

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY MITCHELL PARDO,

Defendant and Appellant.

E039420

(Super.Ct.No. FMB6545)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Marsha Slough,
Judge. Affirmed.

James R. Bostwick, Jr., 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, Senior Assistant Attorney General, Gil Gonzalez, Supervising
Deputy Attorney General, and Garrett Beaumont, Deputy Attorney General, for Plaintiff
and Respondent.

Defendant Gary Mitchell Pardo appeals his conviction and sentence for embezzlement, diversion of construction funds, grand theft of personal property, and misdemeanor contracting without a license. Defendant contends his conviction should be reversed because the trial court committed prejudicial error when it failed to sua sponte instruct the jury on the corpus delicti rule, as set forth in CALJIC No. 2.72. Pursuant to *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], defendant also argues the trial court violated his federal constitutional right to a jury trial by imposing an aggravated term based on facts not found true by a jury. We affirm.

FACTUAL AND PROCEDURAL HISTORY

At trial, Mark Tiffany testified he is the owner of Mark and Sons Yucca Valley Transmission in Yucca Valley, California. On August 13, 2003, defendant had his car towed into Tiffany's shop because it needed a clutch. Tiffany noticed defendant was wearing a grading and excavating shirt, and he told defendant he needed a grading and excavating plan for his property. Tiffany showed defendant where the property was located by pointing to it from his shop. Defendant indicated he did that kind of work for a living, gave Tiffany his business card, and wrote his cell and home telephone numbers on the back of the card.

The business card defendant gave to Tiffany indicated defendant was the general manager of LKB Contracting (LKB) which, at the time, was a licensed contractor in the State of California. Defendant had been employed by LKB for about a year, but Beverly Buck, who was the corporate secretary for LKB, testified defendant's employment had been terminated as of June 2003. Defendant's responsibilities at LKB included

overseeing jobs and pursuing leads for new business, but he was not authorized to enter into contracts on behalf of LKB. At all relevant times, defendant was not a licensed contractor in California. There was also testimony indicating defendant was aware he needed to be licensed in order to enter into contracts to do construction work on real property.

The day after he met Tiffany, defendant left a note on the gate at Tiffany's house which said "[c]all me immediately." When Tiffany called, defendant told her he had some friends with an engineering stamp who could probably complete the plans Tiffany needed for his project. Following some negotiations, Tiffany gave defendant a check for \$3,500, and defendant agreed to talk to an engineer and let her know how much the project would cost to complete. Defendant later advised Tiffany the job would cost about \$8,600, and this figure was in line with other estimates Tiffany had obtained. Tiffany told defendant he would need a receipt, but agreed to write defendant another check for \$3,500 and to pay the balance of the cost by transferring ownership to a 1989 Camaro. Defendant prepared a handwritten contract to memorialize the transaction, and he and defendant both signed the contract. The contract indicated defendant had hired someone named Jim McBrian to complete the grading plan.

Approximately one month after the handwritten contract was signed, defendant requested more money from Tiffany, stating Jim McBrian had quit, and he had hired another engineer and needed to pay him \$4,000. When Tiffany refused to give defendant more money, defendant telephoned another engineering firm in Tiffany's presence and retained the firm to survey Tiffany's property and prepare a grading plan. After

witnessing this telephone conversation, Tiffany gave defendant an additional \$1,400 in cash to pay the engineers. At this time, a second typewritten contract was prepared by defendant indicating a different engineer named Jim McBride, allegedly a certified engineer with an engineering stamp, had been retained to prepare the plan for Tiffany's project. The contract also outlined all of the monies paid by Tiffany and indicated a balance due of \$3,000.

On or about September 22, 2003, surveyors from Coachella Valley Engineering arrived on Tiffany's property to prepare a survey needed by the engineer to complete the plan. Tiffany witnessed defendant sign a contract and give the surveyors a check. The surveyors told Tiffany the grading plan would be done in approximately two weeks. Two weeks or so later, Tiffany contacted Coachella Valley Engineering and was advised they stopped progress on the survey because the check they received from defendant had bounced.

After learning defendant's retention check to Coachella Valley Engineering had bounced, Tiffany asked a friend, Gary Cote, to witness two telephone conversations in which Tiffany confronted defendant about the status of the survey and plan. Tiffany and Cote also drove over to defendant's house and asked defendant about the status of the plan and requested contact information for the engineer, as well as a copy of the contract with Coachella Valley Engineering. Having received unsatisfactory answers to all of his inquiries, Tiffany contacted Coachella Valley Engineering again and entered into a new contract with them. Tiffany never received any money back from defendant.

The jury found defendant guilty of embezzlement (Penal Code, § 506),¹ diversion of construction funds (§ 484b), grand theft of personal property (§ 487, subd. (a)), and misdemeanor contracting without a license (Bus. & Prof. Code, § 7028, subd. (a)). The jury found defendant not guilty of fraudulent use of a contractor's license. (Bus. & Prof. Code, § 7027.3.) The trial court imposed an aggravated term of three years in state prison for embezzlement and stayed concurrent three-year terms on the grand theft and diversion counts. In addition, the trial court imposed a sentence of 85 days in county jail for contracting without a license.

DISCUSSION

Instructional Error

Under California law, “the corpus delicti or body of the crime . . . cannot be proved by *exclusive* reliance on the defendant’s extrajudicial statements.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165.) In other words, “every *conviction* must be supported by some proof of the corpus delicti *aside from* or *in addition to* such statements. . . .” (*Ibid.*) Defendant argues the prosecution relied on extrajudicial statements he made to the victim to satisfy the intent elements of the embezzlement, grand theft, and diversion charges, but the trial court failed to satisfy its sua sponte duty to give a corpus delicti instruction to the jury. The incriminating statements were made in telephone conversations with Tiffany, with Tiffany’s friend Cote listening on another

¹ All further statutory references will be to the Penal Code unless otherwise indicated.

extension. Statements made by defendant in these conversations suggested he used the amounts he received from Tiffany for his own personal use and did not intend to use the funds for their intended purpose. In these telephone conversations, Tiffany and Cote testified defendant asked Tiffany for more money, and told them his bank account was overdrawn, other contractors had not paid him, he had a large telephone bill, and his telephone was being shut off. According to defendant, the trial court's failure to give the corpus delicti instruction was prejudicial because these incriminating statements were the only direct evidence introduced on his intent, and other circumstantial evidence of intent was biased and conflicting or contradictory.

Embezzlement and grand theft both require proof of a specific intent to unlawfully or permanently deprive an owner of property. (*People v. Davis* (1998) 19 Cal.4th 301, 304-305; *People v. Stein* (1979) 94 Cal.App.3d 235, 241.) Diversion of construction funds in violation of section 484b is a general intent crime and does not require proof of a specific intent. "The offense is complete if the wrongful diversion was the cause of failure either to complete the improvement or . . . to pay for services, labor, materials or equipment. It is immaterial whether defendant intended that there be a failure either to complete the project or to pay subcontractors or material suppliers." (*People v. Stark* (1994) 26 Cal.App.4th 1179, 1182-1183.)

A corpus delicti instruction (CALJIC No. 2.72)² must be given sua sponte by the trial court whenever extrajudicial statements by the accused form part of the prosecution's case. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1170.) However, “[e]rror in omitting a corpus delicti instruction is considered harmless . . . if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given.” (*Id.* at p. 1181.) Independent proof of the corpus delicti may be circumstantial, “need only be a slight or prima facie showing,” and “need not be beyond a reasonable doubt.” (*Id.* at pp. 1171, 1181.) Such evidence “is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible.” (*Id.* at p. 1171.) If the record contains the requisite prima facie showing, failure to give a corpus delicti instruction is harmless as a matter of law. (*Ibid.*)

In this case, any failure to instruct the jury with CALJIC No. 2.72 was harmless as a matter of law, because the prosecution met its burden of making the requisite prima facie showing. The record includes evidence independent of defendant's extrajudicial statements which persuasively implies defendant misappropriated and/or diverted funds he received from Tiffany for his own personal use and had no intention of using these funds to fulfill his promise to provide Tiffany with a grading and excavating plan.

Specifically, Mr. Tiffany testified as to the timing and amount of funds he paid to defendant pursuant to written contracts for defendant to obtain an excavation and grading

² CALJIC No. 2.72 instructs, in pertinent part, that “[n]o person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any [confession] [or] [admission] made by [him] [her] outside of this trial.”

plan from a licensed engineer for his construction project. Despite these payments, Tiffany testified he did not receive the grading and excavation plan as a result of any of defendant's activities, and he never received any money back from defendant. Although the owner of Coachella Valley Engineering testified his firm was retained by defendant to complete the plan, he also stated the \$1,000 retention check made out to his firm was returned for insufficient funds, and defendant never paid his firm for any work completed on the project. In addition, defendant's personal banking records were entered into evidence showing the dates and amounts of deposits from Tiffany, along with withdrawals from defendant's bank accounts before and after defendant received monies from Tiffany. An investigator who examined the bank records testified many of the withdrawals from defendant's accounts were made for cash and/or purchases at gambling casinos and stores, such as 7-Eleven, Circle K, and Food-4-Less. This evidence is more than enough to satisfy the prosecution's burden to make a prima facie showing of defendant's intent independent of his extrajudicial statements. From this evidence, the jury could reasonably infer defendant was guilty of stealing and/or diverting the funds he received from Tiffany for his own personal use and never meant to return or use the funds for their intended purpose. Therefore, we conclude any error by the trial court in failing to instruct the jury on the requirement of independent evidence was harmless as a matter of law.

Violation of Blakely

Defendant argues the trial court violated *Blakely v. Washington, supra*, 542 U.S. 296 by imposing the upper term of three years based on four factors in aggravation which

he did not admit and which the jury did not find true. However, our Supreme Court decided this issue adversely to defendant in *People v. Black* (2005) 35 Cal.4th 1238, 1244. Defendant acknowledges the California Supreme Court's decision in *Black* is controlling, but raises the issue to preserve it for federal court review. On February 21, 2006, the United States Supreme Court granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) (nonpub. opn.), certiorari granted *sub nom. Cunningham v. California* (2006) ___ U.S. ___ [126 S.Ct. 1329, 164 L.Ed.2d 47], to consider whether California's determinate sentencing law unconstitutionally allows judges to impose enhanced sentences based on facts not found true by the jury. At this time, we are required to follow the holding in *Black* by affirming the trial court's decision to impose the upper term. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ramirez _____
P.J.

We concur:

/s/ McKinster _____
J.

/s/ King _____
J.