Filed 3/1/17 P. v. Frederick CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES BRYAN FREDERICK, Defendant and Appellant.	B270211 (Los Angeles County Super. Ct. No. PA084117)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Reversed with instructions.

C. Matthew Missakian, 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, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant James Bryan Frederick challenges his conviction for burglary of a vehicle. Frederick smashed the passenger side window of victim Maribel G.'s car with a rock and began rummaging around inside. He was completely naked at the time. When Maribel G. and her husband came outside to investigate, Frederick ignored their shouts and continued searching through the glove compartment until sheriff's deputies arrived. Frederick contends that the court erred by failing to instruct the jury on a lesser included offense of vehicle tampering and by excluding evidence relevant to his defense of mistake of fact. We agree and reverse his conviction.

FACTS AND PROCEEDINGS BELOW

Shortly before 9:00 p.m. on August 16, 2015, Maribel G. heard a sound of glass breaking and a car alarm going off outside her home in the Canyon Country area of Santa Clarita. She and her husband Nestor G. went outside and saw Frederick inside Maribel G.'s sport utility vehicle, a gray Nissan Armada, which she had parked on the street. He was completely naked and was searching through the car, throwing bills and other items around inside it. He opened the glove compartment and started pulling things out of it. Maribel and Nestor G. yelled at Frederick, asking him what he was doing and telling him to stop, but he did not respond. Maribel G.'s daughter came out of the house and handed her a phone, with which Maribel G. called 911. Frederick attempted to get out of the car, but every time he did so, Maribel G. locked the door using the car's remote control locking device. Frederick then appeared to reach down to the area near the gas pedal, where Maribel G. had a number of additional bills.

At this point, sheriff's deputies arrived on the scene and found Frederick still inside the car and rummaging through the glove

compartment. A deputy removed Frederick from the car and arrested him. Maribel G. found that the interior of the car was in disarray, with various bills, CDs, and other items scattered around. There was also a rock inside the car near the gas pedal, which Frederick had apparently used to smash the passenger side window. In a patch of grass outside the passenger side of the car, Maribel G. found a wedding ring and a glasses case that had previously been in the glove compartment.

Deputies recovered a torn shirt that apparently belonged to Frederick in a gutter near the car. They also found Frederick's own car, a Mercedes GL450, parked less than one block away. Frederick's car and the car he broke into were both gray sport utility vehicles.

An information charged Frederick with second degree burglary of a vehicle, in violation of Penal Code section 459.[1] The information also alleged that Frederick had suffered two previous convictions for prison priors pursuant to section 667.5. After the jury found Frederick guilty, and Frederick admitted the prison priors, the trial court sentenced him to four years in county jail. The sentence consisted of the upper term of three years for burglary, plus one additional year for one prison prior. The court struck the second prison prior because Frederick's two priors had resulted in only a single commitment.

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

DISCUSSION

Frederick raises three contentions on appeal. First, he contends that the trial court erred by failing to instruct the jury on the lesser included offense of vehicle tampering. Next, he contends that the trial court erred by excluding relevant evidence of his mental state. Finally, he contends that his trial attorney rendered ineffective assistance by failing to request a specific instruction regarding mistake of fact. We need not decide whether Frederick is entitled to relief for ineffective assistance of counsel because we agree with his two remaining contentions. Because these errors cumulatively prejudiced Frederick, we reverse his conviction.

I. Jury Instruction on Vehicle Tampering

Frederick contends that the trial court erred by failing to instruct the jury regarding the lesser included offense of vehicle tampering. (Veh. Code, § 10852.) We agree.

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531 . . . .) That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present (see, e.g., *People v. Hood* (1969) 1 Cal.3d 444 . . .), but not when there is no evidence that the offense was less than that charged.' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) This duty to instruct on lesser included offenses arises whenever there is

substantial evidence—that is, " ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed. (*Id.* at p. 162.) An error in failing to instruct a jury on a lesser included offense is reviewed for prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), such that reversal of a conviction is appropriate only if "it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred."[2] (*Breverman*, *supra*, 19 Cal.4th at p. 178.)

Vehicle Code section 10852 forbids "wil[l]fully injur[ing] or tamper[ing] with any vehicle or the contents thereof or break[ing] or remov[ing] any part of a vehicle without the consent of the owner." In the context of this section, courts have interpreted tampering as equivalent to " 'interfer[ing] with.' " (*People v. Mooney* (1983) 145 Cal.App.3d 502, 505 (*Mooney*).) "Interference . . . is much broader than merely damaging a vehicle, [and] includes 'any act inconsistent with the ownership thereof.' " (*Ibid.*, quoting *People v. Anderson* (1975) 15 Cal.3d 806, 810.) Because burglary of a vehicle requires that the perpetrator break into a locked vehicle (see § 459), it is impossible to burglarize a vehicle without also tampering with it. (*Mooney*, *supra*, 145 Cal.App.3d at p. 505.) Thus, "Vehicle Code section 10852 defines a lesser included offense" of burglary of a vehicle. (*Mooney*, *supra*, at pp. 505-506.)

Frederick argues that there was substantial evidence to support a conclusion that he tampered with the vehicle, but that he lacked the specific intent "to commit grand or petit larceny or any felony" when doing so. (§ 459.) We agree. Frederick's actions

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[2] Because we conclude that Frederick suffered prejudice from the cumulative effect of the errors in this case, we do not address whether the error in the jury instructions alone prejudiced him.

in breaking into Maribel G.'s car while completely naked were bizarre. As we explain further below (see Discussion part III, *post*), there was substantial evidence to suggest that Frederick broke into Maribel G.'s car not to steal from it, but because he mistook it for his own. If he had entered the car determined to steal, he would have been expected to flee when her car alarm went off, or at least when Maribel and Nestor G. came out of the house and found him. Instead, he remained in the car rummaging through Maribel G.'s papers. Under the standard required for substantial evidence, there was sufficient evidence to support a conviction for tampering rather than burglary of a vehicle. (See *Breverman*, *supra*, 19 Cal.4th at p. 162.)

The People argue that no jury instruction was required because the evidence at trial was not consistent with a conviction for tampering. They cite a portion of *Mooney* in which the court stated that the defendant could not have been convicted of tampering "if the jurors found he entered a locked vehicle." (*Mooney*, *supra*, 145 Cal.App.3d at p. 506, italics omitted.) In this case, there was no doubt that Maribel G.'s car doors were locked—otherwise, Frederick would not have needed to smash the window with a rock. Thus, according to the People, substantial evidence did not support a conviction for tampering.

This argument misreads the law. Burglary of a vehicle requires that the perpetrator enter the victim's locked vehicle with the intent to commit larceny or any felony. (§ 459.) In *Mooney*, the defendant "testified he entered [the victim's car] to steal." (*Mooney*, *supra*, 145 Cal.App.3d at p. 506.) The only question, then, was whether the door was locked at the time the defendant entered the vehicle. The court held that if it had not been locked, the defendant would not have been guilty of burglary but would still be guilty of

tampering because "opening the door of an unlocked vehicle to facilitate a nonconsensual entry to commit theft both interferes with the owner's right to possession and improperly alters the closed state of the vehicle." (*Ibid.*)

The same reasoning applies in this case. Here, just as in *Mooney*, Frederick's defense essentially conceded that he had committed one of the two elements of burglary of a vehicle. In *Mooney*, the defendant admitted he intended to steal property from within the car. Here, Frederick clearly broke into a locked vehicle. By his actions, Frederick, like the defendant in *Mooney*, interfered with the victim's ownership of a vehicle. The question in both cases was whether the defendant had committed the second element of burglary. In both cases, if the jury answered in the negative, it could properly convict the defendant of tampering rather than burglary. Thus, just as in *Mooney*, the trial court erred by failing to instruct the jury as to vehicle tampering.

II. Exclusion of Evidence Regarding Frederick's Mental State

Frederick contends that the trial court erred by excluding evidence relevant to his defense. " 'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Only relevant evidence is admissible (Evid. Code, § 350), and, "[e]xcept as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) " 'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.] The trial court retains broad discretion in determining the relevance of evidence.' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 995.) Errors in the exclusion

of evidence are reviewed under the *Watson* standard, except when they are so severe that they violate the defendant's right to due process.[3] (*Id.* at p. 999.)

During cross-examination of the sheriff's deputy who transported Frederick to jail following his arrest, Frederick's attorney asked, "Did you ever tell Mr. Frederick that the car that he was in was not his car?" The deputy replied, "Yes." Frederick's attorney then asked, "And in response to that, did he seem confused by that?" The prosecutor objected to this question on the basis of relevance, and the trial court sustained the objection.

This testimony was indeed relevant to Frederick's defense, and the trial court erred by excluding it. The deputy's response to the question, along with any follow-up questions, would tend to establish a material fact—whether Frederick believed the car he broke into was his own. As we discuss below (see Discussion part III, *post*), Frederick's defense was based entirely on this alleged mistake of fact.

The People contend that, even if the deputy's response to the question would have been relevant, it should have been excluded as hearsay. But Frederick's attorney's question—"did he seem confused . . . ?"—did not explicitly call for the deputy to respond with hearsay. The deputy might have answered by describing the expression on Frederick's face and his physical appearance. Alternatively, if she answered by reporting what Frederick said, that statement might have been admissible under a hearsay exception because it was used to prove Frederick's "existing state of

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[3] In this case, because we conclude (see Discussion part IV, *post*) that the errors cumulatively prejudiced Frederick under the *Watson* standard, we need not decide whether the error in excluding evidence violated Frederick's right to due process.

mind, emotion, or physical sensation." (Evid. Code, § 1250, subd. (a)(1).) There is no basis for concluding that the deputy's response would have been inadmissible.

III. Pinpoint Instruction on Mistake of Fact

Frederick contends that his attorney provided him with ineffective assistance of counsel by failing to request a pinpoint instruction regarding mistake of fact.[4] Because the other errors in the case require that we reverse his conviction (see Discussion part IV, *post*), we need not decide whether Frederick is also entitled to relief on the basis of ineffective assistance of counsel. Nevertheless, the issue of an instruction on mistake of fact may arise again on retrial, and for that reason we will comment on this issue. We agree with Frederick's contention that an instruction on mistake of fact[5] would have been appropriate in light of the facts of this case.

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[4] Because the trial court correctly instructed the jury on the general principles of law regarding burglary, including the specific intent requirement, and a mistake-of-fact defense serves to "negate or rebut the prosecution's proof of an element of the offense" (*People v. Anderson* (2011) 51 Cal.4th 989, 996), the trial court did not have a sua sponte duty to instruct the jury on mistake of fact. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 873-874 (*Covarrubias*).)

[5] The relevant pattern instruction is CALCRIM No. 3406. As applied to the facts of this case, that instruction would have read as follows:

"The defendant is not guilty of [burglary] if [he] did not have the intent or mental state required to commit the crime because [he] did not know a fact or mistakenly believed a fact.

"If the defendant's conduct would have been lawful under the facts as [he] believed them to be, [he] did not commit [burglary].

The evidence was overwhelming that Frederick broke into Maribel G.'s locked vehicle. Maribel and Nestor G. discovered him inside the vehicle, with the alarm blaring, a window smashed, and a rock inside the car. Consequently, at trial, Frederick's defense was based almost entirely on the claim that he did not intend to steal from the car, but rather confused it with his own.

A jury instruction on an affirmative defense is appropriate when there is substantial evidence to support it. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " (*Ibid.*) Because burglary is a specific intent crime, in order for Frederick to establish a defense of mistake of fact, he needed to show only that he believed Maribel G.'s car was his own, not that that belief was reasonable. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1427, disapproved of on another ground by *Covarrubias*, *supra*, 1 Cal.5th at p. 874, fn. 14; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 10-11 (*Navarro*).)

Under that standard, there was sufficient evidence to support a defense of mistake of fact. Frederick's car was a gray SUV, the same color and body style as Maribel G.'s, and he had parked his own car less than a block away from Maribel G.'s. Moreover, once inside the car, according to the testimony of both Maribel G. and the

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"If you find that the defendant believed that [he broke into his own car, he] did not have the specific intent or mental state required for [burglary].

"If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for [burglary], you must find [him] not guilty of that crime."

sheriff's deputy who arrived on the scene, he spent much of his time looking through papers he found in the glove compartment. The only evidence of theft was a wedding ring that Frederick apparently took from the glove compartment and discarded into the grass along with a glasses case. Otherwise, Frederick simply rummaged through paperwork inside the car. In light of the fact that he took all these actions while completely naked, a jury might reasonably conclude that Frederick was in a disordered mental state and honestly believed that he was inside his own car.

IV. The Cumulative Effect of the Errors Prejudiced Frederick

When there are multiple errors in a case, the cumulative effect of the errors may prejudice the defendant, even if each error, considered on its own, is not sufficiently significant to require reversal. (*People v. Hill* (1998) 17 Cal.4th 800, 844.) That is the case here. It is reasonably probable that Frederick would have obtained a more favorable result at trial if not for the errors in the jury instructions and the exclusion of evidence. (See *Watson*, *supra*, 46 Cal.2d at p. 836.)

The errors in this case in combination prejudiced Frederick in a way they would not have done on their own. Testimony from the sheriff's deputy who drove Frederick to the station was relevant to establish Frederick's mental state. Frederick's defense—that he mistook Maribel G.'s car for his own—is more credible if Frederick was not entirely mentally sound at the time. The mere fact that the deputy felt the need to tell Frederick that the car he had broken into was not his own suggests that the deputy perceived him to be in a disordered state. Testimony from the deputy regarding the way he appeared and behaved after he was told the car was not his own would have clarified this point, and would have been the only

direct evidence of Frederick's mental state immediately after he broke into the car.

The lack of a lesser included charge compounded the effect of the earlier error. In determining whether the omission of a lesser included offense from the jury instructions prejudiced a defendant, "an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, *supra*, 19 Cal.4th at p. 177, italics omitted.) As we have seen, the evidence that Frederick had the intent to commit larceny or any felony at the time he broke into Maribel G.'s car was not overwhelming. If the jury had been permitted to hear additional testimony regarding Frederick's behavior after being arrested, it only increases the probability that the jury would have acquitted him of burglary, while convicting him of vehicle tampering, if only given the opportunity.

V. Conditional Reversal

Because burglary of a vehicle is a specific intent crime, a defense of mistake of fact does not require the defendant to show that his mistake was reasonable. (*Navarro*, *supra*, 99 Cal.App.3d at pp. Supp. 10-11.) By contrast, vehicle tampering is a general intent crime.[6] Consequently, a mistake of fact is

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[6] The statute that defines vehicle tampering forbids "wil[l]fully injur[ing] or tamper[ing] with any vehicle or the contents thereof." (Veh. Code, § 10852.) "The use of the word 'willfully' in a penal statute usually defines a general criminal intent, absent other statutory language that requires 'an intent to

a defense to vehicle tampering only if the mistake was reasonable. (*Id.* at p. Supp. 10.) Although there was substantial evidence that Frederick believed the car he broke into was his own, there was no evidence to suggest that this mistake could have been reasonable. Thus, the record establishes Frederick's guilt of vehicle tampering as a matter of law.

" ' "An appellate court is not restricted to the remedies of affirming or reversing a judgment. Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial." ' " (*People v. Thomas* (2013) 218 Cal.App.4th 630, 647.) With this authority, an appellate court may reduce a conviction to a lesser included offense. (*People v. Romo* (1967) 256 Cal.App.2d 589, 596; § 1181, subd. (6).) On remand, therefore, the prosecution shall have the option to retry Frederick for burglary, or to accept a modification of the judgment to reflect a conviction for vehicle tampering. If the prosecution elects to accept the modification of the judgment, the trial court shall resentence Frederick in accordance with the modified judgment.

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do a further act or achieve a future consequence.' " (*People v. Atkins* (2001) 25 Cal.4th 76, 85.)

DISPOSITION

The judgment of the trial court is reversed. On remand, the prosecution shall have the option to retry Frederick for burglary, or to accept a modification of the judgment to reflect a conviction for vehicle tampering. If the prosecution elects to accept the modification of the judgment, the trial court shall resentence Frederick in accordance with the modified judgment.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.