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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. DONALD OTIS, Defendant and Appellant.	B233608 (Los Angeles County Super. Ct. No. BA354931)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald Rose, Judge. Affirmed.

Lise M. Breakey, 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, Steven E. Mercer and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Donald M. Otis was a real estate agent who cultivated the unguarded trust of a client. Through fraudulent manipulation of funds and real estate transactions, appellant betrayed the client and also a coworker and stole real property worth over $150,000.

A jury found appellant guilty of grand theft, embezzlement, failure to file tax returns, and money laundering. He was sentenced to serve over four years in state prison. Appellant contends that the evidence is insufficient to support the conviction in count 1, grand theft of real property by means of false pretenses. He also contends that the sentence for money laundering (count 9) must be stayed under Penal Code section 654. As we find that neither contention is meritorious, we affirm.

FACTUAL BACKGROUND

Shirley Smith received a pension distribution from her late husband, which she put into a trust account for her son, Christopher Brown. In 1999, Brown took all of the money out of the trust to purchase a condominium in Long Beach. In 2004, the IRS sent Brown a letter informing him that he owed taxes on income dating back to 1989 and that it held a lien against Brown for over $168,000. The previous year, Brown had met appellant, who had lived next door to him in Long Beach. At some point, Brown had noticed that appellant was wearing a Century 21 Beachside Realty polo shirt, so he asked appellant what he thought the likelihood of selling Brown's condo was. Appellant had told Brown that in his opinion, the condo would be a quick sale.

Brown and appellant discussed the potential market value of the condo again in 2004. Appellant told Brown that the condo could potentially list for as much as $215,000. Appellant researched the value of the property and signed Brown up into an executive agency listing agreement with Century 21 Beachside. Two separate individuals made offers to buy Brown's condo; however, both fell through.

Appellant informed Brown of a special program at Century 21 Beachside that would allow appellant to purchase Brown's condo because of his good credit. Brown accepted the proposal, and appellant agreed to buy Brown's condo for $199,000. In conjunction with the sale, appellant prepared a rental agreement whereby Brown would

loan appellant $90,000 at a 6.75 percent interest rate. As a result, Brown would remain living in the condo while paying appellant monthly rent reduced by the interest due on the loan. Brown understood that after escrow closed, the agreement would take effect and appellant would begin making monthly payments on the $90,000 loan.

After escrow opened, appellant instructed Talbrook Escrow to draw two escrow amendments to pay two bills at the close of escrow: (1) $5,003.69 to appellant "for taxes and personal loan" and (2) $90,000 to Nu Vision Entertainment, Inc., "in care of" appellant. At a later date, appellant also told Talbrook Escrow to draw an amendment to release the initial escrow deposit back to him. Brown did not sign either amendment.

A title report, however, revealed existing liens against both appellant and Brown that prevented escrow from closing. Appellant informed Brown that escrow could not close as scheduled because of Brown's lien. Appellant never disclosed that appellant himself also had tax liens that were preventing escrow from closing. Appellant consulted a former real estate agent named Darryl Evans about the problem. He told Evans that he had a disabled client who "owed him some money for helping him out." Appellant further explained that his client was trying to sell a property in order to pay appellant back; however, his client had a tax liability that was preventing escrow from closing. Appellant thought the IRS would demand the tax payment from the equity held in escrow.

Evans told appellant that if property is in a corporation, trust, or a limited liability company, the IRS will not go after it. Based on this information, appellant asked Evans to draft a trust document. Evans did so in the understanding that appellant would create the trust in order to help Brown settle whatever pending tax issues Brown had with the IRS. The document stated that appellant, as trustee, had a duty to work for the benefit of Brown and that "any proceeds, avails, or any funds at the close of escrow would belong to [Brown,] the beneficiary." Furthermore, Brown was always to be able to inspect all records pertaining to the property.

Appellant proposed the idea of the trust account to Brown and Smith. Their prior agreement for Brown to loan $90,000 would remain in place under the trust account.

Appellant told Brown and Smith that "he had gotten expert advice" from an "attorney" and showed them the trust document. Appellant also recommended that they cancel the first escrow and open a separate second escrow. He told Brown not to set up a separate bank account because the IRS could still take money from it.

On April 13, 2005, Brown entered into a trust agreement with appellant. Thereafter, Brown also executed a grant deed granting his property to appellant as the trustee. Brown testified that he granted his property to appellant solely because appellant had told him that doing so was necessary to close escrow. He did not intend to gift his condo to appellant.

Around the same time the trust agreement was executed, appellant told Artrenity Borden, the Century 21 Office Administrator, that he was selling a condo that he owned. Borden informed appellant that if she were to purchase the property she would need to rent it. Appellant offered to help Borden keep the current renter or get a new one. Appellant told Borden she could eventually see the inside of the condo; however, Borden never did.

On May 9, 2005, Borden signed a purchase agreement to buy appellant's condo for $235,000. Sometime later, Borden received a check for $13,300. Appellant told Borden the check was for any upgrades she might have to do to the property. For the remainder of the year, Borden continued to receive cash in her mailbox from the person she believed to be the renter of the condo.

At trial, the prosecutor presented a purchase agreement for the condo to Borden. The date on the document was April 18, 2005, and the purchase price was $199,000. The document bore the signature of "Artrenity Borden" and the initials "A.B."; however, Borden testified that she had never signed it. Borden had never authorized appellant to sign her signature on any of the documents. After Brown served Borden with notice of a lawsuit, Borden was unable to reach appellant.

In June or July of 2005, appellant called Smith and Brown to inform them that there had been some trouble with the title company, but that escrow could close as soon as the next Monday. Smith tried to call appellant while waiting to hear back from him

concerning the close of escrow; however, appellant did not answer any of her calls. On August 2, 2005, appellant called to tell Smith and Brown that escrow had closed. Smith and Brown never received the final settlement statement or any of the proceeds from the sale of Brown's condo. The only money Brown received was $3,000 on August 16 "to tide [him] over for just a brief period of time until escrow closed."

After August 2, Smith and Brown never heard from appellant again. They went to appellant's condo in Long Beach about 60 times attempting to reach him, but he was never there. After a few weeks had passed with no word from appellant, Smith and Brown went to Century 21 Beachside to try to contact him. There, they learned that escrow had actually closed in June. A few months later, Smith and Brown filed a police report and sued appellant. After appellant failed to respond to investigators, the Department of Real Estate revoked appellant's real estate license.

Appellant never informed his Century 21 branch manager about the sale of Brown's property, as he was required to do. The file concerning the sale was not in the Century 21 office, as it should have been. Despite e-mails and phone calls, Century 21 was not able to reach appellant or discover the file from the sale. Century 21 terminated appellant's employment.

The proceeds from the sale to Borden totaled $210,424.91. Appellant created an escrow amendment instructing All Coast Escrow to direct a $28,748 check to himself "for consideration, receives, and services rendered on his behalf." Brown had not authorized this payment, nor did appellant provide any consideration. Appellant converted this check into additional checks at Union Bank on June 21, 2005. Appellant thereafter issued new checks to various entities and persons: $1,090.24 to Bedrosian's, $2,672 to Arcadia Financial, $10,000 to the Golden Nugget Hotel, and $10,000 to the MGM Grand Hotel

Appellant signed an additional escrow amendment instructing All Coast Escrow to direct a $30,017 check to the LAPD Credit Union account of Yvette D. Bass, appellant's wife. All of the money was spent in about five months from the day of its deposit.

Appellant as trustee lastly received a payment of the remaining $151,659.91 proceeds. Appellant then disbursed a number of checks, all dated June 27, 2005, to various places: $7,785.48 to Pacific Sales, $1,000 to Jackie Johnson, $25,000 to Russell J. Otis, $13,300 to Borden, $8,000 to Michael Tran, $5,000 to New York-New York Hotel, $2,800 to Primus Financial, $66,674.43 to Bass, and $5,000 to Evans. Appellant wrote an additional two checks on June 27: $2,000 to Sanchez Electric and $15,000 to the Wynn Las Vegas; however, both checks were endorsed as used for purposes not intended and cashed back in at an office by appellant. On July 22, 2005, appellant wrote out an additional check to Bass for $10,000.

Appellant deposited each of the checks made out to the four casinos into a front money account, from which he gambled until he had lost or won a small amount. When appellant converted his chips back into cash, the amount of money he obtained was not reportable to the IRS.

PROCEDURAL BACKGROUND

A jury convicted appellant of grand theft of real property (Pen. Code, §487, subd. (a)[1]; count 1), grand theft by embezzlement (§ 487, subd. (a); count 3), failure to file an income tax return (Rev. & Tax Code, § 19706; counts 4-5), and money laundering (§ 186.10; count 9). The jury acquitted appellant of forgery (§ 470, subd. (a); counts 6-8). The trial court granted a defense motion to dismiss count 2 pursuant to section 1118.1. The jury also found true the section 12022.6, subdivision (a)(2) allegation (loss of property valued over $150,000.00) as to count 3 (embezzlement) and the section 803 allegation (crime not discovered until August 1, 2008) as to count 9 (money laundering).

The trial court sentenced appellant to a total of four years eight months in state prison. The court selected count 3 as the base count and imposed the mid-term of two years, plus two years pursuant to the section 12022.6 allegation. As to count 1, the trial court sentenced appellant to two years and then stayed the sentence. As to count 4, the

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1 All further references are to the Penal Code, unless otherwise noted.

trial court sentenced appellant to eight months. As to counts 5 and 9, the trial court imposed a two-year sentence for each count to run concurrently with the base term.

DISCUSSION

A. Sufficiency of the evidence of appellant's intent to defraud

The district attorney charged appellant with grand theft of real property and tried this charge on the theory that the theft was by means of false pretenses. The district attorney's pleadings allege that appellant falsely represented that if Brown made appellant trustee over his property, and the property was later sold, Brown would receive the proceeds from the sale. Appellant, however, contends that such cannot constitute a false representation because there was not enough evidence at trial to establish that appellant had the intent to steal Brown's money when he and Brown set up the trust account. Appellant maintains that he did not form the intent to steal Brown's due proceeds until a much later time.

"The jury's determination of felonious intent . . . is conclusive on appeal unless without any substantial support in the evidence." (*People v. Hambleton* (1963) 218 Cal.App.2d 479, 482.) Reviewing the record in the light most favorable to the judgment of the trial court, we find that substantial evidence exists when the prosecution introduces evidence that could lead a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.) Circumstantial evidence and reasonable inferences from that evidence will suffice to uphold the lower court's ruling. (*Id.* at p. 943.) By using this standard of review and by examining the facts of this case, we agree with the ruling of the lower court.

An intent to defraud is a question of fact to be determined on a case-by-case basis. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 469.) Mere evidence of nonperformance of a promise is not enough to show that the defendant had the intent to defraud at the time he made the promise. (*Id.* at p. 467). However, reasonable inferences from other evidence may satisfy the prosecution's burden of proof. (*Hambleton*, *supra*, 218 Cal.App.2d at p. 482.) In *Hambleton*, for example, the defendant contracted to purchase and make monthly payments on a car. He obtained the car without ever making

payments on the balance. (*Ibid.*) The court held that the circumstances of the case were enough to sustain the jury's finding of the defendant's intent to defraud: the defendant had not only exaggerated the amount of both his and his wife's salaries on his customer's statement, he had also applied for unemployment insurance 10 days prior to signing the statement. (*Ibid.*) Given the defendant's poor financial background and the false information he reported on the customer's statement, the jury's conclusion that the defendant intended to defraud the car company in order to obtain the car was not unreasonable. (*Ibid.*)

A similar situation exists in the present case. At trial, the prosecution argued to the jury that appellant represented to Brown that the trust would be for Brown's benefit when appellant's true intent in creating the trust was to obtain Brown's money and then spend it as soon as possible. To support this argument, the prosecution highlighted several pieces of evidence: appellant had several tax liens that he never disclosed to Brown (despite his duty to do so), appellant was financially unstable, and the IRS was on the verge of taking appellant's money from escrow. The prosecution additionally reminded the jury that Brown had previously settled a lien with the IRS through negotiations. Thus, it was not vital for appellant to turn to a trust account to protect Brown's assets. The prosecution concluded that in light of such circumstantial evidence, appellant was looking to benefit himself when he proposed the idea of the trust account; he was not intending for the trust to benefit Brown, as he had promised.

We disagree with appellant's contention that the evidence was not substantial enough to allow a reasonable juror to infer that appellant intended to take money from the trust account when he set it up with Brown. The prosecution clearly argued the issue of intent to the jury and supported its arguments with solid evidence. Furthermore, at trial, the prosecution presented additional evidence that could allow a jury to infer that the defendant had fraudulent intent: appellant lied to Brown when he said that he consulted an attorney in setting up the trust, he failed to inform his branch manager of the sale of Brown's condo, and he misrepresented the circumstances of the condo to Borden and unilaterally altered the purchase agreement that she signed to mirror the price appellant

himself had contracted to pay. Given the substantial evidence of appellant's clear tax problems, failure to fulfill his duties as a real estate agent, and his alterations of the truth, we reject the contention that the jury acted unreasonably when it found that appellant intended to defraud Brown when he entered into the trust agreement with him.

B. Concurrent sentences for grand theft by embezzlement and money laundering

Appellant contends that the trial court should have stayed count 9 because the acts establishing the money laundering charge were the same acts establishing the grand theft by embezzlement charge. We will not reverse a trial court's sentencing decision under section 654 unless we find that the prosecution failed to present substantial evidence that appellant harbored separate objectives while committing each of his crimes. (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1336-1337.) Even if the defendant's separate offenses shared common acts, we will nonetheless uphold a trial court's concurrent sentencing if the evidence sufficiently shows that the defendant entertained more than one criminal intent. (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.) We will deem evidence sufficient when it is such that would allow a reasonable juror, examining the facts in a light most favorable to the prosecution, to find that the defendant entertained separate objectives. (*Ibid.*)

Grand theft by embezzlement requires the jury to find that the defendant fraudulently converted or used another's property with the intent to deprive the owner of its use. (*People v. Casas* (2010) 184 Cal.App.4th 1242, 1246.) Embezzlement is complete the moment the defendant diverts the trust money from the trust purpose. (*People v. Parker* (1965) 235 Cal.App.2d 100, 109.) On the other hand, money laundering requires the jury to find that the defendant transacted a monetary instrument, of a value of at least $5,000, in order to promote or facilitate criminal activity. (*People v. Mays* (2007) 148 Cal.App.4th 13, 30 (*Mays*).) The purpose of money laundering as an offense is to criminalize those who use the financial institutions of California "to promote criminal activity or to transact proceeds derived from a crime." (*Id.* at p. 22).

Furthermore, a defendant's acts and intent in laundering funds derived from criminal activity will often bear stark similarity to the acts and intent of the criminal activity itself. (See *Mays*, *supra*, 148 Cal.App.4th at p. 35.) For example, in *Mays*, the defendant owned a fund of cash derived from his illegal prostitution business. (*Ibid.*) From that fund, the defendant paid for office space, residency for the prostitutes, and cell phone bills in order to carry the prostitution business forward. (*Ibid.*) In light of the defendant's monetary transactions from the fund, the court found that substantial evidence existed to support the defendant's money laundering conviction. The fact that the acts of money laundering contributed to the defendant's criminal act of pimping did not preclude separate punishment for the money laundering itself. (*Ibid.*)

In the case before us, we focus on whether the evidence establishes that appellant (1) intended to deprive Brown of his property and (2) intended to facilitate criminal activity through a monetary transaction, or if appellant's intent was solely limited to the former. In light of the facts surrounding appellant's conviction, we find that there is substantial evidence that appellant intended both. We agree with appellant's contention that when he, as trustee, received the $151,659.91 proceeds from the sale of the condo, he had not yet embezzled Brown's funds. Accordingly, we agree that the remaining transactions did not constitute money laundering because they were not transactions yet derived from criminal activity. The remaining transactions rather constituted embezzlement.

However, before appellant received proceeds as trustee, he signed two escrow amendments directing $28,748 to his own personal bank account and $30,017 to his wife's LAPD Credit Union account. As the jury found, appellant embezzled Brown's funds through these two amendments. From the $28,748, appellant further created new checks to direct Brown's proceeds to Bedrosian's, Arcadia Financial, and the Golden Nugget and MGM Grand hotels. Because a reasonable juror certainly could have found that such transactions were to facilitate appellant's prior acts of embezzlement, we conclude that the prosecution did present substantial evidence that appellant harbored a

separate intent in laundering money. Accordingly, we hold that the trial court properly sentenced appellant to concurrent sentences for counts 3 and 9.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.