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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JESSE NAJERA, Defendant and Appellant.	D046044 (Super. Ct. No. SCN181843)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

Boyce & Schaefer and Laura G. Schaefer for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Jesse Najera was convicted of vehicle theft and possession of burglary tools. He was sentenced to four years in prison. Najera appeals, arguing the trial court

erred in failing to instruct sua sponte in the terms of CALJIC No. 2.15. That instruction states the possession of recently stolen property is alone insufficient to support a conviction of a theft-related offense; however, any corroborating evidence need only be slight and need not be sufficient itself to prove guilt. We depart here from the rule laid down in *People v. Clark* (1953) 122 Cal.App.2d 342 and conclude the trial court was not required to give CALJIC No. 2.15 sua sponte.

FACTS

On the evening of July 21, 2004, Joseph Donato parked his car in front of his apartment complex. The following morning the car was gone. Donato reported the theft to police. Shortly after midnight on July 23 Officer Tim Reiley saw Donato's car and stopped it. Appellant was driving the car and his sister Erica was in the passenger seat.

The police searched the occupants and discovered three keys in Erica's pocket. The keys had been altered or "shaved" to bypass a vehicle ignition system. There was a shaved key in the car's ignition, as well as a second key showing some signs of alteration on the same key ring. Officer Reiley inspected the ignition and discovered it had no visible damage but was very loose and seemed to be damaged internally. Officer Reiley was able to start the vehicle by inserting a flathead screwdriver into the ignition.

At the police station a further search of Erica's purse revealed items that were later identified as belonging to Donato. Appellant did not have anything belonging to Donato in his possession.

DISCUSSION

Citing *People v. Clark, supra,* 122 Cal.App.2d 342, appellant argues the trial court was required to instruct sua sponte in the terms of CALJIC No. 2.15. The instruction states in part: "If you find that a defendant was in [conscious] possession of recently [stolen] [extorted] property, the fact of that possession is not by itself sufficient to permit an inference that the defendant ____ is guilty of the crime of ____. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt."[1] CALJIC No. 2.15 also lists examples of evidence that may corroborate the defendant's guilt, such as the attributes of possession, opportunity to commit the crime, the defendant's conduct or statements, or any other evidence tending to connect the defendant with the crime.

A. *Procedural Background*

At trial, the prosecutor presented testimony from the victim and two police officers who arrested appellant. The prosecutor also introduced as exhibits the three shaved keys found in Erica's pocket, the shaved keys in the ignition, the shaved key on the key ring and a gaming card belonging to the victim that Erica had in her purse. Appellant offered no witnesses or exhibits. In closing argument, appellant's attorney argued the circumstances could be reasonably interpreted in a manner consistent with appellant's innocence.

Following the close of evidence, neither party requested the judge give CALJIC No. 2.15. The judge instructed the jury on the presumption of innocence and the prosecutor's burden of proof as well as the elements of the charged offenses. The court also gave CALJIC Nos. 2.00 and 2.02, defining circumstantial and direct evidence and instructing that the jury was required to adopt any reasonable inferences in favor of appellant's innocence that could be drawn from the circumstantial evidence.

B. *General Duty to Instruct Sua Sponte*

The oft-repeated general rule is that even without a request, the trial court must instruct on the " ' "general principles of law relevant to the issues raised by the evidence." ' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Courts have taken the term "general principles" to mean "those principles of law closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*Ibid.*) The broad question raised by this rule is what types of principles are necessary for the jury to understand a case. The answer is found not in some general rubric but in the policy considerations that support the giving of sua sponte instructions, statutory and decisional requirements for the giving of such instruction and, in the case of a particular instruction, any countervailing interests arguing against a sua sponte requirement.

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1 Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 376 incorporates this language.

With this in mind we review the requirement that CALJIC No. 2.15 be given sua sponte.

C. *People v. Clark* and *People v. Smith*

Respectfully, the case authority requiring CALJIC No. 2.15 be given sua sponte is less than compelling. Appellant refers us to the use note following CALJIC No. 2.15. It states: "An appropriate instruction that unexplained possession of recently stolen property will not alone support a conviction of burglary must be given sua sponte." (Use Note to CALJIC No. 2.15 (Oct. 2005 ed.) p. 46.) The use note cites *People v. Clark, supra,* 122 Cal.App.2d 342.[2]

The *Clark* opinion does not analyze why CALJIC No. 2.15 must be given sua sponte. It is notable that in *Clark* the Attorney General conceded that the trial court erred in failing to give the instruction, so there is no consideration or analysis of opposing arguments. (*People v. Clark, supra,* 122 Cal.App.2d at p. 346.) Moreover, the *Clark* opinion attributed the sua sponte rule to *People v. Smith* (1950) 98 Cal.App.2d 723, stating *Smith* "undoubtedly held that the failure of the trial court to give such an instruction *sua sponte* was error." (*Ibid*.) This conclusion is, however, suspect.

In *Smith*, a typewriter was found to be missing from a county office and was recovered the following day when the defendant offered it for sale at a tavern. (*People v. Smith, supra,* 98 Cal.App.2d at p. 724.) The defendant was charged with burglary, but

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2 CJER Mandatory Criminal Jury Instructions Handbook (CJER 13th ed. 2004) also requires this instruction sua sponte in section 2.97(d). CJER categorizes the instruction

not theft. The trial court informed the jury that " 'the method by which the People undertake to prove [burglary] is by showing from their testimony that this typewriter was in that building at a certain time, and that thereafter was in the defendant's possession, was sold by him, at least disposed of, and under the various circumstances shown in the evidence of this case. It is up to the jury to determine whether or not the defendant entered this building with the intent of stealing, committing larceny.' " (*Id.* at p. 729.) The defendant appealed his conviction and the Court of Appeal affirmed.

We note that *Smith* did not involve the trial court's failure to instruct on applicable legal principles that were necessary for the jury's proper consideration of the case. Rather, the case concerned an instruction that improperly suggested the jury could rely on circumstantial evidence of possession in a manner contrary to existing law. The instruction failed to communicate to the jury the evidentiary significance of the defendant's possession of the stolen typewriter. (*People v. Smith, supra,* 98 Cal.App.2d at p. 730.) The Court of Appeal concluded the trial court should have instructed the jury that possession of stolen property is one circumstance to consider in deciding whether the defendant had the specific intent to steal the typewriter. Further, the jury should have been informed that the possession must be corroborated by circumstances tending to show the defendant's guilt. (*Ibid*.)

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as a miscellaneous burglary instruction and cites *People v. Clark, supra,* 122 Cal.App.2d 342.

An incorrect instruction raises entirely different legal issues than a failure to instruct where required, and there is no indication the *Smith* court intended to reach factual scenarios other than a trial court's failure to give an accurate instruction. Contrary to the *Clark* court's summary conclusion that an instruction is required sua sponte, we think *Smith* stands for the limited principle that once it decides to instruct the jury on the significance of possession of stolen property, the trial court must give a complete instruction that fairly states the permissible uses of the evidence.

We therefore disagree with the *Clark* court's extension of *Smith*'s holding to require a sua sponte instruction on recently stolen property in all theft-related cases.

Accordingly, we conclude the court in *Clark* incorrectly attributed a sua sponte instructional requirement to *Smith.*

In addition to citing the use note to CALJIC No. 2.15 and the *Clark* decision, appellant also points to *People v. McFarland* (1962) 58 Cal.2d 748 to demonstrate CALJIC No. 2.15 must be given sua sponte. However, *McFarland* offers no support for appellant's argument. In *McFarland*, the jury was fully instructed that mere possession of stolen property must be corroborated by other inculpatory circumstances to justify a guilty verdict. (*Id.* at pp. 758-759.) The Supreme Court upheld the instruction as a correct statement of the law. (*Id.* at p. 759.) Nothing in the holding suggests courts must always give such an instruction in a theft-related case. The court did not rely upon, or address, the *Clark* and *Smith* decisions. Only an overbroad interpretation of *McFarland*'s legal significance would compel us to hold that since the instruction approved in *McFarland* was legally correct, it must be given sua sponte in all theft-related cases.

We conclude there is no compelling legal precedent supporting the rule that CALJIC No. 2.15 must be given sua sponte. In our view, whether CALJIC No. 2.15 must be given sua sponte has never been fully analyzed by the courts.

We turn next to the general principles concerning sua sponte jury instructions to determine whether CALJIC No. 2.15 is the kind of instruction that should be given on the court's own motion in all theft-related cases.

C. *Sua Sponte Jury Instructions*

In general, the purpose of instructing jurors is to inform them of the applicable law so they may reach a fair verdict. Because jurors must understand such important and sometimes esoteric legal concepts as the presumption of innocence and the burden of proof, California has determined that trial courts have an independent duty to instruct the jury sua sponte on the general principles of law closely and openly connected with the facts of the case and necessary for the jury's understanding of the case. (*People v. Cavitt* (2004) 33 Cal.4th 187, 204.)

However, in determining whether an instruction must be given sua sponte, the interest in informing the jury of all pertinent legal issues is balanced against the burden a sua sponte duty places on the trial court, the desire to preserve counsel's ability to make tactical decisions and to avoid sharp practices. Thus the sua sponte rule not only ensures the jury is properly educated in the law, but also acts as a shield against inadequate counsel who fails to request an instruction on an essential requirement. (See *People v. Malgren* (1983) 139 Cal.App.3d 234, 241; *People v. Crawford* (1968) 259 Cal.App.2d 874, 877.) Courts have also long noted the difficulty of requiring the trial judge to

anticipate defendants' legal arguments and have expressed concern that " 'the trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly.' " (*People v. Crawford, supra,* 259 Cal.App.2d at p. 877.) Such a rule would put trial courts under unreasonable pressure to review the record for remotely tenable legal theories on which to instruct the jury. (*Id.* at p. 878.)

Other policy considerations may weigh against according sua sponte status to an instruction. Insistence on sua sponte instructions hampers the tactical choices of defense attorneys by depriving counsel of the opportunity to decide which legal issues should be emphasized. (*People v. Chapman* (1968) 261 Cal.App.2d 149, 174.) In some instances, counsel might prefer to forego a particular instruction rather than draw the jury's attention to unfavorable evidence. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1198.) Thus, while requiring instructions sua sponte may protect some defendants from their attorney's oversight, other defense attorneys may find their reasonable tactical choices undercut by the requirement an instruction be given sua sponte.

We also note direction as to what instructions must be given sua sponte has come from several sources. The Legislature has decided that as a matter of policy sua sponte instruction may be required. Thus, jurors must be instructed concerning their role and the way they are to approach their task. (Pen. Code, § 1122, subd. (a).) When particular kinds of evidence are likely to be unfamiliar to jurors, instructions on the importance and limitations of such evidence are required sua sponte. For example, jurors must be specifically admonished regarding the proper use of expert testimony. (Pen. Code, §

1127b.) The Legislature has also imposed sua sponte instructional requirements to clarify the legal significance of certain kinds of evidence, e.g., an instruction that evidence of flight is insufficient in itself to establish guilt (Pen. Code, § 1127c), or to caution concerning the testimony of certain types of witnesses, e.g., an instruction that the testimony of a witness 10 years of age or younger is to be viewed with caution (Pen. Code, § 1127f).

Courts have independently required a number of fundamental instructions be given sua sponte on matters crucial to the judicial process, e.g., instruction on the elements of the charged offense (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311), instruction on lesser included offenses (*People v. Breverman, supra,* 19 Cal.4th at p. 154) and defenses raised by the evidence (*People v. St. Martin* (1970) 1 Cal.3d 524, 531).[3]

Courts have also required sua sponte instructions to help the jury in its consideration of potentially confusing evidence. One such court-imposed requirement is the duty to instruct the jury sua sponte on the proper application of circumstantial evidence when circumstantial evidence is substantially relied upon for proof of guilt. (*People v. Bender* (1945) 27 Cal.2d 164, 175-176 [abrogated on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) This rule helps jurors correctly apply evidence that has unfamiliar legal significance or application.

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3 Other examples of such fundamental instructions that courts have required sua sponte include the requirement of a unanimous verdict (*People v. Kelso* (1945) 25 Cal.2d 848, 852), the need to agree unanimously on the defendant's conviction of a specific unlawful act (*People v. Madden* (1981) 116 Cal.App.3d 212, 214, 217-218) and that each

The circumstantial evidence instruction synthesizes the presumption of evidence and the burden of proof beyond a reasonable doubt with the logical inferences that can be drawn from incriminating circumstances. Jurors unused to applying the standard of proof beyond a reasonable doubt might be inclined to rely too heavily on inferences that are reasonable, but nonetheless insufficient, to meet the strict evidentiary burden required to sustain a conviction.[4]

Similarly, courts require instructions be given sua sponte to help jurors properly consider unfamiliar kinds of evidence. One example is the requirement that courts must instruct sua sponte on the use of dog tracking evidence. (CALJIC No. 2.16; *People v. Malgren, supra,* 139 Cal.App.3d 234.) This rule stems from the concern that dog tracking evidence may be given too much weight due to the jury's "awe of the animal's apparent powers." (*People v. Malgren, supra,* 139 Cal.App.3d at p. 241.) The instruction is necessary to minimize the jury's tendency to rely too heavily on such evidence rather than considering all the circumstances. (*Id.* at pp. 241-242.) The instruction is almost invariably favorable to defendants and is therefore unlikely to interfere with defense strategy. Accordingly, in this circumstance courts have concluded

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defendant's guilt must be considered separately (*People v. Mask* (1986) 188 Cal.App.3d 450, 457).

4 Courts have also found other instructions that help the jury reconcile the evidence with the law of the case must be given sua sponte. (See, e.g., *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885 [how to weigh the credibility of witnesses when there is conflicting testimony, and the testimony of a single witness can be sufficient to establish guilt]; *People v. Atwood* (1963) 223 Cal.App.2d 316, 334 [defendant's falsehood can be a

the benefit derived from giving the instruction in all cases involving dog tracking evidence outweighs the considerations disfavoring sua sponte instructions.[5]

Courts also require some instructions that are best characterized as admonitions concerning common sense propositions. For example, courts must instruct the jury sua sponte that in considering the defendant's guilt, it may not take into account the fact that the defendant is visibly held in restraints. (*People v. Duran* (1976) 16 Cal.3d 282, 291-292.) At the same time, jurors are expected to have everyday experiences that enable them to distinguish between matters that are relevant to the issues under consideration and matters that have no bearing on their decision. While common sense instructions such as these are accurate statements of legal requirements, they do not add appreciably to the reasoning ability jurors are expected to possess at the outset.[6]

Courts have concluded that some common sense instructions on evidentiary matters are not required sua sponte. (See *People v. Carter*, *supra,* 30 Cal.4th at p. 1198.) Indeed, instructions that inform the jury how to reasonably interpret the facts are unnecessary to secure a fair result because jurors are peculiarly equipped with the expertise necessary to analyze evidence and interpret the facts in a reasonable manner. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1127.) Consequently, an instruction

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circumstance tending to show consciousness of guilt, but is not in itself sufficient to establish guilt].)

5 Courts similarly require sua sponte instructions limiting the use of testimony about child abuse or child rape trauma. (*People v. Housley* (1992) 6 Cal.App.4th 947, 959.)

that tells the jury what kinds of rational inferences may be drawn from the evidence does not provide any insight jurors are not already expected to possess. The benefit of such instructions may be outweighed by counsel's tactical preference to rely on the jury's inherent reasonableness rather than drawing attention to particular bits of evidence through a cautionary instruction. (See *People v. Carter, supra,* 30 Cal.4th at p. 1198.) These considerations strongly weigh against imposing a sua sponte duty to instruct the jury on matters of common sense interpretation of the evidence.

D. *Application*

We conclude CALJIC No. 2.15 is not the type of instruction that must be given sua sponte in every theft-related case and believe all interests are best served by leaving the giving of the instruction to the trial court and parties as the needs of individual cases dictate.

The concept that mere possession of recently stolen property is incriminating but alone insufficient to support a conviction is a matter of common sense. It is obvious that there are an infinite number of innocent explanations for the possession of stolen property, the credibility of which are totally dependent on the facts surrounding that possession. CALJIC No. 2.15 merely informs what common sense suggests and experience teaches, i.e., there are logical limits on the inferences that can be drawn from the mere possession of stolen property but that such possession in the light of

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6 Another common sense instruction that must be given sua sponte is an instruction to view the defendant's confessions, pre-offense statements and oral admissions with caution. (*People v. Beagle* (1972) 6 Cal.3d 441, 455.)

circumstance is enough to prove guilt. Thus, CALJIC No. 2.15 is not essential for a fair trial because it tells jurors nothing they do not already know.

Further, requiring CALJIC No. 2.15 to be given in all theft-related cases can unreasonably interfere with defense strategy. In a given case, it may be far from clear whether the defendant would wish the court to give this instruction. (*People v. Carter, supra,* 30 Cal.4th at p. 1198.) Although the instruction states that possession of stolen property must be corroborated to sustain a theft conviction, it also highlights for the jury that the corroborating evidence need only be slight. Requiring CALJIC No. 2.15 in all theft-related cases impedes the tactical choices of defendants who would prefer that the jury focus on alternative reasonable inferences rather than examining the record for slight corroborating evidence. Indeed, defendants have repeatedly challenged CALJIC No. 2.15 on constitutional grounds. (See *People v. Holt* (1997) 15 Cal.4th 619, 676-678; *People v. Johnson* (1993) 6 Cal.4th 1, 35-36; *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1225-1229; *People v. Anderson* (1989) 210 Cal.App.3d 414.)

We note as well that because possession of stolen property is circumstantial evidence of the defendant's guilt, courts will instruct generally on the application of circumstantial evidence whenever the circumstances to be covered by CALJIC No. 2.15 are relevant. (See *People v. Bender, supra,* 27 Cal.2d at pp. 175-176; *People v. Yrigoyen*, *supra,* 45 Cal.2d at p. 49.) The instructions on circumstantial evidence inform the jury it must adopt any reasonable interpretations of the evidence tending to prove innocence. (CALJIC Nos. 2.01, 2.02.) CALJIC No. 2.02, which concerns the sufficiency of circumstantial evidence to prove specific intent, further instructs the jury that it may not

convict unless the proved circumstances are consistent with the theory that the defendant had the specific intent and cannot be reconciled with any other rational conclusion. Reasonable jurors applying these instructions would not conclude solely on the basis of the defendant's possession of stolen property that the defendant is guilty of theft. In this regard, CALJIC No. 2.15 is much like a pinpoint instruction because it provides greater detail on a general legal issue. Although such instructions are appropriate when requested, courts are not required to give them sua sponte.

In this regard we note CALJIC No. 2.15 protects a defendant from being convicted for theft based solely on the possession of recently stolen property. However, if the only evidence implicating the defendant is his possession of the stolen item, the evidence would be insufficient to sustain a conviction as a matter of law. As such, the specific factual scenario addressed by CALJIC No. 2.15 is, at least in theory, highly unlikely to face the jury. Theft cases invariably rely on some claim of additional incriminating circumstances. One justice has noted: "Prior to *McFarland,* courts occasionally said that 'mere possession' of stolen goods was not enough. One difficulty with that language is that almost any case presents some other circumstances, e.g., the nature of the goods, the time, the place, the manner of possession. The real question in any case is the weight of the evidence as a whole." (*People v. Champion* (1968) 265 Cal.App.2d 29, 34, dis. opn. of Kingsley, J.) It thus makes little sense to single out for special attention a single circumstance -- the possession of stolen property -- and encourage the jury to winnow the remaining evidence for some slight corroboration. Although we do not question the validity of instructing in the terms of CALJIC No. 2.15, we think its factual remoteness

from cases likely to reach the jury weighs strongly in favor of allowing trial strategy to influence whether the instruction is given.

Turning to the instructions given in the present case, we are unable to find any legal insufficiency. The adequacy of jury instructions is considered by examining the charge as a whole. (*People v. Holt, supra,* 15 Cal.4th at p. 677.) Read in its entirety, the instructions given in the present case, including CALJIC Nos. 2.00 and 2.02, fully educated the jury as to the permissible uses of all circumstantial evidence, including the defendant's possession of the stolen car.

Indeed, we note in this case defense counsel argued all of the evidence pointed as much to innocence as guilt, an argument that shifted examination of the evidence away from the slight evidence needed to corroborate possession as strong indicia of guilt. Here the corroborative evidence was very strong. Understandably, competent defense counsel might elect not to have it spotlighted by requesting CALJIC No. 2.15 be given.

In summary, we decline to hold that CALJIC No. 2.15 is necessary for the jury's understanding of all theft-related cases. Accordingly, we hold the trial court here had no obligation to give CALJIC No. 2.15 sua sponte.

The judgment is affirmed.

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BENKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.