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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY DEMICHELLE,

Defendant and Appellant.

2d Crim. No. B235970
(Super. Ct. No. 1359475)
(Santa Barbara County)

Jimmy Demichelle appeals a judgment following his conviction of transportation of a controlled substance - methadone (Health & Saf. Code, § 11352), transportation of a controlled substance - heroin (*ibid.*), transportation of a controlled substance - methamphetamine (*id.*, § 11379), being under the influence of a controlled substance - methamphetamine (*id.*, § 11550), petty theft (Pen. Code, § 484), and driving with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)).

We conclude, among other things, that: 1) the trial court did not err by not instructing the jury on aiding and abetting for the drug transportation counts, 2) it properly responded to the jury's question about the absence of a witness, 3) substantial evidence supports the petty theft conviction, and 4) the abstract of judgment does not include mandatory court security fees. (Pen. Code. § 1465.8.) We order the abstract of judgment to be corrected. In all other respects, we affirm.

FACTS

On the evening of October 25, 2010, Sheriff's Deputy Jeffrey Greene noticed that a car did not have an "illuminated" license plate and that rear plate had an expired registration "tag." He "activated [his] overhead lights" and stopped the vehicle. Demichelle was the driver; Anthony Centeno was the passenger.

Greene noticed that Demichelle's pupils were "constricted," which meant he could be under the influence of a "stimulant" such as methamphetamine. Centeno, a parolee, was taken into custody because there was an outstanding warrant for his arrest. Demichelle was driving with a suspended license.

During a search of Demichelle's car, Sheriff's Deputy Holman found two "bindles" and some pills inside a pack of cigarettes. The bindles contained usable quantities of methamphetamine and heroin. The pills contained usable quantities of methadone.

Demichelle waived his Miranda rights and agreed to answer questions. Greene asked him if the bindles were cocaine. Demichelle said, "No. It should be meth," and the pills were methadone. He added that "somebody wanted them and he got them." Greene asked if he was willing to provide a urine sample. Demichelle said it will "come back dirty," as he had "used the day before."

The license plates on the front and rear of Demichelle's car did not match. Demichelle said the car belonged to his neighbor. He then told Greene that he took the license plate from his neighbor's car and put it on his vehicle. He said she "wouldn't mind," and Greene "could talk to her." Greene asked the name of his neighbor; Demichelle was unable to answer. At trial, Veronica Mendez, Demichelle's neighbor, testified that Demichelle took the plate off her car without her permission.

DISCUSSION

A Sua Sponte Instruction on Aiding and Abetting

Demichelle contends the trial court erred by not giving an aiding and abetting instruction on the drug transportation offenses. We disagree.

"A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. Brown* (2003) 31 Cal.4th 518, 559.) But an aiding and abetting instruction is not required where the evidence and the prosecution's theory are that the defendant is the perpetrator. (*Ibid.*)

The People correctly note this instruction was not appropriate, because the prosecution's theory was that Demichelle committed the drug transportation offenses. The prosecutor told the jury that Demichelle "was transporting the drugs in his car." Demichelle notes that during argument the prosecutor mentioned Centeno's possible role in the drug offenses. The prosecutor, however, was responding to a defense claim. He said, "[D]efense counsel hinted that perhaps it was . . . Centeno who put the drugs there and . . . Demichelle simply was not snitching on [him]." But he rejected the defense allegation and said, "[T]hat's not the case in our factual situation here."

Moreover, "[i]f the defendant performed an element of the offense, the jury need not be instructed on aiding and abetting, even if an accomplice performed other acts that completed the crime." (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1371.) Here essential elements of transporting controlled substances were established. The drugs were in Demichelle's car, Demichelle was driving, and he knew they were there. Consequently, any participation by Centeno would not require an aiding and abetting instruction. (*Ibid.*) But even had the trial court erred, the result would not change. Demichelle's statements to police about the drugs were highly incriminating and constituted compelling evidence of his guilt.

The Trial Court Properly Responded to the Jury's Question

Demichelle claims the trial court gave an inadequate answer to the jury's question about why Demichelle's passenger did not testify.

The People argue this "claim is forfeited because [Demichelle] agreed to the trial court's proposed response to the jury's question." We agree.

During deliberations the jury asked, "[W]hy wasn't Centeno on the stand?" The court responded by instructing them, "Please refer to CALCRIM Instruction 300, which states . . . 'Neither side is required to call all witnesses who may have information

about the case or to produce all physical evidence that might be relevant." Defense counsel agreed this was an appropriate answer to the jury's question. Consequently, Demichelle "has waived this argument." (*People v. Harris* (2008) 43 Cal.4th 1269, 1317.)

But even on the merits, the result does not change. Demichelle claims this instruction suggests the defense has a burden of proof and it is consequently misleading and unconstitutional. But appellate courts have rejected this contention. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 937-938.) CALCRIM No. 300 "is a correct statement of the law" (*Id.* at p. 938.) By directing the jury to it, the court gave jurors proper guidance using "plain and accurate" language. (*People v. Harris, supra*, 43 Cal.4th at p. 1318.) Nothing in CALCRIM No. 300 refers to the burden of proof. Our Supreme Court has rejected the argument that this type of instruction (former CALJIC No. 2.11) would mislead jurors on the burden of proof. It said, "[T]he inference defendant claims the jury would draw from the instruction is 'quite strained' and was dispelled in any event by the reasonable doubt instructions." (*People v. Solomon* (2010) 49 Cal.4th 792, 828.) There was no error.

Petty Theft

Demichelle claims the evidence is insufficient to support his conviction of petty theft. But in closing argument, Demichelle's counsel said Demichelle was guilty of this offense. He told jurors, "[Demichelle] *stole a license plate*. He was driving around on a suspended license. *You're going to find him guilty of those charges.*" (Italics added.) "[Y]our verdicts in the driving on a suspended license *and petty theft should be guilty. No question.*" (Italics added.) Defendants are generally precluded from inviting a trier of fact to rule one way, and then attacking the ruling they requested on appeal. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1234.) Moreover, Demichelle has not shown that his lawyer was not authorized to make these admissions or that it constituted ineffective assistance. (*People v. Memro* (1995) 11 Cal.4th 786, 858; *People v. Cain* (1995) 10 Cal.4th 1, 30-31.)

But even on the merits, the result does not change. Demichelle concedes he took his neighbor's license plate, but he contends there was no evidence of an intent to permanently deprive her of it.

In deciding the sufficiency of the evidence, we view the record in the light most favorable to the judgment. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The trial court instructed the jury with CALCRIM No. 1800. It provides, in relevant part, that a necessary element of petty larceny (Pen. Code, § 484) requires proof that "[w]hen the defendant took the property he intended to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property." That is the correct standard. (*People v. Avery* (2002) 27 Cal.4th 49, 57-58.) "[A]n intent to permanently deprive someone of his or her property may be inferred when one unlawfully takes the property of another." (*People v. Morales* (1993) 19 Cal.App.4th 1383, 1391.) The defendant's "intent was to be inferred from circumstances and was a question of fact for the jury to decide." (*People v. DeLeon* (1982) 138 Cal.App.3d 602, 606; *People v. Brown* (1894) 105 Cal. 66, 69.)

Demichelle suggests he only took the license plate with the intent to use it that evening. But he has not cited to the record to support this claim. Nor has he shown why the jury could not reasonably infer he had a different intent. Demichelle told Greene that he had his neighbor's permission to take the license plate. He said Greene could talk with her and she would confirm this. But when Greene asked for the neighbor's name, Demichelle was unable to provide it. Mendez testified Demichelle took her plate without permission. She said she could not move her car because she did not have the plate.

Even where defendants testify that they intended to return the property, jurors may find criminal intent for theft where they do not believe the testimony. (*People v. Avery, supra*, 27 Cal.4th at pp. 56-57; *People v. DeLeon, supra*, 138 Cal.App.3d at p. 606; *People v. Brown, supra*, 105 Cal. at p. 69.) Here Demichelle did not testify and he did not present a defense case. He did not tell Greene that he intended to return the license plate. He did not claim he put it on his car for temporary use. He attempted to deceive the police about how he obtained it. The jury could find Demichelle's lies to

Greene constituted evidence of his consciousness of guilt. They could reasonably infer that he made the false statements about his car belonging to his neighbor and his consent to take the plate because he knew he had stolen the plate. Once the jurors determined he lied about consent and "unlawfully" took the plate, they could reasonably draw the necessary inference on criminal intent for theft from the record. (*People v. Morales, supra*, 19 Cal.App.4th at p. 1391; *DeLeon*, at p. 606; *People v. McFarland* (1962) 58 Cal.2d 748, 755 ["Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession . . . , an inference of guilt is permissible"].) Demichelle has not shown the evidence is insufficient.

The Abstract of Judgment

The People note that the abstract of judgment does not include the court security fee under Penal Code section 1465.8. It must be corrected to include that fee "for each of [Demichelle's] convictions." (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865; Pen. Code, § 1465.8.)

We order the abstract of judgment corrected to include the court security fee. In all other respects, the judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Patricia L. Kelly, Judge
Superior Court County of Santa Barbara

John Derrick, under appointment by the Court of Appeal, for Defendant and Appellant.

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