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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE BARRAZA, Defendant and Appellant.	B258934 (Los Angeles County Super. Ct. No. YA089654)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed.

Heather E. Shallenberger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Brendan Sullivan, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Barraza appeals his convictions for unlawfully driving a vehicle and receiving a stolen motor vehicle. The trial court sentenced him to eight years in prison. Barraza contends the trial court committed instructional error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Eduardo Crispin owned a red Ford Explorer. On January 21, 2014, at approximately 9:00 p.m., he parked the Explorer in front of his apartment, locked the car, and took the keys.

At approximately 3:30 a.m. on January 22, 2014, Los Angeles County Deputy Sheriff Ricardo Cobian and his partner, Deputy Cheryl Martin, were on patrol near Inglewood Avenue in an area known for high crime and narcotics activities. Cobian saw Crispin's Explorer parked in a parking lot in front of Lucy's Laundromat. Barraza was seated in the driver's seat. It appeared Barraza was manipulating something near the steering column, using his cellular telephone as a flashlight.

Because the Laundromat was closed, the deputies exited their patrol vehicle and Cobian asked Barraza what he was doing. Barraza, who appeared "frazzled" or "spooked" at the sight of the deputies, told Cobian that he had been driving to his girlfriend's house and decided to pull over to call her and tell her he was on the way. Barraza admitted the Explorer was not his, he did not know the owner, and he did not have permission to have or use the vehicle. Barraza appeared nervous; his voice trembled, he was "fidgety," stuttering, and sweating slightly despite the cold weather. While searching the vehicle for information identifying the owner, Cobian noticed that the ignition was damaged; it would spin, causing the lights and radio to turn on, but the engine would not start. Barraza did not have the key, nor did Cobian find any tools or a shaved key in the vehicle or on Barraza's person.

Shortly thereafter, two other deputies went to Crispin's residence and alerted him that his Explorer had possibly been stolen. Crispin checked outside his apartment and

realized the vehicle was missing. He had not given anyone permission to take it. Crispin accompanied the deputies to the Laundromat, which was three to four blocks from his residence. He confirmed that he did not know Barraza and had not given him permission to drive or take the Explorer.

When Crispin attempted to start the Explorer, it "kind of got locked up" several times, but he was eventually able to start it. It had not previously locked up.

2. *Procedure*

Trial was by jury. Barraza was convicted of unlawfully driving a vehicle (Veh. Code, § 10851, subd. (a)) and receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a)).[1] After Barraza waived his right to jury trial on the prior conviction allegations, the trial court found he had suffered two prior convictions for unlawfully driving or taking a vehicle within the meaning of section 666.5; had a prior "strike" conviction for robbery (§§ 211, 1170.12, subd. (b), 667, subds. (b) – (i)); and had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Barraza to a term of eight years in prison. It imposed, inter alia, a restitution fine, a suspended parole restitution fine, a court operations assessment, and a criminal conviction assessment. Barraza appeals.

DISCUSSION

The trial court did not commit instructional error

1. *Additional facts*

The parties agreed upon a special instruction, which was given by the trial court, as follows: "The lawfulness of any search by law enforcement and the taking of a statement of a defendant are legal issues decided by the judge and are not issues decided by the jury. [¶] The jury is not to consider the lawfulness of any stops, seizures, or searches made by the police officers in this case." The trial court also instructed, inter alia, with the standard versions of CALCRIM Nos. 223 (direct and circumstantial

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

evidence defined), 224 (sufficiency of circumstantial evidence), 225 (circumstantial evidence in regard to intent or mental state), and 358 (evidence of defendant's statements). Barraza contends the special instruction was ambiguous and its use was prejudicial error in regard to the Vehicle Code section 10851 count.

2. *Standard of review*

We independently determine whether the instructions given were correct and adequate. (*People v. Acosta* (2014) 226 Cal.App.4th 108, 119; *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1311; *People v. Riley* (2010) 185 Cal.App.4th 754, 767.) When reviewing a purportedly ambiguous or misleading instruction, we inquire whether there is a reasonable likelihood the jury applied the challenged instruction in a way that violates the Constitution. (*People v. O'Malley* (2016) 62 Cal.4th 944, 991; *People v. Boyce* (2014) 59 Cal.4th 672, 714; *People v. Lopez* (2011) 198 Cal.App.4th 698, 708.)[2] We consider the instructions as a whole, as well as the entire record of the trial, including the arguments of counsel. (*O'Malley, supra,* at p. 991; *People v. Young* (2005) 34 Cal.4th 1149, 1202; *People v. McPheeters* (2013) 218 Cal.App.4th 124, 132.) We presume that the jurors are intelligent persons, capable of understanding and correlating the instructions given. (*O'Malley, supra,* at p. 991; *People v. Gonzales* (2011) 51 Cal.4th 894, 940; *Lopez, supra,* at p. 708.) Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation. (*Riley, supra,* at p. 767; *Lopez, supra,* at p. 708.)

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[2] Barraza states that the reasonable likelihood standard is "considered an equivalent of the 'harmless error' standard adopted in *Chapman v. California* (1967) 386 U.S. 18." He is incorrect. The reasonable likelihood standard is used to determine whether an instruction is impermissibly ambiguous or subject to misinterpretation, whereas the *Chapman* standard pertains to the question of whether an error was harmless. (See *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1220-1221.) " ' " '[M]isdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated' in *Watson*." ' " (*People v. Chism* (2014) 58 Cal.4th 1266, 1299; *People v. Larsen* (2012) 205 Cal.App.4th 810, 829-830; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

3. *Forfeiture*

Barraza failed to object to the challenged instruction and in fact agreed it should be given. Although a defendant may raise a claim that his substantial rights were affected by instructions to which he did not object, Barraza fails to make such a showing here. (*People v. Gonzales, supra,* 51 Cal.4th at p. 938; see generally *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103, fn. 34; § 1259.) As we explain *post*, the instruction was not erroneous. Accordingly, Barraza's contention has been forfeited. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927 ["Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights"].) Alternatively, Barraza contends that his trial counsel provided ineffective assistance by agreeing to the instruction. Because the instruction was not ambiguous and did not misstate the law, counsel was not ineffective for acquiescing in its use. (See, e.g., *People v. Kendrick* (2014) 226 Cal.App.4th 769, 780 [defense counsel is not required to indulge in idle acts to appear competent]; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 ["Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance"].)[3]

4. *Discussion*

Apart from the question of forfeiture, Barraza's claim fails on the merits. His argument runs as follows. To prove a violation of Vehicle Code section 10851, subdivision (a), the People had to prove he actually drove the Explorer.[4] (See CALCRIM

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[3] Barraza additionally contends the invited error doctrine does not bar his challenge to the special instruction, because the record does not reflect that defense counsel's agreement to the instruction was a tactical choice. The People appear to agree that it cannot be determined from the record whether counsel's agreement was a deliberate, tactical choice. (See *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1267-1268.) In light of our conclusion that Barraza's contention fails on the merits, we need not and do not reach the question of invited error.

[4] Vehicle Code section 10851, subdivision (a) can be violated in two ways: the defendant can either drive or take the vehicle. (*People v. Garza* (2005) 35 Cal.4th 866,

No. 1820.) The only evidence proving this element was Deputy Cobian's testimony that Barraza told Cobian, at the Laundromat, that he had been driving to his girlfriend's house and pulled over in order to call her. Although the special instruction was legally correct, it failed to "differentiate between the factual issues to be determined solely by the jury and the legal issues already determined by the trial court." Instead, it suggested all issues relating to Barraza's out of court "confession," including its reliability, had already been determined by the trial court and could not be considered by the jury. The instruction was therefore ambiguous and misleading. It hampered the defense's efforts to convince jurors that the confession's reliability was doubtful, and therefore violated Barraza's due process rights.

We disagree. The instruction was not misleading. It did not state or imply that the court had placed its stamp of approval on Barraza's admissions. The instruction clearly stated that the jury was "not to consider the lawfulness of any *stops, seizures, or searches* made by the police officers in this case," and that the "lawfulness of *any search* by law enforcement" and "the *taking of a statement* of a defendant" were legal issues decided by the judge. (Italics added.) This language did not state or imply that the jury was prohibited from considering whether Barraza's statements were actually made or were reliable. "Lawfulness" is not equivalent to "reliability," and reasonable jurors would not have equated the language "lawfulness of . . . the taking of a statement" with the question of whether Barraza's statements to Cobian were truthful. There is no reasonable likelihood the instruction misled jurors into thinking they should not consider the credibility or accuracy of Deputy Cobian's testimony or the reliability of Barraza's statements.

Moreover, other instructions made clear that Cobian's credibility and evaluation of Barraza's statements were questions for the jury. CALCRIM No. 358 provided: "You have heard evidence that the defendant made an oral [statement] before the trial [when]

876; *People v. Smith* (2013) 57 Cal.4th 232, 242.) Here, the prosecutor opted to proceed on only the former theory.

the court was not in session. You must decide whether the defendant made any such statements, in whole or in part. If you decide that the defendant made such . . . statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. [¶] Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded." Jurors could not have read this instruction, yet mistakenly concluded "any and all issues relating to the reliability or credibility" of Barraza's statements had "already been decided by the trial court," as he suggests. Additionally, CALCRIM No. 200 told jurors they "must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial." From this instruction, jurors would have known they were to determine whether Barraza's admission that he drove the Explorer was accurate. CALCRIM No. 226 informed jurors that "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience." CALCRIM No. 226 provided a series of factors for the jury's consideration in evaluating witness credibility. Considered together, the instructions were not misleading.

Likewise, the parties' arguments never suggested that the special instruction should be interpreted in the fashion Barraza suggests. The parties did not argue that the trial court had already determined Barraza's statements were reliable. To the contrary, their arguments focused on whether Deputy Cobian's testimony was credible in light of his failure to record Barraza's statements, and whether it was reasonable to believe Barraza drove the Explorer given the absence of a key or tools in Barraza's possession. These arguments would have made little sense if the trial court had already determined Barraza's statements were reliable and accurate.

Barraza's citation to *Crane v. Kentucky* (1986) 476 U.S. 683, does not assist him. In *Crane*, after a trial court found the defendant's confession was admissible, it precluded the defense from introducing evidence about the physical and psychological environment

in which the confession had been obtained, reasoning that such evidence pertained solely to the issue of voluntariness that it had already decided. (*Id.* at pp. 684, 686.) The Supreme Court held this deprived the defendant of a fair trial, because even when a confession is voluntary, evidence about the manner in which it was obtained is often highly relevant to its reliability and credibility. (*Id.* at pp. 688-690 ["the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial"].) But *Crane* is distinguishable. First, unlike in *Crane*, the trial court here did not preclude Barraza from introducing evidence regarding the circumstances under which his admissions were obtained. Second, as we have explained, nothing in the plain language of the special instruction expressly or impliedly precluded the jury from considering whether the circumstances suggested Barraza's statements were unreliable. Third, the defense did not proffer significant evidence suggesting that the circumstances of Barraza's encounter with the deputies rendered his statements unreliable. In *Crane*, for example, the defense evidence showed the 16-year-old defendant had been detained in a windowless room for a protracted period, had been surrounded by as many as six police officers during the interrogation, had repeatedly requested and been denied permission to telephone his mother, and had been badgered into making a false confession. (*Id.* at p. 685.) Nothing remotely similar occurred here.

Barraza further argues that the jury's questions to the trial court during deliberations indicated it misconstrued the special instruction. The jury's questions and the trial court's answers were as follows:

> 1. "Are any of the defendant's statements as testified by the deputy considered direct or circumstantial evidence?" The trial court replied: "Please refer to CALCRIM instructions 223. . ., 224. . . , and 225."

2. "Does this apply to CALCRIM No. 358 regarding a defendant[']s self incriminating statement." The trial court replied, "Please refer to CALCRIM 200."[5]

Barraza contends that these questions indicated the jury was considering whether Barraza made the statements at all, and therefore was "obviously confused between whether this was a factual issue for them to decide or whether it was a legal issue already decided." We do not agree that the questions evidence jury confusion about whether Barraza "made the statements at all." It is even less clear that the questions indicated "general confusion" about whether either the existence of the statements or their reliability were factual issues. To the extent the questions indicated jurors were considering whether the statements were actually made, this was hardly surprising: CALCRIM No. 358 told jurors "You must decide whether the defendant made any such statements, in whole or in part." If the jury was considering whether the statements were made, they cannot have believed the trial court had already determined "any and all issues" related to the statements. Indeed, none of the jury's questions referenced or pertained to the special instruction. In our view, none indicated confusion about the jury's role in evaluating the reliability of Barraza's statements.

In sum, in light of the instructions given and the parties' arguments, no reasonable juror would have concluded the court had already found Barraza actually made admissions to Deputy Cobian, and that those admissions were reliable.

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[5] The jury also asked a third question: "Regarding CALCRIM 359, does this include the defendant's statement to the deputy on the morning of the arrests? Define 'out of court statement.' " The trial court replied: "CALCRIM 359 . . . applies to any out-of-court statement made by the defendant. An out-of-court statement is made by the defendant when not under oath during a trial." Barraza appropriately does not contend this question indicated juror confusion.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.