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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. TAMMY LYNN SHIRK, Defendant and Appellant.	B234828 (Los Angeles County Super. Ct. No. MA052101)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles Chung, Judge. Affirmed.

D. Inder Comar, 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, Senior Assistant Attorney General, Michael C. Keller and Eric J. Kohm, Deputies Attorney General, for Plaintiff and Respondent.

Defendant Tammy Lynn Shirk appeals her convictions for burglary (Pen. Code, § 459)[1] and receipt of stolen property (§ 496, subd. (a)). She contends the trial court failed to instruct on the affirmative defense of mistake of fact, and she is entitled to resentencing because the court's imposition of the upper term was not based on any reason. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On March 8, 2011, defendant was charged by information with one count of first degree residential burglary. (§ 459.) The information further alleged that defendant had suffered two prior convictions within the meaning of section 667.5, subdivision (b). On June 15, 2011, the information was amended to add one count of receipt of stolen property. (§ 496, subd. (a).)[2]

1. Prosecution Case

Anthony Solis owned property in Lancaster on Third Street. On March 6, 2011, after being burglarized five or six times at the property, he was in the process of moving. The property is a vacant house, and is surrounded by a chain link fence in the rear and a concrete block wall around the front. There is a rolling wrought iron gate in the front and a chain link fence gate in the rear. The driveway is in the front.

At about 4:45 p.m., he went to his property with his coworker Luis Zapata. Zapata remained in the car. The previous evening Solis had secured the property and the garage. He saw a Toyota 4Runner in the driveway. Solis parked in a manner that would block the 4Runner. He saw two women next to the 4Runner. He saw that the vehicle was loaded with several boxes and bags that he recognized as his property, many of his things were strewn on the ground, and the garage door—which had been boarded up—was broken open. Solis approached the driver's side door and saw defendant. She tried to block his

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] In the record, the counts are labeled as count 2 and count 3, respectively, in an information filed April 19, 2011, as defendant was initially charged in an information with two codefendants. The three defendants' cases were severed from each other.

view, and he asked what she was doing there and why his property was in her car. Defendant moved side to side to try to block Solis's view into the car. Solis asked her what she was doing, and defendant responded that she was not doing anything wrong.

During a previous burglary, a set of keys had been stolen from the property. Solis saw on the floor of defendant's car a set of keys that he recognized as belonging to him. He reached for them, and defendant pushed him out of the way. She grabbed the keys, and Solis backed away to call the police. Defendant made a cell phone call and jogged off with Solis's keys. As Solis was on the phone with the police, a third woman came from the garage carrying a bin full of items belonging to Solis.

Deputy Sheriff Scott Peterson responded to the scene. While en route, he and his partner were flagged down by a person who told him someone had just thrown some keys on his property, which was the Islamic Center.[3] Detective Jeff Bishop of the Sheriff's Department drove around the containment area that had been set up. He was advised that Deputy Peterson had some keys. Detective Bishop got the keys and gave them to Solis, who identified them as belonging to him.

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[3] We do not agree with the dissent's contention there was no admissible evidence of defendant's conduct in disposing of the keys. At trial, Deputy Peterson testified that he contacted the person at the Islamic Center. The person was "saying that somebody had just [run]." The trial court overruled defendant's hearsay objection on the grounds the statement was not offered for the truth of the matter asserted, but rather to explain Deputy Peterson's conduct. When the prosecution's questioning of Deputy Peterson continued, no further hearsay objection was made: Deputy Peterson testified that the person at the Islamic Center had seen someone run by and throw a set of keys on the property, and the person gave the keys to Deputy Peterson. When Deputy Peterson received the keys, he placed them in his pocket and made a containment area for the person who had fled from the Islamic Center. This latter evidence was admitted. (*People v. Geier* (2007) 41 Cal.4th 555, 611 [failure to object to hearsay forfeits objection to admission of evidence].) Both the prosecution and defense referenced this testimony in argument on the question of defendant's guilt; thus, it is clear that neither counsel believed that the evidence about defendant's disposition of the keys was subject to any limitation on its use for the truth of the matter asserted.

2. Defense Case

Defendant testified that she was at home on the morning of March 6, 2011 with her friend Corrie McCaslin. Later in the day they went to a swap meet near Littlerock, where they met up with Simona Simon. Simon took the keys to defendant's car, and when defendant got back to her car, defendant saw that it had items in it that had not previously been there and which were not hers. She did not believe the items were stolen property because Simon showed her a receipt, and told her that "Mike" had helped her put the items in the car. Simon wanted to take the items to Mike's house in Quartz Hill.

They drove to Solis's property, and defendant asked Simon whether it was permissible for them to be on the property. Simon told defendant that someone named "Sam" had items for sale; and Simon got out and went inside to meet Sam. Defendant had seen the receipt, so she did not believe anything was wrong. Then defendant saw Solis come in the driveway and she told Solis they were there to meet Sam and had a receipt for the items.

Defendant claimed she had never seen Solis's keys before. Defendant attempted to call the police, but did not do so because at that time the deputies were arriving. At this time, she realized that the items in the truck were possibly stolen. Defendant did not realize she had dropped the keys after she left the property.

Defendant's friend Rick came and picked her up, and dropped her off at a Motel 6. Defendant called police officers from the Motel 6, and spoke to a detective the next morning. For the next three weeks, she called the police every day.

3. Rebuttal

Detective Bishop testified that on March 6, 2011, a radio call went out that a suspect was headed away from the victim's location. Sheriff's units set up a containment area. The keys recovered from the Islamic Center consisted of a large key ring with about 20 keys. The key ring was not like a typical key ring containing three or four keys, such as a house key and a car key.

The jury found defendant guilty of both counts. Defendant admitted the prior conviction allegations. The court sentenced defendant to a total of five years, consisting of the upper term of three years on the burglary count, stayed sentence on the receiving stolen property count, and imposed two years for the prior conviction enhancements.

DISCUSSION

I. MISTAKE OF FACT INSTRUCTION

Defendant contends the court erred in failing to instruct on the defense of mistake of fact. She claims that her belief that the items in the 4Runner had been paid for at the swap meet negates the knowledge and intent elements of the burglary and receipt of stolen property counts. While we agree that defendant's testimony supported the giving of the instruction, we find the omission was not prejudicial.

In a criminal case, a trial court has a duty to instruct the jury on general principles of law relevant to the issues raised by the evidence. "The 'general principles of law governing the case' are those principles connected with the evidence and which are necessary for the jury's understanding of the case." (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) This obligation includes the duty to give instructions "on any affirmative defense for which the record contains substantial evidence," namely, "evidence sufficient for a reasonable jury to find in favor of the defendant." (*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"; instead, it determines "only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*Ibid*.) "We review the record to determine whether defendant presented substantial evidence to support the claimed defense and thus require the trial court to give the jury" the mistake of fact instruction sua sponte. (See *People v. Federico* (2011) 191 Cal.App.4th 1418, 1422.)

Section 26 provides in relevant part, "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] . . . Persons who committed the act or made the omission charged under an ignorance or mistake of fact,

which disproves any criminal intent." Mistake of fact must be reasonable. (*People v. Reed* (1996) 53 Cal.App.4th 389, 396; *People v. Castillo* (1987) 193 Cal.App.3d 119, 124 [reasonableness is assessed by objective standard].)

An honest but unreasonable mistake of fact may negate the specific intent necessary to prove a crime. (See *People v. Tufunga* (1999) 21 Cal.4th 935, 943.) Burglary is a specific intent crime. (*People v. Hill* (1967) 67 Cal.2d 105, 117.) On the other hand, receiving stolen property is a general intent crime, but with the specific mental state of knowledge that the property at issue was stolen. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425.)

Defendant relies on *People v. Russell*, *supra*, 144 Cal.App.4th 1415 to support her argument that there was substantial evidence supportive of her mistake of fact defense. In *Russell*, the defendant was convicted of receiving a stolen motorcycle. (*Id.* at p. 1419.) The defendant testified that he had seen the motorcycle located outside a repair shop. (*Id.* at p. 1420.) He spoke with a salesperson at a neighboring business, who told him that it was not one of their motorcycles. (*Id*. at p. 1422.) Defendant repaired the motorcycle and attempted to contact the registered owner, including visiting the address where the registered owner had lived, but the apartment manager said the registered owner had not lived there for 18 months. Defendant was also told by the police that the motorcycle had not been reported stolen. (*Ibid.*) Defendant's testimony was corroborated by the police and the apartment manager. (*Id.* at p. 1423.) The court found that defendant presented substantial evidence from which a jury could have inferred defendant had a good faith belief that the motorcycle was abandoned because defendant testified repeatedly that he thought the motorcycle was abandoned, the condition and location of the motorcycle supported that inference, and the defendant's conduct supported the inference that he had a good faith belief it was abandoned. (*Id.* at p. 1430)

Here, like *People v. Russell*, *supra*, 144 Cal.App.4th 1415, defendant's mistake of fact defense was supported by substantial evidence based on a good faith belief that the property in her car had been legitimately acquired or that she and her companions had a

right to be on the Solis property. Defendant testified she believed the items in the 4Runner had been legitimately purchased by Simon because she was shown a receipt for the items and Simon told her someone had helped to put the items into the vehicle; they were going to take the items to Mike's house. Further, when they got to Solis's property, Simon told defendant the property was Sam's and he had some items for sale. These facts, if believed by the jury, could have raised a reasonable doubt as to defendant's guilt.

Nonetheless, any error in failing to give a mistake of fact instruction was harmless, because there is no reasonable probability that the jury would have reached a more favorable verdict if the instruction had been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Russell*, *supra*, 144 Cal.App.4th at p. 1431 [erroneous failure to instruct on mistake of fact defense is subject to harmless error test set forth in *Watson*].)

Here, the evidence of defendant's guilt was overwhelming. When confronted by the victim Solis, defendant inexplicably tried to block his view into the 4Runner so that he could not see the items therein. There is no innocent explanation for defendant's attempt to block his view and her conduct was inconsistent with the knowledge the property had been lawfully acquired. In addition, there is no plausible explanation for defendant's presence in Solis's driveway with his keys and his property in her car. Defendant purportedly had just come from a swap meet where Simon ostensibly "purchased" the very same property. Defendant claimed she was taking the property to "Mike's house in Quartz Hill." Further, when Solis confronted her with the fact she had his keys, defendant made a cell phone call and ran away and attempted to dispose of the keys by throwing them in the church yard. Not only did defendant leave her vehicle at the victim's house, an act inconsistent with her defense, but according to the witness who recovered Solis's keys, defendant did not just drop the keys, but threw them away. (See *People v. Enos* (1973) 34 Cal.App.3d 25, 37 [defendant's conduct in attempting to obscure stolen property in vehicle provided inference of suspicious circumstance indicating consciousness of guilt]; *People v. Williams* (1997) 55 Cal.App.4th 648, 652 [flight readily and logically supports inference of guilt].)

For that reason, *People v. Russell*, *supra*, 144 Cal.App.4th 1415, is distinguishable because the defendant in *Russell* displayed no conduct indicating anything other than innocent belief the motorcycle was abandoned. The defendant in *Russell* attempted to find the owner of the property to determine if it was in fact abandoned; the police informed him that the motorcycle had not been reported stolen; and the condition of the motorcycle itself suggested abandonment. To the contrary here, defendant attempted to hide the property in the 4Runner from Solis's view; fled the scene when he confronted her, abandoning her car; and disposed of Solis's keys in a highly suspicious manner.

We conclude the omission of the instruction was not prejudicial.

II. SENTENCING ERROR

Defendant argues the trial court failed to provide a basis for the imposition of the upper term sentences on both counts, acted in an arbitrary and capricious manner in imposing sentence, and we therefore must remand for resentencing. She further argues the issue was not waived because her counsel did not have a meaningful opportunity to object, and if an objection was required, counsel was ineffective for failing to object. Respondent argues that defendant waived any claim of error by failing to object at the time of sentencing, and in any event, defendant cannot demonstrate error because the court identified the factors it was relying on, was justified in using one factor in aggravation (the prior convictions), and even if there was error, it is not reasonably likely the court would impose a different sentence because defendant's probation report set forth a number of aggravating factors, but no mitigating factors.

A. Factual Background

At the sentencing hearing, the court asked defense counsel whether he wished to be heard before sentencing. Counsel advised the court that "this court has always been fair. I'll leave it up to the court." The court sentenced defendant to three years on count 1, and eight months on count 2 for a total of three years eight months. The court justified

its sentencing choices by stating, "[T]he court selected the high term [based on] a lengthy criminal history[4] and sophistication involved in this case." Defendant did not object.

B. Discussion

1. Forfeiture

Preliminarily, defendant failed to object to the reasons for the sentencing choice at trial, thereby forfeiting the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351–352.) Her contention that she had no opportunity to meaningfully object lacks merit as well. In *Scott*, the court explained, "there must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived. . . . This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons the support any discretionary choices." (*Id.* at p. 356; see also *People v. Gonzalez* (2003) 31 Cal.4th 745, 755 [the court gave defendant a "'meaningful opportunity to object'" consistent with *Scott*].) The record reflects that when the court announced its sentence, defendant had ample opportunity to interpose an objection, but did not do so.

2. Merits

Defendant contends the reasons given here—her lengthy criminal history and the sophistication of the crimes—are too vague under California law to impose an upper term sentence, relying on *People v. Fernandez* (1990) 226 Cal.App.3d 669 and *People v. Salazar* (1980) 108 Cal.App.3d 992. We disagree.

Under section 1170, subdivision (b), a trial court has broad discretion in selecting the base term for an offense.[5] (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) The

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[4] Defendant's prior convictions were a 2004 conviction of violating Vehicle Code section 10851, subdivision (a) (theft and unlawful driving or tacking of a vehicle) and a 2008 conviction for receiving stolen property.

[5] Section 1107, subdivision (b) provides, "In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the

court may consider the record in the case, the probation report, evidence introduced at the sentencing hearing, and "any other factor reasonably related to the sentencing decision," and "shall select the term which, in the court's discretion, best serves the interests of justice." (Cal. Rules of Court, rule 4.420(b); § 1170, subd. (b).) "[T]he existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for [imposition of] the upper term." (*People v. Black* (2007) 41 Cal.4th 799, 813; *People v. Osband* (1996) 13 Cal.4th 622, 728.) Imposition of an upper term sentence is permissible when based upon the aggravating circumstance of the defendant's criminal history. (See *Black*, at p. 818.)

A requirement that reasons be stated to support a sentencing decision facilitates appellate review and "imposes an intellectual discipline that may lead to better reasoned decisions." (*People v. Martin* (1986) 42 Cal.3d 437, 450.) Hence, section 1170, subdivision (b) and California Rules of Court, rule 4.420(e) require the trial court to set forth its reasons in imposing sentence.

Here the court properly relied on two permissible factors in selecting the upper term: the crimes involved planning and sophistication (Cal. Rules of Court, rule 4.421(a)(8)); and defendant's criminal history (Cal. Rules of Court, rule 4.421(b)(2).) As defendant's criminal history is obvious from the record, defendant complains the court did not explain why it found the crimes sophisticated. However, the record supports an interference of sophisticated planning because the house had been burglarized previously and the burglars knew it was unoccupied and thus vulnerable, and defendant had been one of the burglars on at least on one prior occasion as evidenced by her possession of Solis's previously stolen keys; in addition, defendant's prior visits to the Solis property had given her insight on how to enter the property and leave quickly. Thus, we find the court's

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victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."

choice of aggravating factor adequately explained. For that reason, *People v. Fernandez, supra*, 226 Cal.App.3d at pp. 678–679 is distinguishable because in that case, the court merely incorporated the probation report by reference without stating what factors it was relying on; similarly, *People v. Salazar, supra*, 108 Cal.App.3d at pp. 1000–1001 is likewise inapposite because there, the trial court stated it had referred to the probation officer's report, the nature of the crime, and a diagnostic report; "the statement [of reasons] should be complete by itself and should not refer to written documents for clarification."

However, even when the sentencing court fails to state its reasons for a sentencing choice, "remand for resentencing is not automatic; we are to reverse the sentence only if 'it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.' [Citations.]" (*People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684.) Defendant has not established that the court would have imposed the midterm in this instance. The court clearly signaled its reasons for imposing upper term on the burglary count when it stated it found the crimes showed sophistication and defendant had a lengthy criminal history. "Where sentencing error involves the failure to state reasons for making a particular sentencing choice, including the imposition of consecutive terms, reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence." (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889; see also *People v. Blessing* (1979) 94 Cal.App.3d 835, 838–839 [no remand necessary solely for a recital of reasons where record supported court's sentence choice].) Based on the record in this case, it is not reasonably probable that the court's sentencing choice would be different on remand.

3. Ineffective Assistance of Counsel

The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684–686 [104 S.Ct. 2052, 80 L.Ed.2d 674]; see also Cal. Const., art. I, § 15.) To demonstrate

ineffective assistance, defendant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's performance "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 784.) Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are "'virtually unchallengeable.'" (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) "'Prejudice is shown when there is a "reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different."'" (*In re Harris* (1993) 5 Cal.4th 813, 833.)

Under these circumstances as discussed above, since we would not remand for the sole purpose of requiring an explicit statement of reasons for the sentence on a record such as this, counsel's failure to preserve the issue by timely objection is harmless.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

I concur:

ROTHSCHILD, Acting P. J.

NOT TO BE PUBLISHED

CHANEY, J., Dissenting.

The majority concludes defendant's conduct can have no explanation consistent with her professed knowledge that the property had been lawfully acquired. I respectfully disagree because defendant provided such an explanation.

Under *People v. Watson* (1956) 46 Cal.2d 818, a trial court's instructional error must result in reversal if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id*. at p. 836.) "There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.' [Citation.]" (*People v. Mower* (2002) 28 Cal.4th 457, 484.) Posttrial review of the reasonable probabilities "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, 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." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

To evaluate whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, we must consider both sides. Anthony Solis testified defendant tried to block his view of her truck by moving side to side as he attempted to peer around her into the vehicle. Solis also testified that when he confronted defendant he saw a set of his keys on the driver's side floor of her truck. When he reached for them, defendant pushed him out of the way,

grabbed the keys, made a cell phone call, and, while still on the phone, jogged away with the keys.

Deputy Sheriff Scott Peterson testified he was flagged down by a security guard who told him (Peterson) that someone had just thrown a set of keys onto his property. But when defense counsel objected to Peterson's hearsay testimony, the court instructed the jury that Peterson's narrative was "not offered for the truth of the matter asserted," but "simply to explain the deputy's conduct."[1] Therefore, contrary to the majority's conclusion, no evidence was admitted indicating defendant "disposed of Solis's keys in a highly suspicious manner."

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[1] The colloquy was as follows:

"Q Tell us what happened when you contacted [the security guard].

"A I exited my vehicle and went to contact him. He was very, very excited. He was yelling. I told him if he could calm down and take a deep breath. He was saying that somebody had just ran.

"[Defense Counsel]: Objection; hearsay. Move to strike.

"The Court: Overruled. [¶] Folks, this is not offered for the truth of the matter asserted. Offered simply to explain the deputy's conduct.

"By [the prosecutor]: Okay.

"A The individual, his name was Mustapha. He said somebody had just ran eastbound on L-4 and had thrown a set of keys on to his property, which is the Islamic Center. He said he recovered the keys and he handed them to me right away.

"Q All right. And tell us what happened after that."

Contrary to the majority's interpretation, "questioning" did not continue after defense counsel's hearsay objection, only Peterson's answer did. The repeated phrase "somebody had just ran," which occurred both before and after defense counsel's objection, indicates Peterson's answer was interrupted by the objection. After the trial court ruled on the objection, Peterson resumed his answer where he had left off. The court's limiting instruction thus applied to Peterson's entire answer, and no second objection was necessary. And assuming the prosecutor's and defense counsel's beliefs about the evidence are relevant, defense counsel's objection and the prosecutor's acquiescence to the limiting instruction make it clear both counsel believed the evidence was to be limited.

For her part, defendant testified the property was put into her car by Simona Simon, who possessed a receipt and had explained she purchased the property at a swap meet. Defendant had no idea the property was stolen and would not have permitted it in her vehicle if it was. She followed Simon to Solis's house because Simon had told her the resident had more things for them. It was not until Solis drove up behind her, blocked her vehicle and demanded the property that she realized Simon might have stolen it.

Defendant testified Solis "ran up" to her and tried to reach around her and "grab" her keys out of the ignition. He "freaked out on" her, pushed her against the door, injuring her arm, ignored her attempt to explain that she had acquired the property at a swap meet and had a receipt, and tried to "rip" the keys out of the ignition. She was "scared." He never told her the keys belonged to him.

Defendant testified she left the scene because Solis acted aggressively, and it was dawning on her that Simon might have lied about having purchased the property. She said, "And at this point I'm not sure what's going on. You know? I just want to get out of there because I don't want to get in trouble."

Defendant explained that although only two keys on the key ring were hers, she thought the others might have belonged to Simon, who had borrowed the ring to load the property into defendant's vehicle. Defendant did not notice the additional keys at first, possibly because it was Corrie McCaslin who drove defendant's vehicle to Solis's house. She testified she did not realize until after she left the scene that keys other than hers were on the ring. Even then, she did not know they were Solis's keys—they might have been Simon's. Defendant later "dropped" the keys. She never admitted to having thrown the keys away.

There is nothing inherently incredible about defendant's explanations. For example, I do not think it inexplicable or even particularly surprising that a person would try to block someone from attempting to rip the keys from the ignition of her vehicle. Neither is it improbable that that person, once she has been injured by someone who has "freaked out," would leave the scene of the incident.

The evidence that defendant knew the property was stolen thus consisted of Solis's testimony that defendant tried to block his view of the property in her vehicle and that she fled the scene. The evidence that she did not know the property was stolen was her testimony explaining she believed Simon regarding the property's provenance and her blocking maneuver on Solis was merely an attempt to fend off his attack. Defendant testified she left the scene because she had begun to suspect the property was stolen, but this belated suspicion was irrelevant for purposes of trial because proof of the crime of receiving stolen property requires a showing that the accused knew the property was stolen at the time she received it, not when she is confronted by the victim. (CALJIC No. 14.65.)

Even were we to consider Deputy Peterson's hearsay testimony that defendant threw the keys away, the conflicting testimony on that point results in a toss-up at best.

The purpose of a *Watson* harmless error analysis is to determine "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." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177.) When the evidence consists of conflicting plausible testimony falling evenly on two sides of an issue, neither side can be considered overwhelming. Here, defendant's explanation for how she came into possession of the property legally is at least rational. We therefore have no cause to conclude that no innocent explanation exists or that the prosecution's evidence was overwhelming.

Accordingly, I conclude "there exists at least such an equal balance of reasonable probabilities" that leaves me "in serious doubt" whether failure to instruct on the mistake-of-fact defense affected the result. (*People v. Watson*, *supra*, 46 Cal.2d at p. 837.) Because the mistake-of-fact defense would negate the knowledge element of the offenses for which defendant was convicted, she needed only to raise a reasonable doubt about it. (*People v. Mower*, *supra*, 28 Cal.4th at pp. 479-480.) But the jury was not instructed that defendant's good faith belief that Solis's property had been legitimately acquired would

negate the knowledge element of burglary and receiving stolen property. Such an instruction would have clarified the knowledge element and drawn the jury's attention to facts that could raise a reasonable doubt about her guilt. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1433.) I think it is thus at least reasonably probable that defendant would have obtained a more favorable result had the instruction been given.

I would therefore reverse.

CHANEY, J.