to use a check to either assert that the check is genuine or to represent to another person that the check is genuine. The assertion or representation may be direct or indirect, express or implied by words or conduct."

IV. There is insufficient evidence Hernandez defrauded an "innkeeper."

The People also concede that the judgment on count 2 for defrauding an innkeeper under section 537, subdivision (a)(2), must be reversed because Renkema was not an "innkeeper."

Section 537, subdivision (a), applies to any person who, with the intent to defraud, fails to pay for, among other things, services or accommodations at "a hotel, inn, restaurant, boardinghouse, lodginghouse, apartment house, bungalow court, motel, marina, marine facility, autocamp, ski area, or public or private campground[.]" Under rules of statutory construction, the expression of certain things in a statute necessarily involves exclusion of other things not expressed—*expressio unius est exclusio alterius.* (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1241.) Hernandez rented a bingo hall from Renkema, an establishment not listed in section 537, subdivision (a).[6] (See *Gogue v. MacDonald* (1950) 35 Cal.2d 482, 483 [defendant not violate section 537 when he failed to pay rent because a "cottage" was not one of the establishments listed in the statute].) A bingo hall is therefore excluded under the statute.

Because Renkema was not the keeper of an "inn," specifically defined under section 537, subdivision (a), the judgment on count 2 must be reversed. Hernandez's remaining contentions concerning count 2, namely, instructional error and ineffective assistance of trial counsel, are moot.

V. Grand and petty theft.

The jury found Hernandez guilty of count 3, the grand theft of Renkema's labor or services. The People concede that there is insufficient evidence Hernandez committed grand theft, because there was no evidence that the value of Renkema's labor and services exceeded $400. The People contend instead that there is sufficient evidence of petty theft.

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[6] The jury was instructed that an element of the crime was the "person obtained the services or accommodations with the specific intent to defraud the proprietor or manager of the *hotel or inn*." (Italics added.)

Section 484, subdivision (a), defines theft: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property *or obtains the labor or service of another*, is guilty of theft." (Italics added.) Theft therefore includes the appropriation of labor or services by means of fraud. (§ 484.) At the time of these events, grand theft was theft of property exceeding $400. (Former § 487, subd. (a).)[7]

Hernandez first appears to argue that the square circumstances here do not fit into the round hole of theft. Theft requires the defendant to have the specific intent to permanently deprive the victim of the property at issue. (*People v. Abilez* (2007) 41 Cal.4th 472, 510.) Because there was no "future aspect" to the labor or services Renkema provided (she, e.g., rearranged the tables to get the bingo hall ready for the party and performed administrative duties), Hernandez could not have intended to *permanently* deprive Renkema of labor or services already delivered. What happened here, in other words, is not like, for example, permanently depriving someone of their car or even loss of consortium. That there was no "future aspect" to Renkema's labor or services, however, does not mean Hernandez could not "permanently deprive Renkema of [the] labor" she performed the day of the party, December 5. Hernandez certainly could have intended Renkema prepare the hall for the party and not pay her for doing so, thereby "permanently depriving" Renkema of her labor.

Hernandez's second argument is there was insufficient evidence of her intent to deprive Renkema of her labor and services, because Hernandez reassured Renkema, on the day of the party, she would be paid, and Hernandez had already paid a $500 cash

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[7] Section 487 was amended and grand theft is now the theft of property exceeding $950.

deposit. The jury, however, could have believed, based on Hernandez's past assurances the money would be in the bank, that she was lying to Renkema about having the money to induce her to prepare the hall for the party.

Next, Hernandez argues that the prosecutor argued a different theory of guilt than the one on which the jury was instructed. The jury was instructed: "Every person who steals or takes money, labor or the personal property of another with the specific intent to deprive the owner permanently of her money, labor or property is guilty of the crime of theft. [¶] In order to prove this crime, each of the following elements must be proved: [¶] "[1.] A person took labor or services of some value belonging to another; and [¶] [2.] When the person took the labor or services, she had the specific intent to deprive the alleged victim permanently of her labor or services." (CALJIC No. 14.02.) The jury was also instructed that if the property exceeded $400 it was grand theft, less than $400 was petty theft.

During closing argument, the prosecutor, instead of referring to a "specific intent to permanently deprive" Renkema of her labor and services referred to a "specific intent to defraud": "[Hernandez] took the services of Shirley Renkema, Ms. Griffin and the third person, who were there managing the party, taking care of the administrative duties, looking over the hall, coordinating the details of the facility, all of that. *And when she did that, she had the specific intent to defraud*." (Italics added.) We disagree that this brief statement amounted to a different theory of liability than that in the jury instruction. The prosecutor was merely arguing that Hernandez defrauded Renkema. She was not arguing it was an element of the crime.

Hernandez also contends that the jury was improperly instructed on theft under CALJIC No. 14.02, above. The jury should have been instructed, she argues, on CALJIC No. 14.10, theft by false pretense.[8] That CALJIC No. 14.10 could have been used in this

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[8] CALJIC No. 14.10 provides: "Every person who knowingly and designedly by any false or fraudulent representation or pretense, defrauds another person of money, labor, real or personal property, is guilty of the crime of theft by false pretense. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person

case does not mean that the trial court erred by instructing the jury instead with CALJIC No. 14.02. As we have said, there was evidence that Hernandez intended to "permanently deprive" Renkema of her labor on December 5, 2009. The instruction was therefore appropriate.

We also do not believe that the jury would have been confused by any internal inconsistency in the instruction. The introductory sentence of the instruction refers to "money, labor or the personal property of another," but the second element of the crime refers to "labor or services." The introductory sentence informed the jury generally what types of things a person may steal to be guilty of theft. The first and second elements specified what the People had to prove Hernandez stole here, namely, "labor or services."

We therefore reject Hernandez's contention that her theft conviction must be reversed, although we agree she is guilty of petty, not grand, theft. Because we reject her contentions concerning theft, we also reject her claim that her trial counsel provided ineffective assistance of counsel by failing to object to the jury instructions. We have found no error, and therefore Hernandez cannot have been prejudiced by any inaction on her trial counsel's part. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Holt* (1997) 15 Cal.4th 619, 703.)

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made or caused to be made to the alleged victim by word or conduct, either (1) a promise without intent to perform it, or (2) a false pretense or representation of an existing or past fact known to the person to be false or made recklessly and without information which would justify a reasonable belief in its truth; [¶] 2. The person made the pretense, representation or promise with the specific intent to defraud; [¶] 3. The pretense, representation or promise was believed and relied upon by the alleged victim and was material in inducing [him] [her] to part with [his] [her] money or property even though the false pretense, representation or promise was not the sole cause; and [¶] 4. The theft was accomplished in that the alleged victim parted with [his] [her] money or property intending to transfer ownership thereof."

DISPOSITION

The judgment is reversed as to counts 1 and 2. The conviction on count 3 for grand theft is reduced to petty theft. The matter is remanded for resentencing.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.