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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES DARY OYLER,

Defendant and Appellant.

A144355

(Lake County
Super. Ct. No. CR930911)

James Dary Oyler appeals from a judgment sentencing him to prison after a jury convicted him of theft from a dependent adult and grand theft. (Pen. Code, §§ 368, subd. (d), 487, subd. (a).)¹ His court-appointed counsel has filed a brief raising no issues, but seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*). We find no arguable issues and affirm.

I. FACTS AND PROCEDURAL HISTORY

On November 30, 2012, the Lake County District Attorney's Office filed an information alleging that appellant had committed theft from an elder or dependent adult under section 368, subdivision (d) and grand theft under section 487, subdivision (a). The case proceeded to a jury trial, at which the following evidence was adduced:

¹ Further statutory references are to the Penal Code unless otherwise indicated.

Kimey Burkdoll has an unspecified progressive medical disorder causing her to lose the use of her legs. By 2011, she was unable to safely ride her motorcycle and a friend suggested having it modified to convert it to a three-wheeler so she would not have to put her feet down when she came to a stop. Burkdoll and her domestic partner, Daniel Larsen, decided to go forward with the modification and began speaking with appellant, a mechanic who had been recommended to do the work.

Larsen met with appellant at the Lakeport Garage/Iron Horse Creations shop on Main Street in Lakeport on May 5, 2011. Also present was Forrest Garrett, whose stepfather owned the property and who lived in a trailer on the property. After discussing the scope of the work, appellant told Larsen he needed money to order parts and a conversion kit and Larsen gave him \$2,000 in cash. Larsen recalled that Garrett typed up the work order for the job and understood that Garrett was going to order the parts, but he did not believe he had a contract with Garrett. Larsen made an additional payment of \$2,600 in cash to appellant, though he was unclear about the date. Burkdoll gave appellant \$2,400 in cash in two installments on August 30 and September 1, 2011, and appellant gave her written invoices for the payments.

Appellant kept Burkdoll's motorcycle for 10 months without completing the conversion. In September of 2011, after a falling out with Garrett, he moved to his own shop and took the motorcycle with him. Burkdoll called appellant a number of times and was told the motorcycle would be ready soon, but when she visited the shop no work had been done. Appellant told her not to contact Garrett because he was not involved in the modification.

Burkdoll called the police in January 2012 to tell them she had paid appellant to modify her motorcycle but he had not done so. About a month later, Larsen picked up the motorcycle and appellant said he was having trouble completing the job because Garrett had kept the money and had not ordered the necessary parts. The gas tank had been painted and a couple of minor repairs had been made, but the motorcycle was otherwise in the same condition as when it was given to appellant. Sometime after

Larsen picked up the motorcycle, appellant told him he would sell the conversion kit for \$9,000 and pay Larsen and Burkdoll the \$7,000 he owed them.

The defense theory at trial was that Garrett actually ran the Iron Horse shop during the time appellant had Burkdoll's motorcycle and that Garrett had kept the money paid by Burkdoll and Larsen. In support of this theory, a number of witnesses testified to doing business with Garrett in the garage in 2011. Appellant, who had been convicted of a crime of moral turpitude, testified that he was working for Garrett when he was contacted by Larsen about converting Burkdoll's motorcycle into a three-wheeler. He told Larsen he would donate his labor to the project, but Larsen would have to talk to Garrett about ordering the parts. Garrett took all of the cash paid by Burkdoll and Larsen, but did not order the conversion kit. After his falling out with Garrett, appellant took Burkdoll's motorcycle to his new shop because he felt bad for her and tried to do the modifications himself. Fabricating from scratch takes much longer than installing a kit.

Garrett testified that he had worked on and off for many years as a mechanic at the Lakeport Garage, which was owned by his stepfather. He had operated his business, Iron Horse Creations, out of the garage, but did not have an ownership interest in Lakeport Garage itself and never managed that business.² He stopped working as a mechanic due to health problems and appellant started working in the garage in 2010. Garrett would sometimes help appellant by filling out work orders and invoices, but he did not order parts for him and told customers the shop was appellant's, not his. Garrett created an invoice for Larsen and gave appellant the cash for that transaction, but he never saw a conversion kit arrive in the garage. Garrett denied taking any of Burkdoll's or Larsen's money.

After hearing the evidence, the jury convicted appellant of violating sections 368, subdivision (d) and 487, subdivision (a) as charged. Additionally, appellant had pleaded

² Garrett had filed a business license application identifying himself as the sole owner and proprietor of Lakeport Garage.

no contest to an unrelated count of grand theft in one separate case (No. CR912296) and to felony domestic violence under section 273.5 in another (No. CR933425).³

The court denied appellant's motion for new trial and sentenced him to four years eight months in prison: the four-year upper term for the violation of section 368, subdivision (d) in the current case, an additional eight months (one-third the middle term) for the violation of section 487, subdivision (a) in case No. CR912296, and a concurrent four-year upper term for the violation of section 273.5 in case No. CR 933425.

II. DISCUSSION

As required by *People v. Kelly* (2006) 40 Cal.4th 106, 124, we affirmatively note that appointed counsel has filed a *Wende/Anders* brief raising no issues, that appellant has been advised of his right to file a supplemental brief, and that appellant did not file such a brief. We have independently reviewed the entire record for potential error and find none.

The trial court properly instructed the jury on the elements of the charged offenses and the general principles of law applicable to the case. It allowed appellant to present evidence regarding a third party's culpability and did not exclude any proffered defense evidence that was reasonably probable to change the result of the trial.

The trial court did not abuse its discretion in denying probation or selecting the upper term for the section 368, subdivision (d) conviction based on appellant's prior criminal record and his poor prior performance on probation. (See Cal. Rules of Court, rules 4.414(b)(1), (b)(2), 4.421(b)(2), (4) & (5).) Nor did it abuse its discretion by imposing a consecutive term for the grand theft in case No. CR912296, which arose from a separate incident. (Cal. Rules of Court, rule 4.425(a)(1).) And, while we recognize that convictions under sections 368, subdivision (d) and 487, subdivision (a) are offenses for which a jail term rather than prison would be the usual punishment pursuant to the Criminal Justice Realignment Act of 2011 (see § 1170, subdivision (h)(1)), the Act does

³ Between 2009 and the sentencing hearing on the present charges, appellant had also been convicted of two counts of driving under the influence and been found in violation of probation.

not apply to the concurrent term imposed for appellant's conviction of felony domestic violence under section 273.5 in case No. CR933425. (*People v. Guillen* (2013) 212 Cal.App.4th 992, 995.) The term for all of appellant's crimes must, therefore, be served in state prison. (§ 669, subd. (d).)

We are satisfied that appellant's appointed attorney has fully complied with the responsibilities of appellate counsel and that no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 283.)

III. *DISPOSITION*

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A144355)