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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
RAMON SOLORIO RODRIGUEZ,
Defendant and Appellant.

A121601
A125057

(Sonoma County
Super. Ct. No. MCR437813)

Defendant Ramon Solorio Rodriguez appeals the judgment entered after a jury convicted him on multiple counts of grand theft by false pretenses, in violation of Penal Code, section 487.[1] The victims in this case were all Mexican immigrants residing illegally in the United States who paid defendant sums of money based upon his assurance that he would obtain legal residency in the U.S. for them through the process of applying for political asylum followed by cancellation of removal. In case number A121601, defendant contends that: (1) six of the counts of conviction are barred by the applicable statute of limitations; (2) the entire jury verdict should be reversed because there was no substantial evidence that defendant acted with requisite criminal intent. In case number A125057, defendant appeals the trial court's post-judgment restitution order, entered on the respective counts of conviction, on various grounds. We have consolidated these two appeals, which arise out of the same underlying facts, for purposes of argument and disposition.

[1] Further statutory references are to the Penal Code unless otherwise noted.

Having thoroughly evaluated defendant's claims of error, we conclude that defendant's convictions on counts 9 and 11 must be reversed on statute of limitations grounds. In addition, we reverse the trial court's restitution order on these counts as well. In all other respects, we affirm the judgment and the trial court's restitution order.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was first charged in a felony complaint filed on March 17, 2004. The charging document for purposes of trial is the First Consolidated Amended Information (FCAI) filed on August 28, 2007. The FCAI charged defendant with eleven counts of grand theft against different victims, and at trial the prosecution presented evidence on ten of those counts, specifically counts 2 through 11. [2]

After more than three years and considerable motion practice, the case eventually went to trial on August 27, 2007. The evidence adduced at trial may be summarized as follows: Defendant's spouse, Gladys Bustamante Rodriguez (Bustamante), testified that she and defendant ran a business offering tax preparation services. In 1998, they began to offer immigration services to clients because many of them indicated they were having trouble getting driver's licenses and other legal documentation. In preparation for providing immigration services, defendant and Bustamante met with Gabriel Cisneros, an immigration attorney. Cisneros gave them a book called "A guide for Immigration Advocates" put out by the Immigrant Legal Resource Center in San Francisco. Cisneros told them that through the process of applying for political asylum and cancellation of removal applicants could obtain a work permit and a social security card. Cisneros informed defendant the applications for political asylum are routinely denied and that the applicant would then automatically be placed in removal proceedings. Once placed in removal proceedings, the applicant could apply for cancellation of removal, which, if granted, allows the applicant to obtain legal residency.

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[2] At trial, the prosecution did not present evidence on count one, and the jury was instructed to disregard it.

Cisneros prepared and gave defendant two forms to use in filing asylum applications on behalf of his clients. One form, entitled "Servicios de Inmigracion," is entirely in Spanish. Testimony elicited through an interpreter at trial shows that this form states defendant will prepare an asylum application and prepare an application of cancellation of removal on behalf of the applicant. The other form is entitled "Cancellation of Removal information," and lists the names of the applicant's family members, including the date of birth and citizenship of the children. This form states, in both Spanish and English, that by signing below, "I understand that I will be applying for cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents through first submitting an Asylum application. I understand that I have to prove that I resided in the United States for at least 10 years, that my removal would result in exceptional and extremely unusual hardship to my X and be of good moral character. I understand that by applying its [sic] not a guarantee of residency and that only an immigration judge can grant me legal permanent residency. Denial of my application will result in deportation." Bustamante stated that she read both forms to all the clients in Spanish. All the victims signed these forms.

Immigration law expert, attorney Nora Privitera, testified regarding the process of applying for political asylum and cancellation of removal and the difficulty associated with obtaining this type of relief. She described political asylum as a remedy for people defined as refugees, i.e., who can show they have a well-founded fear of persecution in their home country due to race, religion, nationality, membership in a particular social group or political opinion. She testified that applications for political asylum submitted by illegals from Mexico are generally unsuccessful, with the rare exception of Mexican illegals who can establish they suffered persecution on grounds of sexual orientation (homosexual) or extreme domestic violence. Privitera opined that absent a showing of persecution based on sexual orientation or extreme domestic violence, there is no basis to file an asylum application for an illegal from Mexico.

Privitera also addressed the process of obtaining cancellation of removal following denial of political asylum. Privitera testified that in order to obtain cancellation, an

applicant must have been in the U.S. for ten years and be of good moral character. Additionally, the applicant must meet the hardship requirement, which is the most difficult part of proving a case for cancellation of removal: An applicant must show that deportation to the country of origin would result in exceptional and extremely unusual hardship to a minor U.S. born child. Exceptional and extremely unusual hardship requires a factual showing above and beyond the normal hardship of readjusting to life in a less developed country, i.e., hardship caused by such factors as a poor economy and the lack of health care and education does not constitute extreme hardship.

Privitera testified she has heard of attorneys who file asylum applications the denial of which entitles clients to seek relief through cancellation of removal. According to Privitera, however, ethical attorneys do not seek cancellation of removal through asylum on a routine basis as, "The risk is very high because once you are in removal proceedings, if you don't qualify for the benefit, you are going to be ordered to leave the United States . . . . So the risk is extremely high. And unless you're, . . . really, really sure the case qualifies, it would be, in my opinion, an unwarranted risk to put somebody in removal proceedings through an asylum application." Privitera stated that the number of cancellation of removal grants is capped at 4,000 for the entire country — this figure also reflects the difficulty of winning these cases. Moreover, she testified that to her knowledge, the cap has never been reached in the ten years since the new law came into effect in 1997.

The victims named in counts two through eleven testified at trial. The victims were poorly educated, non-English speaking, Mexican citizens who had been living and working continuously in the United States for over ten years as illegal immigrants. The victims either knew defendant through his tax preparation business or went to see him after hearing his advertisement for immigration services on a Spanish-speaking radio station. The victims all paid substantial sums of money to defendant in return for his promise that he would obtain for them the papers necessary for them to live and work legally in this country. The victims testified that defendant promised them legal residency but they did not understand the nature of the process of political asylum and

cancellation of removal, that defendant did not explain that process to them and did not advise them of the extremely high risk of deportation inherent in it. All victims were denied political asylum and placed in removal proceedings. Many are currently under orders of deportation and none have been granted cancellation of removal and permanent legal residency.

Lissette Gomez, an immigration attorney, also testified about her dealings with defendant and his clients. Gomez learned that defendant was providing immigration services through Gabriel Cisneros. She met defendant sometime in 2001. After they met, defendant referred to Gomez clients who had been placed in removal proceedings after the asylum application filed by defendant on their behalf had been denied. In November 2001, she represented several clients referred to her by defendant at hearings in immigration court. In her opinion, these clients were not statutorily eligible for cancellation of removal. According to Gomez, eligibility for cancellation of removal entails a "complicated legal analysis" and defendant was not undertaking such an analysis. On one occasion in February 2002, Gomez met defendant in immigration court and told him that "what he was doing was wrong and that he needed to stop and that he didn't know the law."[3]

Upon deliberating after the presentation of evidence at trial, the jury returned guilty verdicts against defendant on counts two through eleven of the FACI. On May 5, 2008, the trial court sentenced defendant to the midterm of four years on each count (sentences to run concurrently) and ordered defendant to pay each victim restitution. Defendant filed a timely notice of appeal on May 21, 2008.

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[3] Defendant did not testify at trial. However, in addition to Bustamante's testimony, the defense also presented testimony from four former clients who were granted legal residency through the process advised by defendant, and Philip Levin, an expert in immigration law. Trial testimony and other evidence is further discussed where required in the following section of our opinion.

DISCUSSION

I. Statute of Limitations

A. Applicable Legal Standards

It is well-established that "the statute of limitations is a substantive matter which the prosecution must prove by a preponderance of the evidence at trial." (*People v. Le* (2000) 82 Cal.App.4th 1352, 1360 (*Le*).) Furthermore, "[w]hen a statute of limitations issue has been tried to a jury, on appeal the question becomes whether there was substantial evidence to support the jury's implied findings. (Citation.) If there was not, the judgments are reversed." (*Id.* at p. 1361.) Substantial evidence is evidence that is reasonable, credible, and of solid value. (See, e.g., *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1368.)

The statute of limitations for grand theft is four years from the discovery of the commission of the offense. (§ 801.5; 803, subd. (c)(1).) Section 803, subdivision (c) provides that the four-year limitation of time "does not commence to run until the discovery of [the enumerated offense]." (§ 803, subd. (c).) Case law holds that an offense is "discovered," and the limitations period begins running, "on the date either the 'victim' or a responsible 'law enforcement personnel' learn of facts which, if investigated with reasonable diligence, would make that person aware a crime had occurred. (Citations.)"[4] (*People v. Moore* (2009) 176 Cal.App.4th 687, 692 (*Moore*).) The inquiry as to the discovery of the offense is a question of fact for the jury to decide. (*People v. Zamora* (1976) 18 Cal.3d 538, 565 (*Zamora*).) "The crucial determination is whether law enforcement authorities or the victim had actual notice *of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud.*" (*Id.* at pp. 571-72.) In this regard, a defendant's exploitation of a position of trust within a fiduciary relationship is highly relevant to determining when a

[4] The jury was instructed in conformity with case law as follows: "A crime should have been discovered when the victim was aware of the facts that would have alerted a reasonably diligent person in the same circumstances to the fact that a crime may have been committed."

victim should have become aware of any fraud perpetrated by a fiduciary. (See *People v. Crossman* (1989) 210 Cal.App.3d 476, 482 (*Crossman*) [stating that if defendant and victim are in fiduciary relationship where defendant occupies a "position of trust, . . . 'facts which would ordinarily require investigation may not excite suspicion' "].)

B. Analysis

Defendant contends that his conviction on counts 2, 3, 4, 7, 9 and 11 is barred by the applicable four-year statute of limitations. Regarding these counts, the jury was instructed that it could not convict defendant of grand theft by false pretences "unless the prosecution began within 4 years of the date the crime should have been discovered." Further, the jury was provided with a special instruction which reflected the date that the prosecution of each count commenced: The prosecution of the crime alleged in count 2 began on September 25, 2006; the prosecution of the crimes alleged in counts 3, 4 and 7 began on March 17, 2004; and the prosecution of the crimes alleged in counts 9 and 11began on May 11, 2005. Accordingly, there being no dispute regarding the dates the prosecution of each count commenced, we must assess whether the jury's finding that the crimes alleged in counts 2, 3, 4, 7, 9 and 11 were commenced within the applicable 4-year statute of limitation is supported by substantial evidence. Moreover, in applying the substantial evidence test to the jury's determination that the crimes were committed within the statute of limitations under the circumstances presented here, it is significant that defendant operated from a position of trust by holding himself out as an immigration professional to unsophisticated illegal immigrants from Mexico. (See *Crossman, supra,* 210 Cal.App.3d at p. 482 [stating that if defendant and victim are in fiduciary relationship where defendant occupies a "position of trust, . . . 'facts which would ordinarily require investigation may not excite suspicion' "].)

Count 2 ***(Claudia Jara-Elias)***

Prosecution of the crime alleged in count 2 began on September 25, 2006. Accordingly, count 2 is barred by the statute of limitations if the victim should have, with reasonable diligence, discovered the crime before September 25, 2002. Defendant asserts

that his conviction on count 2 is barred by the statute of limitations because the victim, Claudia Jara-Elias, should have discovered the crime of grand theft by false pretense when her asylum request was denied on January 28, 2002.

We disagree. Even after Jara-Elias learned that her asylum application had been rejected, defendant continued to assure her, just as he did before the filing, that she should not worry because they were going to "appeal" and "[i]t was all going to be okay." Defendant specifically told Jara-Elias that they would win the case and referred her to attorney Nadeem Makeda to represent her in removal proceedings. Subsequently, in 2003, Makeda told Jara-Elias that "everything was wrong" with respect to her residency application process, and at that point Jara-Elias began to distrust defendant and think something was amiss. In sum, the record reflects substantial evidence to support the jury's implied finding that Jara-Elias reasonably discovered that she had been a victim of a crime in 2003, within four years of the date prosecution began on September 25, 2006.

Count 3 ***(Juan Rodriguez Campos)***

Prosecution of the crime alleged in count 3 began on March 17, 2004. Accordingly, count 3 is barred by the statute of limitations if the victim should have, with reasonable diligence, discovered the crime before March 17, 2000. Defendant contends count 3 is barred by the statute of limitations because the victim, Juan Rodriguez Campos (Campos), should have discovered the crime of grand theft by false pretense when he signed the contract with defendant in 1997. Thus, according to defendant, as the only "dated document in the record," the contract is dispositive in determining when the statute of limitations accrued.

To the extend defendant contends that the contract alone should have put Campos on notice inquiry, we disagree. At their first meeting, when Campos signed the form contract containing a naked warning of potential deportation, defendant assured Campos he qualified for residency because he had been here over 10 years. Also, Campos testified that defendant promised they would win the case and never explained that Campos could be deported. Based on defendant's assurances to Campos that he qualified

for residency, the jury could easily find that Campos had no reason to suspect fraud when he signed the contract in 1997. Moreover, the asylum application submitted by defendant on Campos' behalf was dated September 29, 2000, and his asylum interview was held on May 29, 2001. Campos testified that he trusted defendant until he was in removal proceedings and realized that he was going to be deported, which occurred after denial of asylum. Campos' testimony constitutes substantial evidence to support the jury's implied finding that the crime was reasonably discovered within four years of the date the prosecution commenced on March 17, 2004.

C**ount 4** ***(Filiberto Carrillo Rosas)***

Prosecution of the crime alleged in count 4 also began on March 17, 2004. Accordingly, count 4 is barred by the statute of limitations if the victim should have reasonably discovered the crime before March 17, 2000. Defendant contends that Filiberto Carrillo Rosas, the victim in count 4, should have discovered the crime in January 2000, at the first meeting with defendant when he signed a contract for immigration services and defendant gave him the asylum application, because these documents sufficiently alerted him to the risk of deportation.

We disagree with defendant's contention for the same reasons as we outlined in disposing of count 3, namely, the repeated assurances made by defendant prevent imputing inquiry notice to the victim. At their first meeting in January 2000, defendant promised Rosas that he qualified for residency because his children were born in the U.S. and on January 11, 2000, Rosas paid defendant $1,000. Rosas stated defendant told him that "if immigration caught up with me [Rosas], then the whole process was going to be easier." Defendant completed an asylum application for Rosas dated July 11, 2000, and assured him that although asylum would be denied, denial was just the first step in securing legal residence status as promised. Rosas was interviewed by an immigration judge in connection with his asylum application on May 30, 2001. Rosas testified that he didn't suspect defendant's promise "that everything could be done really easily" regarding obtaining legal residency was untrue until he was placed in removal proceedings (following denial of asylum) and attorney Gomez informed him that it was

going to be very hard to obtain residency. This evidence supports the jury's implied finding that the crime was not reasonably discovered until May 2001 at the earliest. Accordingly, we find no reason to disturb the jury's determination that the crime was reasonably discovered within four years of the date the prosecution began on March 17, 2004.

Count 7 ***(Santos Gomez-Cuevas)***

Prosecution of the crime alleged in count 7 also began on March 17, 2004. Accordingly, count 7 too is barred by the statute of limitations if the victim should have reasonably discovered the crime before March 17, 2000. Defendant contends that Santos Gomez-Cuevas, the victim in count 7, should have discovered the crime at his first meeting with defendant in February 1998, when he signed the contract with defendant for immigration services. Defendant asserts that the contract was read to Gomez-Cuevas and he was therefore aware of the risk of deportation at that point. Again, we conclude defendant's contention lacks merit.

Gomez-Cuevas testified that coincident with signing the contract at his first meeting with defendant, defendant assured him he could obtain residency through "a program they had for children who were born here." Therefore, as with several of the other victims, the signing of the contract for immigration services, in light of defendant's specific assurances of a positive outcome based upon the existence of a particular program, did not place Gomez-Cuevas on notice of criminal wrongdoing. Moreover, the record contains no substantial evidence that serves to impute notice to Gomez-Cuevas that he had been a victim of a crime prior to August 12, 2000, the date he signed his asylum application. Because the initiation of asylum proceedings on August 2000 is within 4 years of the March 17, 2004 commencement of the prosecution on this count, substantial evidence supports the jury's implied finding that prosecution of count 4 fell within the four-year statute of limitations.

Count 9 ***(Miguel Miranda)***

Prosecution of the crime alleged in count 9 began on May 11, 2005. Accordingly, count 9 is barred by the statute of limitations if the victim should with reasonable diligence have discovered the crime before May 11, 2001. Defendant contends that Miguel Miranda, the victim in count 9, should have discovered the crime before May 11, 2001, because he knew at the time of his asylum interview in 1998 that he was subject to the risk of deportation.

We disagree with defendant's contention that Miranda should have discovered the crime in 1998. However, we find that this count is barred by the applicable statute of limitations for reasons different than those asserted by defendant. In our view the record fails to reflect substantial evidence to support the jury's implied finding that the crime was discovered within four years of the date of prosecution. Accordingly, we reverse defendant's conviction on this count.

In arguing that count 9 is not barred by the statute of limitations, the Attorney General (AG) calls our attention to testimony which reflects that attorney Cisneros initially represented Miranda in removal proceedings and, thereafter, attorney Makeda took over the case before Miranda was subsequently ordered deported. According to the AG, the sequence of Miranda's legal representation, coupled with his testimony that he only came to distrust defendant at "the end, when I began to realize that things were not . . . straight forward as he had said," supports the jury's implied finding that Miranda could not have reasonably discovered defendant's fraudulent misrepresentations until Cisneros left the country, Makeda substituted in, and Miranda was ordered deported in 2002. The record, however, does not support the AG's argument.

First, neither Miranda's testimony nor the documents introduced into evidence on count 9, reflect the date of Miranda's removal hearing or the date he was ordered deported. Further, there is no evidence in the record establishing the date Miranda first met with attorney Makeda with regard to the issue of deportation. Bustamante, defendant's wife, testified that Cisneros moved to Spain in 2001 or 2002. Thus, even assuming that Miranda could not have reasonably discovered defendant's fraudulent

misrepresentations until after Cisneros left the country and Makeda substituted in, the record, at best, establishes that Cisneros left the country in 2001 or 2002. Fatal to respondent's contention, however, is the fact that the record does not establish that Cisneros left the country after May 2001. Accordingly, because the record does not establish that the Cisneros-Makeda substitution occurred after May 2001, even under respondent's theory there is no substantial evidence upon which the jury could reasonably infer that Miranda did not discover the fraud until after May 2001.

Count 11 ***(Manuel Cruz-Castro)***

Prosecution of the crime alleged in count 11 also began on May 11, 2005. Accordingly, count 11 is barred by the statute of limitations if the victim could, with reasonable diligence, have discovered the crime before May 11, 2001. Defendant contends that Manuel Cruz-Castro, the victim in count 11, should have discovered the crime before May 11, 2001, because he testified that he distrusted defendant's representations pertaining to legal residency at the time of the asylum hearing in September 1998. We think defendant's characterization of Cruz-Castro's testimony is not quite accurate. Cruz-Castro testified that although he "had his doubts" about defendant regarding the asylum application, "[defendant] said he was a lawyer and . . . I still believed in him . . . [¶] . . . right up to the end, when they told me I couldn't get my residency." Nevertheless, contrary to respondent's contention, Cruz-Castro's testimony that he believed in defendant "right up to the end" is insufficient to support the jury's implied finding that count 11 was discovered within four years of the date of prosecution.

In this regard, respondent contends that Cruz-Castro could not reasonably have discovered the fraud until after May 11, 2001, at the point, "right at the end," when he realized he would not prevail on his residency application. Because Cruz-Castro was represented by attorney Cisneros in removal proceedings until attorney Makeda substituted in after Cisneros left the country, respondent asserts that the jury could infer Cruz-Castro did not reasonably discover the fraud until "after the attorney substitution occurred in 2001 or 2002." However, respondent's contention is unsupported by either trial testimony or documentary evidence.

First, the documentary evidence introduced at trial by the prosecution on count 11 reflects that Cruz-Castro was ordered to appear for a hearing in removal proceedings in September 1998. In addition, Cruz-Castro testified that he went to court with attorney Makeda four times sometime *in 1998*, and on the last occasion was informed that he did not qualify for residency. Therefore, contrary to respondent's contention, the record establishes that Cruz-Castro was placed on inquiry notice that defendant's promises may be untrue beginning in 1998. At that juncture, Cruz Castro was obliged to exercise reasonable diligence toward ascertaining the truth of the promises made by defendant. The record contains no evidence that he did so. Accordingly, on this record, we are unable to find that substantial evidence supports the jury's implied finding that the prosecution of this count fell within the four-year statute of limitations.

In sum, we are satisfied that the jury's implied findings that the crimes alleged in counts 2, 3, 4 and 7 were discovered within four years of the relevant dates of prosecution are supported by substantial evidence. On the other hand, we conclude that the record lacks substantial evidence for the jury's implied findings that the crimes alleged in counts 9 and 11 were discovered within four years of the relevant dates of prosecution. Accordingly, the convictions on counts 9 and 11 must be reversed.

II. Sufficiency of the Evidence

A. Applicable Legal Standards

The well-established standard for review of sufficient evidence to uphold a conviction on appeal is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576; *People v. Reilly* (1970) 3 Cal.3d 421, 425.) While the reviewing court must ensure that the evidence supporting the conviction is reasonable, the court may not reweigh the evidence, reappraise the credibility of witnesses, or resolve conflicts in the evidence as these functions are reserved for the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact

could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' (Citation.)" (*People v. Bolin, supra,* 18 Cal.4th at p. 331.)

Given this court's limited role on appeal, defendant bears a heavy burden in claiming there was insufficient evidence to sustain the jury's findings. (See *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 ["[W]hen a criminal defendant claims on appeal that his conviction was based on insufficient evidence . . . we *must* begin with the presumption that the evidence . . . *was* sufficient, and the defendant bears the burden of convincing us otherwise"].) The standard for securing a reversal is just as high when the prosecution's case depends on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) As long as there is reasonable justification for the findings made by the trier of fact, a reviewing court's opinion that contrary findings might also have been reasonable does not require a reversal. (*Id.* at p. 793.)

In order to obtain a conviction of theft by false pretenses, the prosecution must prove: "(1) that the defendant made a false pretense or representation, (2) that the representation was made with intent to defraud the owner of his property, and (3) that the owner was in fact defrauded in that he parted with his property in reliance upon the representation." (*Perry v. Superior Court* (1962) 57 Cal.2d 276, 282-283, citing *People v. Ashley* (1954) 42 Cal.2d 246, 259.) The jury was instructed as follows on the element of false pretense: "Someone makes a false pretense if, intending to deceive, he or she does one or more of the following: 1. Gives information he or she knows is false; OR 2. Makes a misrepresentation recklessly without information that justifies a reasonable belief in its truth; OR 3. Does not give information when he or she has an obligation to do so; OR 4. Makes a promise not intending to do what he or she promises." (CALCRIM 1804.)

B. Analysis

Defendant acknowledges that the jury instruction given by the court (CALCRIM 3500) accurately defines the conduct/statements which, under California law, constitute false pretenses; hence he takes no issue with the instruction itself. Rather, defendant asserts that the theories of false pretense articulated in the instruction require evidence of bad faith, citing *People v. Marsh* (1962) 58 Cal.2d 732, 736 [stating that "a conviction of theft based on false representations cannot be sustained if the false representations were made in the actual and reasonable belief that they were true"] and *People v. Roof* (1963) 216 Cal.App.2d 222, 226 [stating that if defendant "intended to furnish the equipment as promised and made an honest effort to furnish it, his promises, even if foolish, were free from criminal intent"]). Defendant contends the record cannot support a finding that he acted in bad faith. At most, according to defendant, the record shows that the immigration laws were "never quite as favorable as he thought," that he "may have been guilty of malpractice," and that he "probably should have refunded money when he was unable to provide the benefits he promised." None of this, defendant asserts, amounts to criminal intent. Reduced to its essence, defendant contends his conviction for theft by false pretenses must be reversed because there is insufficient evidence he acted with criminal intent.

"Whether the representations were made honestly or with an intent to deceive [i]s . . . a question of fact to be resolved by the jury from all the circumstances in evidence. (Citations.)" (*People v. Schmitt* (1957) 155 Cal.App.2d 87, 108; *People v. Gordon* (1945) 71 Cal.App.2d 606, 624; see also (*People v. Brown* (1982) 138 Cal.App.3d 832, 834 [stating that where "two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury (Citations)"].) "Proof of a false representation may be established by either words or conduct, or by both. . . . Hence, the words of the defendant[], [his] conduct, the nonperformance of [his] alleged promise, and other circumstances of the 'shake down' must all be considered in determining whether defendant['s] promise constituted a false pretense within the meaning of section 484 of the Penal Code. (Citations.)" (*People v.*

Fujita (1974) 43 Cal.App.3d 454, 467-468.) Here, indulging as we must "every reasonable inference the jury could draw from the evidence" (*People v. Autry, supra,* 37 Cal.App.4th at p. 358), we conclude that the record contains substantial evidence to supports the jury's finding that defendant acted with criminal intent. Such substantial evidence is found in the circumstances attendant to defendant's immigration scheme, the testimony of the victims, the lack of record evidence that defendant conducted any meaningful investigation or analysis before making his promises, and his dealings with other immigration professionals.

First, the circumstances attendant to defendant's promise to secure legal residency for the victims were that defendant held himself out as an expert in immigration matters to poorly educated members of the illegal immigrant community whom he solicited from his existing tax client base or sought out by advertising on a Spanish-language radio program. Defendant's "expertise" was derived from a single meeting with attorney Cisneros and an immigration handbook. On the basis of this "expertise," and having placed himself in a position of trust with respect to the victims, defendant represented to his victims that they could obtain legal residency through a process of applying for political asylum and cancellation of removal. The victims believed and relied upon defendant's representation and paid him considerable sums of money to initiate the necessary paperwork. Defendant utilized form contracts containing a naked prophylactic warning that the process could potentially result in deportation. The record shows that the victims signed these form contracts with no understanding of their contents and that defendant did not explain the process to them. In particular, and most importantly, defendant did not explain the extremely high risk of deportation inherent in the process of applying for asylum followed by cancellation of removal. Rather, at his first meeting with the victims, armed with bare bones information about the process of seeking asylum or cancellation of removal, and without conducting an individualized assessment of the their particular circumstances, defendant promised the victims that they would eventually obtain legal residency. He followed up this initial promise with continued reassurances that legal residency was forthcoming as a result of the applications he filed on their

behalf. In return for their investment, defendant placed each of the victims on a path that led, with a high degree of certainty, to an order of deportation. In total, the record here reflects that the defendant employed a "scheme" whereby he made reckless promises to the victims that they could obtain legal residency without information that would justify a reasonable belief in the truth of those promises—i.e. that he acted with criminal intent. (See *People v. Webb* (1999) 74 Cal.App.4th 688, 694; also, compare *People v. Marsh, supra,* 58 Cal.2d at p.736 [no liability for theft by false pretenses if defendant's "false representations were made in the actual *and reasonable* belief that they were true" [italics added].)

Second, the victim testimony presented at trial supports the jury's determination that defendant acted with criminal intent in furtherance of his false promises made to the victims here. The testimony of the following victims is illustrative of mechanisms defendant employed to deceive his victims.

Rosario and Bertoldo Erostico, (count 6), a married couple in their fifties from Mexico, testified about how they had been deceived by defendant. Rosario has lived in the U.S. for 13 years, does not read or write in either Spanish or English and can only write her name. She and Bertoldo have five children, one of whom was born in the U.S. Rosario heard about defendant on a Spanish radio station announcing he was an attorney. When Rosario met with defendant, she asked if he could "fix their papers." Defendant promised Rosario he could "fix the papers" based on her and her husband's length of residence in the U.S. and the fact they had a daughter born here. Rosario paid defendant over $5,000. Rosario acknowledged she filled out some papers with defendant but testified that she does not know what "political asylum" or "cancellation of removal" means. Rosario did not obtain residency and has been ordered deported to Mexico.

Rosario's husband Bertoldo testified he is illiterate in Spanish and English and knows only how to "put down" his name. He works in "the grapes." Bertoldo heard about defendant on a Spanish radio channel that gave his telephone number and said he "fixed papers." Bertoldo and his wife Rosario went to meet with defendant. Defendant told them that he was going to fix their papers, but did not explain how he was going to

do it. When Bertoldo and Rosario filled out forms with defendant, defendant did not explain what the forms said and did not read the forms to them, nor did defendant's wife. Defendant never explained about "political asylum."

The same pattern is apparent in the testimony of Guillermo Corrales (count 10). At time of trial, Corrales was a 35-year old Mexican who had been in the U.S. since 1991, who spoke no English; did not read or write well in Spanish, and had two years of schooling in Mexico. Corrales and his wife, Adela Martinez, first went to see defendant about taxes and defendant told him he could get him a social security card and "fix up our residency." Corrales paid defendant a total of $2,000. Defendant never discussed political asylum with Corrales and never told Corrales he was going to file for political asylum on Corrales' behalf. Corrales was shown an application for asylum signed by him but did not remember the document or signing it. Defendant never discussed cancellation of removal with Corrales or explained it to him, and did not advise Corrales and Martinez regarding the risks of the process defendant proposed. Defendant promised he would obtain residency for Corrales and Martinez, but never told them how he was going to do it. Corrales is under an order of deportation.

Defendant's conduct with respect to Corrales' spouse, Adela Martinez (count 10), is even more reprehensible because she had the chance to obtain legal residency through her father. Like her husband, Martinez is from Mexico and had been in the U.S. for over ten years. She speaks very little English, reads none, does not read well in Spanish, and graduated from high school in Mexico. When she and Corrales met with defendant, Martinez told defendant she had an application for residency pending through her father, who had already obtained residency by then. Martinez paid defendant $1,700 in order to obtain a work permit and a "seguro" (social security number). Martinez knew she would obtain residency through her father but it would take some time. She filled out an application defendant gave her that she thought was for the work permit. Defendant never told her what would happen after she filled out this application, and promised Martinez the application filed by him would have no effect on her pending application for residency through her father. Subsequently, Martinez attended a hearing in immigration

court and learned that defendant had filed an application for asylum in her name. After defendant referred her to attorney Lissette Gomez for further proceedings, Gomez explained that Martinez was under an order of deportation because defendant "had done it through the political asylum, not through my dad." Martinez testified that defendant never told her there was a risk she could be deported based on what he was doing.[5]

Pedro Arango (count 8) testified that defendant promised him at their first meeting that Arango could obtain residency because his daughter "had problems." Arango made a payment to defendant of $1,500 in reliance on defendant's promise. Six months later, defendant took Arango to San Francisco to meet attorney Nadeem Makeda. Makeda, however, advised Arango not to apply for residency because he had not been in the U.S. for long enough and his daughter was born in Mexico. Makeda further advised Arango that he would be deported if he applied for residency.

Third, the reckless and baseless nature of defendant's promises to the victims is demonstrated by the dearth of record evidence that defendant conducted any meaningful investigation or analysis before making his promises. Without recounting the victims' testimony again in detail, it shows that defendant promised them legal residency if they had been here for more than ten years and had American-born children;[6] that defendant gave such assurances without explaining the requirements for obtaining political asylum,

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[5] Not only did defendant deliberately mislead Martinez regarding the basis of her application for residency, but he also attempted to dissuade her from testifying at trial. In this regard, Martinez testified that after she was ordered deported in 2003 she became involved in the D.A.'s case against defendant. Around the same time, defendant's mother visited Martinez's mother and talked to her about Martinez's testimony. Martinez testified that on a second visit, defendant spoke to her and told her that it would be in their best interest if Martinez did not testify against him at trial. Both defendant and his mother wanted Martinez to withdraw her testimony. Based on this evidence, the jury was instructed that "[i]f the defendant tried to hide evidence or discouraged someone from testifying against him, that conduct may show he was aware of his guilt . . . [but] evidence of such an attempt cannot prove guilt by itself."

[6] The exception is victim Adela Martinez. In her case, defendant falsely promised that he could obtain a work permit and social security card without affecting her pending application for residency through her father.

and without explaining that a denial of asylum would lead to deportation proceedings in which a favorable outcome required far more than simply showing presence in the U.S. for more than ten years and a child born in the U.S.; and that defendant did not undertake a careful assessment of the victims' individual circumstances before launching them into a process resulting in deportation. In sum, defendant's cursory investigation into the individual circumstances of the victims, the lack of any particularized assessment of their chances of obtaining relief in immigration court, coupled with the testimony of attorneys Privitera and Gomez, as summarized above, allowed the jury to conclude defendant acted with criminal intent where, as here, he recklessly and baselessly promised the victims legal residency without information that would justify a reasonable belief in the truth of that promise. (See *People v. Webb, supra,* 74 Cal.App.4th at p. 694.)

Finally, defendant's criminal intent may be inferred through his dealings with attorney Gomez in particular. The latter became concerned that clients referred by defendant, and already in deportation proceedings, had no grounds for cancelation of removal. Gomez initially advised defendant that he needed to be more careful and by the time she met him in February 2002 she told him that "what he was doing was wrong." Instead of heeding her advice, defendant stopped referring clients to Gomez and continued with his business, illustrated by the fact that he attempted to file an asylum application in 2003 for Arango, the victim in count 8.

In sum, as one court observed, "when the criminal purpose of the accused is demonstrated by numerous acts of taking the money of his victims by means of false promises the jury is not required to be too sensitive to fine distinctions in his favor." (*People v. Gordon, supra,* 71 Cal.App.2d at p. 625.) His guilt having been determined by the jury, and given this court's limited role on appeal, defendant has failed to meet the heavy burden he must carry in order to show there was insufficient evidence to sustain the jury's findings. (See *People v. Sanghera, supra,* 139 Cal.App.4th at p. 1573.) Rather, as demonstrated above, when the record is reviewed in the light most favorable to the judgment, it discloses evidence that is reasonable, credible, and of solid value such that the jury could determine the presence of intent necessary to find defendant guilty

beyond a reasonable doubt. (See *People v. Bolin, supra,* 18 Cal.4th at p. 331.) Accordingly, defendant's convictions for theft by false pretenses must be affirmed.

III. Restitution Damages

Victim restitution for economic loss caused by a criminal defendant is mandatory, and a sentence without a restitution award is invalid. (*People v. Hudson* (2003) 113 Cal.App.4th 924, 929.) On appeal, we reverse the amount of a restitution order only for a clear abuse of discretion: The trial court has broad discretion in determining the amount of restitution (*People v. Baker* (2005) 126 Cal.App.4th 463, 470), and "all that is required is that the trial court 'use a rational method that could reasonably be said to make the victim whole, and . . . not make an order which is arbitrary or capricious.' [Citations.] The order must be affirmed if there is a factual and rational basis for the amount." (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.) We presume the order is correct, and indulge in all presumptions to support it on matters in which the record is silent. (*People v. Giordano* (2007) 42 Cal.4th 644, 666.)

As a preliminary matter, defendant is correct that restitution is improper for counts barred by the statute of limitations, and the authorities clearly support him on this point. (See *People v. Lai* (2006) 138 Cal.App.4th 1227, 1249 [restitution is limited to counts of conviction where defendant is sentenced to state prison and not placed on probation]; *People v. Percelle* (2005) 126 Cal.App.4th 164, 180 [same].) Here, defendant received a state prison sentence. Accordingly, having concluded that defendant's convictions on counts 9 and 11 must be reversed, no restitution may be awarded on those counts.[7]

Defendant's remaining contention regarding the trial court's restitution order is that the amounts awarded in restitution should be "limited to the excess of defendant's fees over the value of the services" he purportedly rendered, and should not be awarded in any amount unless the evidence shows the victim "has been or inevitably will be

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[7] As a further preliminary matter, having concluded above (see *ante,* Discussion section II) that the remaining counts of conviction are supported by substantial evidence, we summarily reject defendant's contention that restitution is improper for those counts unsupported by substantial evidence.

deported." Defendant's contention is meritless because it fails to recognize the purpose and role of restitution under California law. It is the avowed policy of this state that persons who suffer losses as a result of the criminal activity of others are entitled to full restitution for the damage they have suffered. (Cal. Const., art. I, § 28, subd. (b); *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 242; § 1202.4.) Defendant's criminal activity was grand theft by false pretences. Accordingly, it was both rational and reasonable for the trial court to make the victims whole by awarding them restitution in the amount of the sums they paid to defendant under such false pretences. (*People v. Akins*, *supra*, 128 Cal.App.4th at p. 1382 [stating that "all that is required is that the trial court 'use a rational method that could reasonably be said to make the victim whole, and . . . not make an order which is arbitrary or capricious.' [Citations.]"].) Defendant does not dispute the actual amounts awarded in restitution, only that they are not discounted for the "value" of his alleged services. Thus, the restitution order is affirmed with respect to counts 2, 3, 4, 5, 6, 7, 8 and 10.

DISPOSITION

The judgment of conviction is reversed with respect to counts 9 and 11. The trial court's restitution order is reversed with respect to restitution awarded on counts 9 and 11. The matter is remanded for sentencing consistent with this opinion. In all other respects, the judgment and the trial court's restitution order are affirmed.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.