Filed 11/13/19 P. v. Oganesyan CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LEVON OGANESYAN, Defendant and Appellant.	B288178 (Los Angeles County Super. Ct. No. BA459192)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe Judge. Reversed and remanded.

Joy Maulitz, 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, Senior Assistant Attorney General, Michael C. Keller, John Wang and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

Levon Oganesyan appeals his conviction for grand theft, based on his cashing of four fraudulently obtained checks. The prosecution aggregated the checks to reach the threshold for a felony charge, and proceeded on that basis. At the conclusion of the trial, the trial court failed to instruct the jury that it was their job to determine whether there were multiple misdemeanor thefts, or a single felony grand theft, and failed to instruct the jury on the lesser included charge of misdemeanor theft. Respondent asserts that the prosecution properly aggregated the amounts to charge grand theft, and that, based on the evidence at trial, the trial court did not err in instructing the jury. Because the respondent's argument rests on a misinterpretation of the Supreme Court's decision in *People v. Whitmer* (2014) 59 Cal.4th 733, we reverse and remand to the trial court for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

In an information filed in September 2017, the People charged Levon Oganesyan with two felony counts: theft of identifying information with priors (Count 1, Pen. Code, § 530.5, subd. (c)(2))[1]; and theft from an elder adult (Count 2, § 368, subd. (d).) Both counts arose from Oganesyan obtaining, possessing and cashing checks on the account of the elder victim without her permission. None of the checks was in an amount exceeding $950, but the aggregate sum of all four cashed checks was $1700.

At trial, the People proceeded on a theory that Oganesyan had a single plan or objective in obtaining and cashing the checks. The undisputed evidence at trial, relevant to this issue,

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1 All further statutory references are to the Penal Code.

demonstrated that Oganesyan cashed four checks, at different bank branches, over a three-day period.[2]

The court instructed the jury with CALCRIM 1807 (Theft From Elder or Dependent Adult), and CALCRIM 1800 (Theft By Larceny.) The trial court did not instruct the jury with CALCRIM 1801 (Grand and Petty Theft) or CALCRIM 1802 (Theft: As Part of Overall Plan.)

After deliberating, the jury declared it could not reach a verdict on Count 1, and found appellant guilty on Count 2. At sentencing, the People announced they would not seek retrial on Count 1, and the trial court dismissed that count in the interests of justice (§ 1385). The court sentenced Oganesyan to 10 years on Count 2. Oganesyan appealed.

DISCUSSION

Appellant does not dispute the right of the prosecution to charge grand theft in this case, but argues that it is the jury that ultimately must make the conclusion as to whether appellant committed grand theft or multiple petty thefts. While there have been many cases addressing this issue, the Supreme Court in *Whitmer, supra*, 59 Cal.4th 733, provides the answer in this case.

I. *People v. Whitmer* Clarifies the Rule on Aggregation

A. *People v. Bailey*

Respondent, in arguing that the jury need not have been instructed on petty theft, or the determination that aggregation was not proper, relies on *People v. Bailey* (1961) 55 Cal.2d 514,

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[2] Due to the limited issue presented on appeal, we will not set forth the testimony at trial in detail.

and cases which followed and expanded on it. In *Bailey*, the defendant made a single misrepresentation to the welfare office and based on that misrepresentation, received a series of payments to which she was not entitled. (*Bailey*, *supra*, 55 Cal.2d at pp. 515-516.) The payments totaled an amount that satisfied the threshold for charging grand theft.

Unlike the case at hand, the *Bailey* trial court instructed the jury that it needed to determine whether there was an initial design to obtain property exceeding the threshold value, and thus whether there was grand or petty theft. In affirming the conviction for grand theft, the Supreme Court held:

"The test applied in these cases in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. The same rule has been followed in larceny and embezzlement cases, and it has been held that where a number of takings, each less than $200 but aggregating more than that sum, are all motivated by one intention, one general impulse, and one plan, the offense is grand theft. [Citations.]" (*Bailey, supra,* 55 Cal.2d at pp. 518-519.)

In the years following *Bailey*, numerous Courts of Appeal interpreted the decision, often reaching different conclusions concerning the scope and meaning of the doctrine. In *Whitmer*, the Supreme Court returned to the issue, acknowledging those different results in addressing the question posed in that case: not whether a series of petty thefts could be aggregated to charge a single grand theft, but rather whether a defendant could properly be convicted on multiple counts for a series of grand thefts, or only for a single offense. (*Whitmer, supra*, 59 Cal.4th at p. 740.)

B. *People v. Whitmer*

In *Whitmer*, the defendant arranged 20 fraudulent sales of vehicles, and was convicted of 20 counts of grand theft. On appeal, he argued that, because the thefts were "committed pursuant to a single overarching scheme" (59 Cal.4th at p. 735), he could properly be convicted of only a single count of grand theft. The Supreme Court held that a defendant committing multiple acts under a single scheme can be convicted of multiple counts of grand theft. (*Ibid.*)[3] In addressing that issue, the Court re-examined *Bailey*, and concluded that *Bailey* "must be interpreted in light of its facts." (*Id.* at p. 740.)

The Court described the basis for its conclusion: "In *Bailey*, the defendant committed a single misrepresentation and then received a series of welfare payments due to that misrepresentation. Other than omitting to correct the misrepresentation and accepting the payments, the defendant committed no separate and distinct fraudulent acts. . . . The evidence supported a jury finding that the defendant did have an initial design to keep receiving the welfare payments until they exceeded that threshold amount. Accordingly, the court concluded that defendant had not committed 'separate and distinct' offenses. [Citation.] But in this case, and, generally, in the earlier cases the *Bailey* court distinguished, the defendant committed separate and distinct fraudulent acts. [¶] This makes all the difference. When the *Bailey* court said that the earlier cases upholding multiple convictions of grand theft would not have done so 'had the evidence established that there was only

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[3] Because it was announcing a new rule, the Supreme Court concluded the rule could not be applied retroactively to Whitmer.

one intention, one general impulse, and one plan' [citation], it must have had this distinction in mind. *Bailey* concerned a single fraudulent act followed by a series of payments. The cases *Bailey* distinguished generally involved separate and distinct, although often similar, fraudulent acts. Accordingly, those cases involved 'separate and distinct' (*ibid.*) offenses warranting separate grand theft convictions." (*Whitmer, supra*, 59 Cal.4th at p. 740.)

In *Whitmer,* the defendant had committed a series of separate, but similar acts, involving separate paperwork on separate days. The Supreme Court concluded those circumstances permitted his conviction for multiple counts of grand theft, notwithstanding that the charged acts were committed pursuant to a single scheme. The Court disapproved "any interpretation of *Bailey* that is inconsistent with this conclusion." (*Whitmer, supra*, 59 Cal.4th at p. 741) see also *People v. Salmorin* (2016) 1 Cal.App.5th 738, 750 [*Whitmer* narrowed the scope of *Bailey*, and disapproved of aggregation where there are "separate and distinct" fraudulent acts]; *People v. Reid* (2016) 246 Cal.App.4th 822, 832 ["concluding *Bailey* had been misinterpreted in a long line of cases, [the Supreme Court] clarified that 'a defendant may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme' and it disapproved any inconsistent interpretation."]; *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1518 ["In [*Whitmer*], our Supreme Court jettisoned much of this earlier precedent by holding that a defendant could sustain multiple convictions 'based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme.' [Citation]"].)

C. Oganesyan Committed Separate, Although Similar, Fraudulent Acts

Here too the facts are more similar to the cases *Bailey* distinguished in coming to its conclusion than to *Bailey* itself. Rather than a single misrepresentation, the evidence established a series of four acts in separately presenting, over a period of three days, four checks for cash. Unlike *Bailey*, however, the jury here was not instructed that it must determine whether the acts were separate, and the jury was not given the option of finding the lesser included crime of petty theft. What the *Whitmer* court determined was, in its essence, a factual issue, was kept from the jury.[4]

Respondent argues, correctly, that it was entitled to charge a single grand theft in this case. That is not, however, the issue on appeal; the issue before this court was whether the jury should have been instructed to determine whether those separate acts were properly treated as four petty thefts or one grand theft. As to that issue, respondent asserts that because the evidence shows a single overarching scheme, the jury could not have inferred from the evidence presented that Oganesyan had more than one intention, impulse or plan. (This *Bailey*-based argument ignores *Whitmer's* conclusion that the presence of a single scheme does not answer the question; where, as here, there are multiple

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[4] In his concurrence in *Whitmer*, Justice Liu underlined the fact that the aggregation rule must be the same for misdemeanor and felony theft, and confirmed that whether there is one crime, or more than one, depends on the facts. (*Whitmer, supra*, 59 Cal.4th at pp. 747-748.)

separate acts, the question is one of fact for the jury.[5] The jury here was not given the tools necessary to make that determination.

II. The Trial Court Should Have Instructed the Jury on Petty And Grand Theft

The jury in this case was given two theft instructions[6]: CALCRIM 1807 [Theft from an Elder or Dependent Adult] and CALCRIM 1800 (Theft By Larceny), but not CALCRIM 1801 and 1802.[7]

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[5] Respondent also relies on *People v. Jaska* (2011) 194 Cal.App.4th 971, a pre-*Whitmer* case interpreting *Bailey*. In that case, which relied for its analysis on cases subsequently disapproved by the Supreme Court in *Whitmer*, the court found that the jury could have found more than one plan or scheme, and thus that multiple convictions were proper. The factors set out by the court (*Jaska, supra,* 194 Cal.App.4th at p. 971) do not survive *Whitmer* to preclude a determination of separate acts in this case.

[6] Because all discussions of jury instructions were conducted off the record, we cannot determine whether the other instructions which we determine should have been given were discussed.

[7] CALCRIM 1801 provides in relevant part:

If you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft.
[The defendant committed petty theft if (he/she) stole property [or services] worth $950 or less.]
[The defendant committed grand theft if the value of the property [or services] is more than $950.] . . .

CALCRIM 1801, which instructs the jury to distinguish between grand theft and petty theft should have been given, sua sponte, in this case because grand theft was charged. Petty theft is a lesser included offense of grand theft. (*People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1116.) The failure to instruct on a lesser included offense is error if there is ""evidence from which a jury composed of reasonable [persons] could . . . conclude[]" that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162; see also *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.) In this case, as discussed above, the facts would have permitted the jury to find multiple petty thefts.

The Use Notes to CALCRIM 1802 also describe this instruction as one which the court has a sua sponte duty to give

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The People have the burden of proving beyond a reasonable doubt that the theft was grand theft rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of grand theft.

CALCRIM 1802 provides:

"If you conclude that the defendant committed more than one theft, you must then decide if the defendant committed multiple petty thefts or a single grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that:

1. The defendant committed theft of property from the same owner or possessor on more than one Occasion;
2. The combined value of the property was over $950; and
3. The defendant obtained the property as part of a single, overall plan or objective.

If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts."

when grand theft is charged based on an aggregation of the value of the property taken. When given with CALCRIM 1801, the instruction gives the jury a basis on which to make the determination entrusted to it. The failure to give this pair of instructions here was error.[8]

We review this error for prejudice under *People v. Watson* (1956) 46 Cal. 2d 818, to determine if it is reasonably probable the defendant would have received a more favorable outcome in the absence of the error. (*Breverman, supra*, 19 Cal.4th at p. 178.) Because the prosecution proceeded on the theory that it need only show events of the same nature, close in time, and against the same victim, and because the failure to instruct the jury precluded any argument by the defense that each cashed check should be considered separately, we conclude that a properly instructed jury could reasonably have found petty theft on this record. Accordingly, we reverse the conviction and remand.

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[8] Oganesyan also asserts that the trial court improperly advised him of his rights before allowing him to admit prior convictions. Because we reverse, we need not reach that issue. Oganesyan also argued, in supplemental briefing, that SB136, signed on October 18, 2019, bars the imposition of section 667.5, subdivision (b) enhancements, as alleged and imposed here. On retrial, he may make this argument to the trial court if the People continue to allege the enhancement.

DISPOSITION

Accordingly, the judgment is reversed and remanded.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.