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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUNIOR VASQUEZ, Defendant and Appellant.	B292872 (Los Angeles County Super. Ct. No. BA467491)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Tyrone A. Sandoval; and G. Martin Velez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

In a felony complaint filed by the Los Angeles County District Attorney's Office, defendant and appellant Junior Vasquez was charged with felony driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a) (section 10851(a)); count 1), misdemeanor giving false information to a police officer (Pen. Code, § 148.9, subd. (a); count 2), and misdemeanor driving without a valid driver's license (Veh. Code, § 12500, subd. (a); count 3). As to count 1, it was alleged that defendant had two prior vehicle-related felony convictions (Pen. Code, § 666.5) and one prior prison term (Pen. Code, § 667.5, subd. (b)). Moreover, it was alleged that defendant was ineligible for probation because he had twice previously been convicted of a felony. (Pen. Code, § 1203, subd. (e)(4).)

The jury found defendant guilty on all counts. Defendant admitted the prior conviction allegations. The trial court sentenced defendant to a total term of five years in county jail and imposed various assessments and a restitution fine.

Defendant raises two issues in this timely appeal. First, he argues that the trial court failed to instruct on the necessary elements of a felony violation of section 10851(a). Second, he argues that the court violated due process by imposing assessments and restitution without first finding his ability to pay.

We agree that the trial court's instructions allowed the jury to convict defendant of felony driving or taking a vehicle without consent in violation of section 10851(a) under a theft theory without proof that the vehicle was valued over $950. This was prejudicial error. Accordingly, we reverse the conviction on count 1 and vacate defendant's sentence in its entirety. On remand, the People may retry count 1 as a felony or reduce it to a

misdemeanor. This ruling renders defendant's due process challenge to the imposition of assessments and restitution not ripe for review. We affirm in all other respects.

BACKGROUND

A. *Relevant facts*

In April 2018, Andres Lopez (Lopez) lent his 1998 Honda CR-V to his cousin to drive to work. In the early morning hours of April 20, 2018, Lopez's cousin returned to where he had parked the Honda several hours earlier before starting a night shift in Gardena. The car had been stolen. The theft was promptly reported to the police.

At approximately 7:15 p.m. that evening, Los Angeles Police Department Officer Brandon Roach and his partner were patrolling an area in South Los Angeles with "a high rate of stolen and recovered stolen vehicles[.]" Officer Roach observed the Honda being driven by defendant, ran a computer search of the license plate number, and learned that the car had been reported stolen earlier that day. Defendant was pulled over and taken into custody without incident.

Officer Roach searched the Honda and observed that its steering column had been dismantled, indicating "that the vehicle was obviously stolen in some method." The dismantled steering column was covered by a towel or cloth, possibly to avoid detection. A wrench, screwdrivers, pliers, and several shaved keys were found in the Honda, as well as "a slim jim device[,]" which is "essentially a thin piece of metal generally with a hook on the end . . . used to open vehicles' door locks." Another shaved key was found in defendant's pants pocket.

B. *Relevant proceedings*

Count 1 of the felony complaint alleged that "[o]n or about April 20, 2018, . . . the crime of DRIVING OR TAKING A VEHICLE WITHOUT CONSENT, in violation of . . . [section] 10851(a), a Felony, was committed by [defendant] who did drive a vehicle, . . . without the consent of the owner, . . . and with the intent to deprive the owner of title and possession of the vehicle."

The trial court instructed the jury that a felony violation of section 10851(a) required proof of the following elements: "1. A person *took or drove* a vehicle belonging to another person; [¶] 2. The other person had not consented to the *taking or driving* of his vehicle; and [¶] 3. When the person *took or drove* the vehicle, he had the specific intent to deprive the owner either permanently or temporarily of his title to or possession of the vehicle." (Italics added.)

During closing arguments, the prosecutor stated that the People's theory on count 1 was "the driving aspect, that [defendant] was driving in a vehicle without the consent of the owner." Given this theory, the prosecutor explained, "My only burden is to prove beyond a reasonable doubt that [defendant] was driving. Did he dismantle the steering column or not? It really doesn't matter if he did or if he didn't." Nevertheless, the prosecutor argued to the jury that defendant "had different kinds of indicia of theft in his car. He had the wrench which had keys attached, numerous different shaved keys. He had a shaved key in his pocket. He also had two sets of screwdrivers and pliers."

The jury returned a verdict finding defendant guilty of violating section 10851(a) by driving or taking a vehicle without consent.

DISCUSSION

I. Defendant's Felony Conviction for Driving or Taking a Vehicle Without Consent Must Be Reversed Due to Instructional Error.

Defendant argues that the trial court failed to properly instruct the jury on count 1 and that the error was prejudicial because it allowed him to be convicted under an invalid legal theory.

A. S*tandard of review*

We review claims of instructional error de novo. (*People v. Mitchell* (2019) 7 Cal.5th 561, 579.)

B. *Vehicle Code section 10851, subdivision (a)*

Section 10851(a), which "prohibits taking or driving a vehicle without the owner's consent and with the intent to temporarily or permanently deprive the owner of title or possession, can be violated by a range of conduct, only some of which constitutes theft." (*People v. Lara* (2019) 6 Cal.5th 1128, 1135 (*Lara*).)

A theft-based violation involves an unlawful taking, which "may be accomplished by driving the vehicle away." (*People v. Garza* (2005) 35 Cal.4th 866, 871.) This is distinguished from a posttheft driving violation, which "consists of driving a vehicle without the owner's consent after the vehicle has been stolen, with the intent to temporarily or permanently deprive the owner of title or possession. Where the evidence shows a 'substantial break' between the taking and the driving, posttheft driving may give rise to a conviction under . . . section 10851 distinct from any liability for vehicle theft. [Citations.]" (*People v. Page* (2017) 3 Cal.5th 1175, 1188–1189.)

Unlawfully driving or taking a vehicle in violation of section 10851(a) is an "alternative felony-misdemeanor[]" (*Lara*, *supra*, 6 Cal.5th at p. 1131)—that is, "a 'wobbler' offense that may be punished as either a felony or a misdemeanor. [Citations.]" (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 853 (*Gutierrez*).) "While a theft-based violation . . . may be punished as a felony only if the vehicle is shown to have been worth over $950, a violation committed by posttheft driving may be charged and sentenced as a felony regardless of value." (*Lara*, *supra,* at p. 1136; see also Pen. Code, § 490.2, subd. (a).)

C. *Analysis*

The trial court's instruction regarding section 10851(a) suffered from two errors. First, the court did not instruct the jury that, to convict defendant of a felony taking (i.e., theft), the People were required to prove that the value of the Honda exceeded $950. (See *Gutierrez*, *supra*, 20 Cal.App.5th at p. 855; *People v. Jackson* (2018) 26 Cal.App.5th 371, 373 (*Jackson*).) Second, the court did not instruct the jury that, to convict defendant of felony posttheft driving, the People had to prove that there was a substantial break between the taking and the driving. (See *Lara*, *supra*, 6 Cal.5th at p. 1138.)

Thus, the "jury instructions . . . failed to adequately distinguish among, and separately define the elements for, each of the ways in which section 10851[(a)] can be violated." (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 856.) This failure permitted the jury to convict defendant on a theory of vehicle theft without finding that the requisite value of the vehicle had been proven. (See *id.* at p. 857; *Jackson*, *supra*, 26 Cal.App.5th at p. 378.)

The People do not dispute that instructional error occurred. Rather, they contend that any error was harmless beyond a reasonable doubt.[1] We disagree.

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 167.) Under this standard, we must reverse defendant's conviction "unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory" (*ibid.*) that defendant committed posttheft driving. We cannot reach that conclusion here.

During closing arguments, the prosecutor stated that the People's theory on count 1 was "the driving aspect," but she also recounted the "indicia of theft" found in the Honda and on defendant's person, including shaved keys and various tools. Those indicia, as well as defendant's "possession of [the vehicle] under suspicious circumstances shortly after it was stolen"

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[1] The People also argue that defendant forfeited his claim of error by failing to object to the instructions below. Failing to object to an instruction or to request a modification generally forfeits a claim of instructional error on appeal. (See *People v. Lee* (2011) 51 Cal.4th 620, 638.) But this general rule does not preclude our review when the instruction affects the substantial rights of the defendant. (Pen. Code, § 1259; *Gutierrez*, *supra*, 20 Cal.App.5th at p. 856, fn. 8.) Here, the claimed errors involve the elements of a felony violation of section 10851(a). Because "the constitutional right to have all elements of a criminal offense proved beyond a reasonable doubt is substantial" (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139), we decline to find forfeiture. (*Gutierrez*, *supra,* at p. 856, fn. 8.)

(*Jackson*, *supra*, 26 Cal.App.5th at p. 380), constituted evidence that could have supported a conviction on a theft theory if a vehicle value of over $950 had also been proven. (See *ibid.*; *People v. Clifton* (1985) 171 Cal.App.3d 195, 199–200.)

The People liken this case to *Lara*, where our Supreme Court concluded that a section 10851(a) instruction's failure to refer expressly to posttheft driving was harmless beyond a reasonable doubt. (*Lara*, *supra*, 6 Cal.5th at p. 1138.) *Lara* is distinguishable in several respects. First, unlike here where the jury also received a taking instruction, the jury in *Lara* "was instructed *only* on an unlawful driving theory of the . . . offense." (*Id.* at p. 1137, italics added; see also *id.* at p. 1132.) Second, the defendant in *Lara* "was apprehended driving the vehicle six or seven days after it was stolen from its owner, a time gap that indisputably qualifies as a '"substantial break"' between the theft and the driving. [Citation.]" (*Id.* at p. 1138.) Here, defendant was stopped by police while driving the Honda on the same day that it was reported stolen. Third, in *Lara*, there was neither "direct evidence tying [the] defendant to the theft" nor "any circumstantial evidence beyond [the] defendant's later possession of the stolen vehicle" six or seven days after the theft. (*Ibid.*) In contrast, defendant was in possession of the Honda on the same day it was stolen and several tools that could have been used to effectuate the theft—including shaved keys and a slim jim device—were found either in the vehicle or on defendant's person.

For these reasons, we cannot conclude beyond a reasonable doubt that each member of the jury convicted defendant based on a posttheft driving theory, which did not require proof of the vehicle's value, as opposed to a theft theory. We therefore must reverse the conviction on count 1 and "remand for the People to

elect whether to retry [defendant] on a felony [section 10851(a)] charge or accept the conviction's reduction to a misdemeanor." (*Jackson*, *supra*, 26 Cal.App.5th at p. 381; accord, *Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.)

II. Defendant's Challenge to the Imposition of Assessments and Restitution Is Not Ripe for Review.

Defendant argues that the trial court erred in imposing a $40 per count court operations assessment (Pen. Code, § 1465.8), a $30 per count court facilities assessment (Gov. Code, § 70373), a $10 crime prevention fine (Pen. Code, § 1202.5), and a $300 restitution fine (Pen. Code, § 1202.4) without first determining his ability to pay, in violation of his right to due process. However, because we are reversing the conviction on count 1, vacating defendant's sentence in its entirety, and remanding for further proceedings, this argument is no longer ripe for our review. (See *People v. Garcia* (2018) 30 Cal.App.5th 316, 328 ["[A] controversy is not ripe until '"the facts have sufficiently congealed to permit an intelligent and useful decision to be made." [Citation.]' [Citation.]"].)

DISPOSITION

The conviction on count 1 is reversed. We affirm the convictions on counts 2 and 3. We vacate defendant's sentence in its entirety and remand the matter to the trial court, where the People may retry count 1 as a felony or reduce it to a misdemeanor.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ