Theft of Vehicle charge reversed because the trial court improperly excluded all evidence that our client believed she had permission to drive the car.!

THE PEOPLE, Plaintiff and Respondent, v. MYKLOR FALENE HUNT, Defendant and Appellant.

G035240

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

2006 Cal. App. Unpub. LEXIS 4702

May 31, 2006, Filed

PRIOR HISTORY: Appeal from a judgment of the Superior Court of Orange County, No. 04HF0967. Susanne S. Shaw, Judge.

DISPOSITION: Reversed.

COUNSEL: Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Raquel M. Gonzalez and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: ARONSON, J.; SILLS, P.J., RYLAARSDAM, J. concurred.

OPINION BY: ARONSON

OPINION

A jury convicted Myklor Falene Hunt of possession of methamphetamine and unlawfully taking a vehicle (*Veh. Code, § 10851, subd. (a)*; all further statutory references are to this code unless otherwise indicated), but acquitted her of residential burglary. Defendant contends the trial court erroneously excluded evidence she claims **[*2]** would support a mistake of fact defense, i.e., an actual, honest belief she had the owner's permission to drive a new 2004

Nissan Maxima. She also argues the trial court erred by failing to instruct the jury sua sponte on the doctrine of mistake of fact and, finally, that she received ineffective assistance of counsel because her attorney failed to request a mistake of fact jury instruction. As we explain below, reversal is required because the trial court's misunderstanding of the mistake of fact defense resulted in the exclusion of virtually all of defendant's evidence. Had her mistake of fact evidence not been excluded, she would have been entitled to have the trial court instruct the jury sua sponte on mistake of fact.

I

FACTUAL AND PROCEDURAL BACKGROUND

Defendant admitted taking the keys to the Maxima from Katherine Rich's Newport Beach condominium on June 22, 2004. She drove the car to a restaurant where her daughter worked. Defendant claimed she had Rich's tacit permission to drive the car based on her close relationship with Rich and her frequent use of other vehicles owned by Rich. At trial, Rich testified defendant was a mere acquaintance and she never gave defendant permission, **[*3]** express or implied, to drive the Maxima.

In contrast, defendant testified her relationship with Rich was more involved than Rich admitted. According to defendant, they had known each other for years, she often cared for Rich's husband who suffered from Parkinson's and Alzheimer's, and moreover, she supplied Rich with cocaine and methamphetamine. Defendant also claimed that, before she took the Maxima, she and Rich spent the previous two nights together, sharing drugs. And early on June 22d, defendant had a friend drop her and defendant's son off at Rich's home so defendant could deliver some methamphetamine to her. As defendant went to open Rich's home with a key Rich provided, Rich's husband opened the door and let defendant inside. Defendant did not feel comfortable leaving the drugs for Rich. She knew the keys to the Maxima were in the kitchen and, taking them, she told Rich's husband she would return later.

Arriving back at her home around 8:00 a.m. after walking her dog, Rich noticed her Nissan was missing. She called the police after learning from her husband that defendant had visited. The police located the car at the restaurant, and defendant's daughter gave them the keys.

[*4] Investigators interviewed defendant. Officer Kent Eischen of the Newport Beach Police Department testified defendant admitted she did not have permission to drive the Maxima and that "she took it even though she knew that it wasn't right." On cross-examination of the officer, the defense sought to elicit a convoluted explanation defendant gave "of why it wasn't -- why she knew it wasn't right?" The trial court sustained the prosecutor's objection on relevance grounds and when defense counsel persisted with this line of questioning, the court recessed to chambers. There, defense counsel admitted the "context" he sought to develop had been the subject of a pretrial exclusion order. Specifically, the defense sought to show Rich had taken *defendant's* BMW the night before and forged the title in her own name. The trial court, however, stood by its earlier ruling that this was not germane to whether defendant herself had unlawfully taken the Maxima. The court concluded such testimony would confuse the jury and consume needless time.

Defense counsel did not request, and the trial court did not sua sponte give, a mistake of fact instruction. (*CALJIC No. 4.35*. **[*5]**) But the defense and the prosecutor disputed in closing argument whether defendant was entitled to believe she had Rich's "carte blanche" permission to drive her cars, including the Maxima. The jury convicted defendant of methamphetamine possession and unlawfully taking the vehicle, but not burglary. The trial court suspended imposition of sentence and placed defendant on three years' formal probation, conditioned on defendant serving 180 days in jail. The court briefly stayed defendant's jail term but, in that interim, defendant tested positive for methamphetamine and failed to maintain contact with her probation officer. The court revoked probation and ordered defendant to serve the 180-day term immediately. Defendant now appeals her conviction.

II

DISCUSSION

Defendant's arguments for reversal all turn on the concept of mistake of fact. A person who "commit[s] the act . . . charged under an ignorance or mistake of fact, which disproves any criminal intent," commits no crime. (*Pen. Code, § 26*, P (3); see *CALJIC No. 4.35* [mistake of fact defense]; 1 Witkin, Cal. Crim. Law (2000) Defenses § 39 **[*6]** , pp. 371-372.) The owner's permission precludes a charge of unlawful taking of a vehicle, [1] and a mistake of fact about the owner's consent negates the requisite mental state. (*People v. Stuart (1956) 47 Cal.2d 167, 171*; accord, *People v. Tufunga (1999) 21 Cal.4th 935, 938* (*Tufunga*) [discussing analogous claim of right doctrine].) Indeed, because unlawful taking of a vehicle is a species of theft and therefore a specific intent crime (*People v. Green (1995) 34 Cal.App.4th 165, 180)*, even an unreasonable mistake of fact vitiates the necessary mens rea. (*People v. Romo (1990) 220 Cal. App. 3d 514, 518, 269 Cal. Rptr. 440*; accord, *Tufunga, supra, 21 Cal.4th at p. 938*.) Nevertheless, the mistake of fact must be actual and not contrived; that is, the defendant must believe in good faith that he or she had the owner's permission to drive the vehicle. (See *Tufunga, supra, 21 Cal.4th at p. 938*; *People v. Mayer (2003) 108 Cal.App.4th 403, 412*.)

1 *Section 10851, subdivision (a)*, provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($ 5,000), or by both the fine and imprisonment." (See *People v. Lam (2004) 122 Cal.App.4th 1297, 1301-1302* [nonconsent of owner is an element of the crime]; *CALJIC No. 14.36* [unlawful taking of a vehicle].)

[*7] Defendant contends the trial court erred by excluding much of her evidence of mistake of fact. We agree. The trial court

seemed not to recognize a defendant's mistake of fact need not be reasonable for a specific intent crime. Defendant complains the court struck her testimony regarding Rich's oft-given permission to use other cars besides the Maxima, as illustrated by the following exchange. "[Defense counsel:] "During this hundred or so occasions [you were visiting Rich's home], did you ever drive any of her vehicles? [Defendant:] Yes, several times. [Defense counsel:] And was that with or without [Rich's] permission that you drove the vehicles? [Defendant:] With her permission. After a while, it was just unsaid. If I had to do something, it was in her car." The prosecutor objected, "calls for speculation," presumably meaning defendant's response was speculative as to whether *Rich* intended to grant tacit permission, and the court sustained the objection and struck defendant's testimony.

But defendant's answer was not speculative as to *her own belief* she had Rich's "unsaid" permission. As defense counsel had earlier explained in chambers: "[I]t is our contention **[*8]** . . . that the victim had given permission for the defendant to drive her vehicles, other vehicles . . . and had given keys to the car or cars, and there is all kinds of wide open permission going back and forth." [2] The trial court responded with sarcasm: "And I suppose [if defendant] had [such] permission [then] if there were credit cards lying around there [she could] use those, too, take the car, take the keys, not every ask anybody whether or not it would be inconvenient for [Rich] . . . . That's ludicrous." Trying again, defense counsel stated: "If I -- I will use myself rather than the defendant as an example. If over a period of time a person who owns or possesses a car gives me permission to drive a car, I would assume that I have permission maybe beyond that. Wait a minute. That there is such a relationship -- ." Interrupting, the trial court rejoined, "That's the most ridiculous thing I have ever heard. You know what 'assume' is? What does 'assume' do?" [3] We conclude the trial court erred in striking defendant's testimony that she grounded her belief she had "unsaid" permission to use the Maxima on her prior use of Rich's other vehicles. Because the defendant's **[*9]** mistake of fact need not be reasonable, the trial court should not have ventured into determining defendant's belief was "ridiculous" or "ludicrous."

2 Defendant claimed to have with her in court "a key for [Rich's] 2004 Hyundai that she gave me, also," but the trial court sustained the prosecutor's objection to the statement because no question was pending. Defense counsel did not elicit the statement again, nor did defendant introduce the purported Hyundai key into evidence.

3 The trial court was apparently invoking the childish, playground deconstruction of the spelling of "assume," which makes an "ass" of "u" and "me."

Similarly, the trial court erred by excluding as hearsay defendant's testimony that she "told [Rich's] husband that I would be back" as she took the keys to the Nissan, since the statement demonstrated an innocent state of mind, consistent with a belief she had permission to use the car. (See *Evid. Code, § 1250* [mental state hearsay exception].)

And **[*10]** the trial court erred in concluding defendant's daughter's proffered testimony was irrelevant. Defense counsel advised the court defendant's daughter would testify "[b]asically that there was an ongoing relationship between the defendant and the victim, that the defendant had permission to drive not this car in question, but other cars. [P] . . . [P] Had permission to enter the residence and . . . confirming the defendant's testimony that two days prior, the victim had stayed at the residence of the defendant."

According to defendant, this testimony was "highly relevant because the closer [the] relationship between appellant and Rich, the more likely it was that Rich gave appellant 'wide-open' permission to use her cars, and thus, the more likely it was that appellant believed she had permission to drive the Nissan on the date of the incident." As discussed, even if the trial court disagreed with this reasoning, an unreasonable mistake of fact remains a viable defense. In sum, the evidence was relevant because it corroborated defendant's testimony her relationship with Rich was closer than Rich admitted, and thus, according to defendant's thinking, supported her belief she **[*11]** had tacit permission to use the Nissan.

Finally, the trial court erred by prohibiting defendant from introducing *any* evidence Rich committed a forgery. Defendant claimed that the night before she took Rich's Nissan, Rich had taken her BMW from outside her apartment and forged the title in her own name. The trial court excluded all evidence related to the BMW out of concern it would amount to a "trial within a trial" that would consume undue time and confuse the jury. (*Evid. Code, § 352.*) The court was within its discretion in curtailing an extended foray into these matters. But permitting defense counsel a single question, i.e., asking Rich whether she forged the title, would not have consumed any appreciable time, and the jury would not be confused by a "yes" answer. Rather, the jury would readily understand its impeaching effect. If the witness denied the forgery, the court could then decide whether defendant's evidence on this point would confuse the issues or consume undue time. In short, the trial court could have simply advised the defense it was stuck with whatever Rich said, whether "yes" or "no," because more than that would amount to a mini-trial.

[*12] Had defendant's mistake of fact evidence not been excluded, substantial evidence would have supported a mistake of fact instruction. The sua sponte duty to instruct on a defense arises "'if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. King (1991) 1 Cal.App.4th 288, 296.*) Although the issue is close, we disagree with the Attorney General that the error was harmless.

True, we agree with the Attorney General that the trial court acted within its discretion in concluding defendant's evidence that Rich took her BMW had the potential to confuse the jury and consume undue time. (*Evid. Code, § 352.*) Paradoxically, however, exclusion of this evidence works to defendant's benefit on appeal. As defense counsel candidly described in chambers: "[T]he point is and . . . without saying . . . yes, she took it [i.e., the Nissan], . . . she took it basically to hold

hostage because the other woman had taken her car." Had this vehicular hostage evidence been admitted, it would **[*13]** have severely undercut the mistake of fact defense by showing defendant's taking of the Nissan was retaliatory rather than pursuant to a good faith belief in the owner's permission.

But the jury did not hear this evidence and could only speculate what defendant meant when she told the officer she took Rich's Maxima "even though she knew that it wasn't right." The trial court cut short cross-examination of the officer on this point to preserve its ruling that BMW-related topics were off limits. Yet without a context showing defendant understood taking the Maxima "wasn't right" because it was retaliatory, the evidence was consistent with legally innocent explanations for the comment.

For instance, the comment could be short-hand for regret that defendant mistook the scope of Rich's permission and, in doing so, seriously offended someone she believed was her friend. Later recognition that perhaps she should have sought Rich's express permission to borrow the Nissan because it was "brand new" would not prevent the jury from concluding that, at the time of taking, she believed tacit permission was enough, even if that belief was unreasonable. In other words, the jury could have reasonably **[*14]** believed defendant meant "it wasn't right" as a polite, embarrassed mea culpa for assuming the relationship was closer than it was. Or, precisely because the comment had no context, the jury might have disregarded it. In any event, because the state of the evidence permitted any number of explanations other than that defendant's taking was retaliatory, and because the court excluded virtually all of defendant's mistake of fact evidence, thus eviscerating her defense, we cannot say the error was harmless beyond a reasonable doubt. (*Chapman v. California (1967) 386 U.S. 18, 17 L. Ed. 2d 705.*)

Because correct rulings on defendant's mistake of fact evidence would have resulted in a sua sponte duty to instruct the jury on the defense of mistake of fact, we need not reach the issue of whether trial counsel rendered ineffective assistance by failing to request the instruction.

III

DISPOSITION

The judgment is reversed.

ARONSON, J.

WE CONCUR:

SILLS, P.J.

RYLAARSDAM, J.