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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. J. RICHARD WOOD, Defendant and Appellant.	C038290 (Super. Ct. No. WS98F0456)

APPEAL from a judgment of the Superior Court of El Dorado County, Eddie T. Keller, J. Affirmed.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Janis Shank McLean and Jane N. Kirkland, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to rules 976(b) and 976.1 of the California Rules of Court, this opinion is certified for publication with the exception of parts II through V, inclusive, of the DISCUSSION.

A jury convicted defendant J. Richard Wood of animal abuse. (Pen. Code, § 597, subd. (b); further undesignated statutory references are to the Penal Code.) Imposition of sentence was suspended and defendant was placed on probation for three years on the conditions, among others, that he serve 180 days of incarceration and forfeit the animal. Defendant appealed.

In the published portion of our opinion, we hold the trial court erred when it allowed an animal control officer to testify, over defendant's Fourth and Fifth Amendment objection, that defendant refused the officer's request to enter his property without a warrant. However, we conclude the error was harmless because the testimony would have been admissible to impeach defendant's testimony that he lacked ownership and control of the property and the animal located thereon.

In the unpublished portion of our opinion, we reject defendant's contentions that the jury instructions on animal cruelty and criminal negligence were incorrect, and that instructions on causation and mistake of fact should have been given sua sponte. We shall therefore affirm the judgment.

FACTS

Prosecution case-in-chief

On December 1, 1998, El Dorado County Animal Control Officer John Vail went to an address on Mt. Aukum Road, a rural, hilly and wooded area of the county. In a pasture area near

some buildings, Vail saw and photographed a horse that was very thin; its ribs were showing, its hips were angular rather than round, and its backbone was concave instead of convex. There was little, if any, vegetation in the pasture.

Vail approached a building to try to contact someone about the horse. When defendant emerged from the building, Vail advised him that he had received a complaint about the horse and asked permission to look at it more closely. Over defendant's objection, Vail testified that defendant refused, telling Vail he did not want Vail on his property.

Ten days later, Vail returned to the property with a warrant to seize the horse, an Appaloosa named Patches, which was in the same condition as when Vail had seen it before. Vail confirmed that Patches was emaciated; he could feel individual ribs, vertebrae and pelvis points. Patches was in the same area as before with no food available and very little grass, which was too short for grazing; nor was there any debris indicating that Patches had been given food or hay. There was slightly more than one bale of hay in an area that Patches could not access. Patches was apparently just scraping the ground with his lips and teeth for sustenance. Vail seized Patches because of his poor appearance and condition and the lack of available food.

Vail took Patches to a truck scale and determined that he weighed 930 pounds. The next day Dr. Christine Vos, a veterinarian, examined Patches. Dr. Vos described Patches as looking worse than the photographs showed. She said he was

"significantly" underweight, with his ribs, vertebrae and pelvic bones showing prominently. His muscles were wasting, showing that his body had used all its fat reserves and was feeding on muscle. He also had a significant amount of sand in his abdomen and his manure, which is abnormal, occurring when an animal is eating dirt for some reason. Sand inside a horse can decrease its weight by abrading its intestines and settling in its bowels so that nutrients from food cannot be as readily absorbed and food cannot travel as well through the intestines.

Dr. Vos found that Patches had sharp points on his teeth, which had caused scarring and cuts along his tongue and cheeks; horses' teeth need to be filed down periodically to prevent this condition. In sum, Dr. Vos found that Patches was not healthy "at all"; he was emaciated, in pain from mouth lesions and the internal sand, and suffering needlessly. She opined that Patches was not receiving enough food and not able to properly use the food he did get because of the teeth and sand problems. On the Henneke scale, used for rating horse health, where five is normal, 10 is obese and one is near death, Patches was a two or two plus. It would have taken at least a few weeks for Patches to decline into this unhealthy condition. Left untreated, these maladies would have killed him.

On March 11, 1999, after receiving three months of care, Patches had gained 130 pounds and looked "normal."

Defendant and his former wife, Micki Wood, bought Patches in 1987 or 1988. While they were together, Wood cared for Patches, who had not had emaciation or weight problems. When

the couple separated in 1990, defendant received Patches in a partial distribution of their marital property.

Defense

Defendant testified on his own behalf. He acknowledged that he obtained ownership and possession of Patches in the divorce. However, he deeded Patches to the Kalashnikoff Trust, from which he had borrowed in order to retain counsel for the divorce. Defendant is one of three trustees of the Kalashnikoff Trust, which his aunt had established.

The Mt. Aukum Road property where Patches was pastured was owned by an unrelated investors' trust, which obtained the property by foreclosure when defendant and his wife failed to keep up the payments after the divorce.

Defendant lived primarily in Utah. He left Patches in the care of a caretaker responsible to the Kalashnikoff Trust, which rented the real property from the investors' trust. While defendant had responsibility for Patches and ordered the feed, it was the caretaker who actually fed Patches. When defendant was on the property on December 1, 1998, he saw the one bale of hay that was inaccessible to Patches. He ordered more feed, but he did not see that Patches was in any danger. The photographs taken on December 1 were "[n]ot at all" what Patches looked like that day. No ribs or other bones were showing or protruding. Defendant did not recall when, prior to December 1, 1998, he had last checked Patches's teeth.

Defendant hired veterinarian Dr. Dean Bader on behalf of the Kalashnikoff trust to examine Patches after the animal

control officer seized him. Dr. Bader examined Patches on December 17, 1998, and on March 11, 1999. Dr. Bader agreed with Dr. Vos's conclusion that Patches was in "poor" condition in December 1998, but nevertheless claimed that Patches was "healthy" and "wasn't sick."

Dr. Bader did not recall whether he checked for sand. He noted that sand was harmful to horses because it irritates their bowels and interferes with absorption of nutrients. The amount of sand Dr. Vos had found in Patches could have caused him some problems, including weight loss.

When Dr. Bader saw Patches again on March 11, 1999, there was a substantial change for the better. Patches had gained weight and regained some lost muscle; his ribs were no longer prominent or visible.

DISCUSSION

I

Defendant contends his Fourth and Fifth Amendment rights were violated when the trial court allowed Officer Vail to testify that defendant refused Vail access to the pasture where Patches was kept. We agree that the trial court erred but conclude that the error was harmless.

Background

Officer Vail testified that during his December 1, 1998, visit to the property (when he did not have a warrant), he told defendant he "had received a complaint about the horse" and asked, "could we go take a look at it." The prosecutor asked Vail, "did [defendant] respond to you." Defense counsel stated,

"Objection. Fifth Amendment, Fourth Amendment." The trial court had an off-the-record discussion with both counsel and then directed the prosecutor to "[g]o ahead." The prosecutor re-asked the question. After refreshing his recollection, Vail testified that defendant had stated, "You know better than that. You're not coming on my property."

Analysis

Defendant relies primarily on *People v. Keener* (1983) 148 Cal.App.3d 73 (*Keener*). In *Keener*, four SWAT officers testified during the prosecution case-in-chief "to what can only be characterized as a siege of defendant's apartment," including "how they tried to coax Keener out of the apartment" and how he responded. (*Id.* at p. 78.) "Evidence of the siege was offered to show a consciousness of guilt; i.e., if defendant was not guilty he would have immediately surrendered." (*Ibid.*) *Keener* held that admission of evidence of the defendant's refusal to consent to a warrantless entry of his residence violated the privilege to be free from comment upon the assertion of a constitutional right. (*Ibid.*)

Keener derived the privilege primarily from three opinions of the United States Supreme Court: *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), *Doyle v. Ohio* (1976) 426 U.S. 610, 619 (*Doyle*), and *Jenkins v. Anderson* (1980) 447 U.S. 231 (*Jenkins*). *Griffin, supra,* had precluded the prosecution from commenting on the silence of an accused who asserts his right to remain silent during the trial. (*Id.* at p. 614.) *Doyle* had held that the due process clause of the Fourteenth Amendment

forbids prosecutors from using a defendant's postarrest, post-*Miranda*[1] silence for impeachment purposes. *Jenkins* had held that *prearrest* silence may be used to impeach the credibility of a defendant who chooses to testify. (*Jenkins, supra*, 447 U.S. at p. 240.)

Keener explained that "Presenting evidence of an individual's exercise of a right to refuse to consent to entry in order to demonstrate a consciousness of guilt merely serves to punish the exercise of the right to insist upon a warrant. It is of no consequence that police had a right to enter without a warrant here, nor does it matter that defendant spoke to the police during the siege. 'The right to refuse [entry] protects both the innocent and the guilty, and to use its exercise against a defendant would be, as the court said in *Griffin*, a penalty imposed by courts for exercising a constitutional right.' (*United States v. Prescott* [(9th Cir. 1978)] 581 F.2d 1343, 1352.)" (*Keener, supra*, 148 Cal.App.3d 73, 79.)

Conclusions similar to *Keener* have been reached in many other jurisdictions that have addressed similar issues. (E.g., *State v. Palenkas* (Ariz. Ct. App. 1996) 933 P.2d 1269, amended by 1 CA-CR 95-0752, 1996 Ariz. App. LEXIS 267 (Dec. 19, 1996) [prosecutor's use of defendant's contacting his attorney and his invocation of his right to refuse a warrantless search as evidence of his guilt denied due process and required a new

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

trial]; *United States v. Thame* (3d Cir. 1988) 846 F.2d 200, 206 [error for the prosecutor to argue that defendant's refusal to consent to search of his bag constituted evidence of his guilt]; *United States v. Taxe* (9th Cir. 1976) 540 F.2d 961 [prosecutor's comments on defendants' refusal to consent to a search of their trucks was "misconduct" but harmless under circumstances]; *United States v. Rapanos* (E.D. Mich. 1995) 895 F.Supp. 165, 168, reversed on other grounds, **115 F.3d 367 (6th Cir. 1997)** [error to insinuate that defendant's refusal to consent to warrantless entry onto his land was evidence of concealment of a crime]; *Padgett v. State* (Alaska 1979) 590 P.2d 432, 434 [right to refuse to consent to warrantless search of car would be effectively destroyed if, when exercised, it could be used as evidence of guilt].)

Under *Keener* (which we think is correctly decided), defendant's constitutional objection should have been sustained. At that point, defendant's invocation of his Fourth Amendment right was improperly being used for the purpose of showing he had something to hide, or, in other words, demonstrating his consciousness of his guilt. (*Keener, supra*, 148 Cal.App.3d 73, 78.) In effect, the testimony punished defendant for asserting his right to have the officer obtain a warrant.

However, the error is harmless, because the evidence of defendant's refusal to admit Officer Vail would have been properly admissible during cross-examination of defendant or as rebuttal evidence following defendant's testimony.

Thus, in *Harris v. New York* (1971) 401 U.S. 222 (*Harris*), the high court held that a statement taken without proper *Miranda* advisements is inadmissible in the prosecution's case-in-chief but may be admitted for impeachment purposes. (Accord, *People v. May* (1988) 44 Cal.3d 309, 315.) As *Harris* explained, "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [Citations.]" (401 U.S. at p. 225; see also *Fletcher v. Weir* (1982) 455 U.S. 603, 607.)

Following *Harris*'s rationale, we conclude that when defendant chose to testify, and to deny that he owned the property where the horse was located, constitutional constraints did not shield him from cross-examination as to his earlier statement refusing to admit Vail onto "my property." Defendant's statement that Vail was "not coming on *my property*" was proper impeachment because it contradicted defendant's testimony that he did not have control of the property where the horse was located, which assertedly was owned by an unrelated trust. Evidence that defendant felt he had a sufficient proprietary interest in the property to refuse Vail access rebutted his claim that he had no responsibility for the property, and, inferentially, for the horse located thereon. Thus, the evidence elicited by the prosecutor in the case-in-chief would have been proper impeachment.

Admission of the foregoing evidence during the prosecution's case-in-chief, rather than for impeachment

following defendant's direct testimony, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

II

Defendant contends the trial court erred by failing to instruct the jury with the animal cruelty instruction used in our decisions in *People v. Youngblood* (2001) 91 Cal.App.4th 66 (*Youngblood*) and *People v. Speegle* (1997) 53 Cal.App.4th 1405 (*Speegle*). He claims the error allowed the jury to convict him without finding the necessary element that his act or omission caused a danger to animal life or safety. We disagree.

Background

Section 597, subdivision (b), provides in relevant part that "every person who . . . deprives of necessary sustenance . . . any animal, or . . . having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or . . . fails to provide the animal with proper food [or] drink . . . is . . . guilty of a crime . . . ."

The People initially requested that the jury be instructed pursuant to *Youngblood* and *Speegle*, as follows:

"Every person who causes an animal to be deprived of necessary sustenance, drink or shelter, or, who, having care or custody of an animal, subjects the animal to needless suffering or fails to provide the animal with proper food, drink, or shelter, in a grossly negligent manner, is guilty of felony cruelty to an animal.

"Deprivation of necessary sustenance, drink, or shelter is unlawful when a person commits an act or omission inherently dangerous to animal life or safety or . . . which would inherently produce danger to an animal's life.

"Subjecting an animal to needless suffering and failure to provide an animal with proper food, drink or shelter are both unlawful when a person . . . commits an act or omission which would inherently produce danger to an animal's life.

"In order to prove such a crime, each of the following elements must be proved:

"(1) That a person has custody or is responsible for providing care to an animal

"(2) That person committed a grossly negligent act or omission

"(3) That act or omission caused danger to an animal's life." (*People v. Speegle, supra*, 53 Cal.App.4th 1405, 1412-1413.)

During trial, the prosecutor submitted a proposed instruction in place of the *Youngblood-Speegle* instruction, which the trial court accepted. This instruction provided in relevant part:

"Every person who causes an animal to be deprived of necessary sustenance, drink, or shelter or who, having care or custody of an animal, subjects the animal to needless suffering or fails to provide the animal with proper food, drink, or shelter in a grossly negligent manner, is guilty of cruelty to an animal.

"In order to prove such a crime, each of the elements must be proved:

"One, that a person has custody or is responsible for providing care to an animal.

"Two, that person committed an act or omission, namely depriving the animal of necessary sustenance or subjecting the animal to needless suffering.

"Three, the act or omission was the result of criminal negligence."

The jury was instructed with CALJIC No. 3.36 as follows:

"Criminal negligence means conduct which is more than ordinary negligence.

"Ordinary negligence is the failure to exercise ordinary or reasonable care.

"Criminal negligence refers to negligent acts which are aggravated, reckless, or flagrant and which are such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for danger to life, or to constitute indifference to the consequences of those acts.

"The facts must be such that the consequences of the negligent acts could reasonably have been foreseen, and it must appear that the danger to life was not the result of inattention, mistaken judgment, or misadventure, but the natural and probable result of an aggravated, reckless, or flagrantly negligent act."

Analysis

Defendant claims that, unlike the *Youngblood-Speegle* instruction, which required the jury to find the "act or omission caused danger to an animal's life," CALJIC No. 3.36 and the special instruction allowed the jury to convict him so long as some danger to life is "reasonably foreseeable," regardless of whether that danger actually existed. To illustrate the difference, defendant hypothesizes an owner who confines a pet without furnishing water in an area that, unknown to him, contains an available water source. Defendant overlooks the last portion of CALJIC No. 3.36.

CALJIC No. 3.36 explains that "the danger to life" must be "the natural and probable result of an aggravated, reckless, or flagrantly negligent act." Thus, the defendant's *act must result* in danger. This is identical to the *Youngblood-Speegle* formulation that the "act or omission caused danger to an animal's life."[2]

CALJIC No. 3.36 does not allow a finding of criminal negligence on the facts hypothesized by defendant because the act of confining the pet does not result in danger (deprivation

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[2] Section 597, subdivision (b) does not require that any of the listed acts cause danger to an animal's life. Thus, where an act proscribed by section 597 is done intentionally, no danger to life need be shown. However, where, as here, the prosecution relies on criminal negligence, the danger must be proved in order to establish the requisite mental state. (See § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"].)

of water). The evidence in this case showed no similar fortuity. Reasonable jurors, giving the instructions a reasonably likely interpretation (*People v. Payton* (1992) 3 Cal.4th 1050, 1072; *Speegle, supra*, 53 Cal.App.4th 1405, 1413), could not have convicted defendant without finding that his act or omission caused danger to Patches's life.

III

Defendant contends the trial court erred by instructing the jury with CALJIC No. 3.36, because it uses the phrase, "contrary to a proper regard for danger to life," rather than the phrase, "incompatible with a proper regard" for life, which appears in the decision upon which the instruction is based. (*People v. Penny* (1955) 44 Cal.2d 861, 879.) He claims the substitution of "contrary to" for "incompatible with" unconstitutionally reduced the prosecutor's burden of proof. We disagree.

"'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 603, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Sanchez* (2001) 94 Cal.App.4th 622, 635.) Defendant did not ask the court to clarify that a "complete inability to coexist" with proper regard for life was required, whereas "an unfavorable indication" toward proper regard for life would not suffice. Thus, his claim of error is not properly before us.

In any event, any error was harmless because the evidence gave the jury no basis to distinguish between "contrary to" and "incompatible with." The failure to properly care for and feed Patches, or to respond to his obvious decline in health and body mass was both contrary to, and incompatible with, a proper regard for his life. (*People v. Breverman* (1998) 19 Cal.4th 142, 177; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

IV

Defendant claims the trial court erred by failing to instruct the jury sua sponte on causation. We disagree.

A trial court is obliged to instruct, even without a request, on the general principles of law that relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1410.)

Defendant filed a new trial motion contending the court erred by failing to give CALJIC No. 3.40 ["cause--'but for' test"] on its own motion.[3] The court denied the motion, explaining, "I don't think there is any tricky causation issue,

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[3] CALJIC No. 3.40 would have told the jury:

"[To constitute the crime of ___ there must be in addition to the ____ (result of the crime) an unlawful [act] [or] [omission] which was a cause of that ____ (result of the crime)].

"[The criminal law has its own particular way of defining cause. A cause of the ____ (result of the crime) is an [act] [or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act] [or] [omission] the _____ (result of the crime) and without which the _____ (result of the crime) would not occur.]"

and I don't think CALJIC [No.] 3.40 would have assisted the jury in any respect . . . ."

Defendant argues that CALJIC No. 3.40 was crucial because the jury could have found that some factors contributing to Patches's condition were foreseeable, whereas others, such as sand in the intestines, were not. However, the jury was instructed, per CALJIC No. 3.36, that "[t]he facts must be such that the consequences of the negligent acts could reasonably have been foreseen." If the jury believed the accumulation of sand in intestines was not a foreseeable result of improper feeding, it could not have relied on that factor to convict defendant. It is not reasonably probable the jury would have reached a different verdict had the court given CALJIC No. 3.40 on its own motion. (*People v. Ervin* (2000) 22 Cal.4th 48, 90; *People v. Watson, supra,* 46 Cal.2d 818, 836.)

Defendant effectively claims the court erred by failing to give CALJIC No. 3.41, which would have explained that a concurrent cause of a result of crime must be a substantial factor.[4] He suggests the jury might have concluded that the overly sharp teeth and the sand in the intestines were the

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[4] CALJIC No. 3.41 would have told the jury in relevant part:

"[There may be more than one cause of the ____ (result of the crime). When the conduct of two or more persons contributes concurrently as a cause of the _____ (result of the crime), the conduct of each is a cause of the _____ (result of the crime) if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the ____ (result of the crime) and acted with another cause to produce the ____ (result of the crime).]"

causes of the emaciation, whereas inadequate food was not a substantial factor.[5]

However, there was no substantial evidence that Patches had been adequately fed; thus, the evidence did not raise the issue of whether sharp teeth and intestinal sand could cause emaciation *where inadequate food is not a factor*. (*People v. Cooksey, supra,* 95 Cal.App.4th 1407, 1410.) Rather, the evidence showed that lack of food might have been the reason that Patches was ingesting dirt and sand; his teeth condition made it more difficult to consume the small amount of food that might have been available. The trial court had no duty to instruct with CALJIC No. 3.41. (*Ibid*.)

V

Defendant lastly contends the trial court erred by failing to instruct the jury sua sponte on mistake of fact. (CALJIC No. 4.35.)[6] Defendant claims he mistakenly believed that, if he

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[5] Contrary to defendant's contention, there was no basis for the jury to conclude that Patches's condition was caused by parasites. Dr. Vos testified that, while it is normal for a horse to have no parasites, a horse would have to have 10 times the number that Patches had before the parasites would make him sick.

[6] CALJIC No. 4.35 would have told the jury:

"[An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime.

"Thus a person is not guilty of a crime if [he] [she] commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful."

ordered hay or other feed in early December, then the caretaker would actually give the hay to Patches. We disagree.

CALJIC No. 4.35 requires that the mistaken belief be reasonable; defendant's posited belief was not. (§ 26; *People v. Lucero* (1988) 203 Cal.App.3d 1011, 1016.) When Officer Vail contacted defendant on December 1, 1998, Patches was significantly emaciated and no food was available to him. It would have been obvious to a reasonable person that the caretaker had not been feeding Patches for some time. There was no evidence that defendant had contacted the caretaker, had investigated why the horse had not been fed, or had taken steps to correct the situation. *If* defendant nevertheless believed the caretaker *would* suddenly start performing his duty once defendant ordered food, then his belief was manifestly unreasonable.

In any event, CALJIC No. 3.36 required the jury to find that "the danger to life was not the result of inattention, mistaken judgment, or misadventure, but the natural and probable result of an aggravated, reckless, or flagrantly negligent act." By convicting defendant on a theory of criminal negligence, the jury necessarily rejected any claim of inattention, mistaken judgment, or misadventure; having done so, it could not have accepted the present claim of mistake of fact. It is not reasonably probable the jury would have reached a different verdict had the court given CALJIC No. 4.35 on its own motion. (*People v. Ervin, supra,* 22 Cal.4th 48, 90; *People v. Watson, supra,* 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

I concur:

MORRISON, J.

I concur in the result:

RAYE, J.