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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAVID CORNELIUS BOULT, Defendant and Appellant.	C068324 (Super. Ct. No. 10F07876)
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A jury found defendant David Cornelius Boulton guilty of two counts of possession of a firearm by a convicted felon. In a bifurcated proceeding, he admitted that he had suffered two strike convictions and had served three prior prison terms. The trial court dismissed one strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Defendant was sentenced to state prison for 10 years 4 months, consisting of six years on one count; one year four months on another count; and three years for the prior prison terms. He was awarded 393 days' custody credit and 196 days' conduct credit.¹

¹ The relevant 2010 amendment to Penal Code section 2933 does not entitle defendant to additional conduct credit because he

On appeal, defendant contends: (1) the trial court erred by failing to instruct the jury sua sponte on the accomplice corroboration rule; and (2) his convictions are not supported by substantial evidence. We affirm.

FACTS

While on duty on the evening of April 23, 2010, Sacramento County Sheriff's Deputy Steve LeCouve observed a car roll through a stop sign about 15 miles per hour. LeCouve pursued the car as it travelled at 40 miles per hour in a 25-miles-per-hour zone and rolled through two more stop signs. Then LeCouve effected a traffic stop of the car.

Deputy LeCouve approached the stopped car and asked the driver for his license. LeCouve noted that five people were in the car: the driver, a male; in the front seat, an adult female (later identified as Brienne Knight); in the rear left seat, a male (identified as defendant); in the rear center seat, a female juvenile (later identified as 15-year-old Kattie O.); and in the rear right seat, another male.

Deputy LeCouve immediately noticed that defendant was very fidgety. Defendant initially claimed that he had no identification. Then he kneeled on the backseat and spun around

has a prior conviction of a serious felony. (Former Pen. Code, § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

We note that on the abstract of judgment, the entries for custody and conduct credits have been transposed into each other's boxes. We shall direct the trial court to prepare a corrected abstract.

in order to face LeCouve. This behavior made LeCouve nervous so he unholstered his gun and told defendant to display his hands. Defendant reached down the front of his pants, which alarmed LeCouve. After LeCouve again demanded to see defendant's hands, defendant raised his hands and produced his identification.

Deputy LeCouve walked backwards to his patrol car while closely watching defendant. In LeCouve's experience, furtive movements and actions of the sort displayed by defendant generally mean that a suspect is trying to conceal or retrieve an object. LeCouve requested backup units and indicated that he intended to search the stopped car. At that point, defendant was still "ducking," "dipping," "bouncing around, twisting around, looking in both directions," which made LeCouve "quite nervous." Because other sheriff's units were still some distance away, LeCouve requested assistance from Elk Grove Police Department officers who were closer to his location.

At this point, defendant got out of the car despite Deputy LeCouve's shouted command to remain inside. LeCouve pointed his gun at defendant and ordered him to get back in the car while keeping his hands in view. Defendant did not comply; he looked at LeCouve, said, "I got to go," and then ran across the five traffic lanes of Calvine Road and headed toward Vintage Park Drive where LeCouve lost sight of him.

Deputy LeCouve remained at the scene of the traffic stop, holding the remaining occupants of the car at gunpoint while awaiting the arrival of other law enforcement units. A Sacramento Police Department helicopter joined the search for

defendant. After other units arrived, the people in the car were ordered out at gunpoint. LeCouve immediately entered the rear passenger compartment, examined the area where defendant had been sitting, found ammunition on the floor, and saw the butt of a revolver protruding from under the driver's seat. When examined, the revolver was found to be fully loaded. The construction of the car is such that the gun could not have slid back from the driver's position to where it was found.

A flight officer from the Sacramento Police Department helicopter testified that the aircraft had been called to the scene of a traffic stop to conduct an aerial search for defendant. Soon after the crew received a description, they spotted defendant running through the area and saw him climb a fence and enter the rear yard of a residence. Defendant was then taken into custody.

Kattie, age 16 at the time of trial, testified about the evening's events. Kattie had been riding in the rear seat of the car. Defendant, whom she had not met before, was seated to her left. They were on their way to a restaurant to purchase dinner. After the traffic stop, an officer approached the car and defendant began moving around, "[t]rying to figure out what to do with the guns." Kattie saw two guns in the car: one was silver, and the other was "black, brown" in color. The driver attempted to convince defendant to get out of the car and run away with one of the guns, because it was "dirty." The black gun, a revolver, was in a pocket on the rear of the driver's seat immediately in front of defendant. The driver handed

defendant the other weapon, which was silver with black grips. Defendant stated, "'I'm going to take one and I'm going to leave one.'" He tried to hide the silver gun under the driver's seat and then took off running.

Knight reluctantly testified under a grant of use immunity. Knight has a 2005 felony conviction for possession of rock cocaine for sale.

Knight confirmed that the five people in the car were on their way to purchase something to eat. She claimed she knew the driver only as "Anthony" and did not know defendant at all. Knight denied knowing anything about any firearms in the car, and she did not remember telling Deputy LeCouve anything about the presence of such firearms.

Deputy LeCouve was recalled to the witness stand to impeach Knight's just-completed testimony. LeCouve had interviewed Knight after the traffic stop, and she had said that she had been aware of the firearms in the car just before the traffic stop. Knight further told LeCouve that, when he initiated the traffic stop, defendant "started freaking out and getting real nervous because he was holding a gun."

After speaking to Knight, Deputy LeCouve spoke to Kattie. Kattie told LeCouve that, after he obtained everyone's identification, defendant had pulled a .38-caliber revolver from his waistband and placed it on the floorboard along with a sock full of bullets, which he also retrieved from his pants. Kattie told LeCouve that, immediately before getting out of the car,

defendant had stated, "'I'm going to take one and I'm going to leave one.'"

Sacramento County Sheriff's Deputy Richard Kemp testified that a police dog, which had been specially trained to locate firearms, searched for a semiautomatic pistol along the route defendant had used to flee the scene of the traffic stop. Following a search of less than 20 minutes, the dog located the silver firearm.

The defense rested without presenting evidence or testimony.

DISCUSSION

I

Corroboration Of Accomplices

Defendant contends the trial court violated his due process rights by allowing the jury to find him guilty based solely on the "uncorroborated testimony of accomplices who had a motive to lie." He claims "the parties recognized that both Knight and Kattie could be deemed accomplices to the crimes," but "the trial court never instructed the jury that before it could consider Knight and Kattie's statements and testimony inculcating [him], it had to decide whether they were accomplices"; nor did the court instruct that, if it found they were accomplices, it could not rely on their testimony alone to convict defendant. None of these claims has merit.

Prior to trial, the court appointed counsel for Knight and Kattie "so that counsel can confer with those witnesses regarding any potential Fifth Amendment issues pertaining to

their testimony that they may give in this matter." Counsel for Kattie indicated he had advised her of her rights and indicated he had no issue with respect to her testifying. Counsel for Knight advised her to invoke her Fifth Amendment right. Ultimately, Knight testified under a grant of use immunity.

Following the close of evidence, the parties met out of the presence of the jurors to settle the issue of the jury instructions. Defense counsel did not request any instructions concerning accomplice corroboration. In the trial court's charge to the jurors, there were no instructions on the subject of accomplice corroboration.

"[Penal Code s]ection 1111^[2] provides: 'A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense' Under section 1111, an accomplice is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' An accomplice must have 'guilty knowledge and intent with regard to the commission of the crime.'" [Citations.] 'If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding

² Further statutory references are to the Penal Code unless otherwise indicated.

that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony.' [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 302.)

Here, the trial court made no determination that Knight was not an accomplice as a matter of law, nor did the court give the accomplice instructions.

"Section 1111 codifies common law concerns about the reliability of accomplice testimony. [Citation.] '[S]uch testimony has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated.' [Citation.] Our analysis of harmless error in the omission of accomplice instructions reflects the idea that sufficient corroboration allays the concerns regarding unreliability embodied in section 1111. Thus, even in cases where the full complement of accomplice instructions (including CALJIC No. 3.18) was erroneously omitted, we have found that sufficient corroborating evidence of the accomplice testimony rendered the omission harmless. [Citations.] [T]he evidence of corroboration is 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Gonzales and Soliz, supra*, 52 Cal.4th at pp. 303-304.)

Defendant's claim that "both Knight and Kattie could be deemed accomplices" is based, not upon statutory analysis, but upon the trial court's appointment of counsel for both witnesses

prior to trial. However, section 1111 makes plain that Kattie was not an accomplice. An accomplice is defined as "one who is liable to prosecution for *the identical offense charged* against the defendant," i.e., possession of a firearm *by a felon*.

(§ 1111; italics added.) Nothing in the record suggested that 16-year-old Kattie was a *felon*. Thus, even if she were liable to prosecution for *some* firearm-related offense that warranted the appointment of counsel in an abundance of caution, she was *not* liable for the *identical offense charged against defendant* and could not have been his accomplice.

In this case, there was sufficient corroboration regardless of whether Knight was in fact an accomplice.

Apart from Kattie's testimony, Deputy LeCouve found one of the firearms and bullets evidently within inches of where defendant had been sitting in the car while engaging in a variety of furtive activity that, the officer suspected, involved secreting something unlawful in the car. And after LeCouve observed defendant's flight from the scene of the traffic stop, another officer and his police dog located a firearm that, in light of its proximity in time and distance, defendant obviously had discarded while attempting to evade capture.

Thus, because Knight's testimony was abundantly and sufficiently corroborated, there was no danger of defendant being convicted on the basis of uncorroborated testimony. Defendant's section 1111 and related due process claims necessarily fail.

II

Substantial Evidence

In a separate but related argument, defendant contends both his convictions must be reversed because there was no "substantial and credible evidence" that he possessed either firearm. He reasons that, because he did not have general dominion and control over either location where a firearm was found, his convictions cannot rest upon his mere presence in the car or along the path of his flight. Thus, he argues, further evidence was required, but the only additional evidence on the point was "the uncorroborated statements and testimony of accomplices Knight and Kattie." We are not persuaded.

"On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the [judgment], and must presume every fact the jury could reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury. [Citations.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.)

Section 29800, subdivision (a)(1), provides in relevant part: "Any person who has been convicted of a felony under the

laws of . . . the State of California . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.”

“The elements of the offense proscribed by section [29800, subdivision (a)(1)] are conviction of a felony and ownership, possession, custody or control of a firearm. [Citations.] Knowledge is also an element of the offense. [Citation.] [¶] As with any crime or public offense, in order to prove a violation of section [29800, subdivision (a)(1)], the prosecution must prove, beyond a reasonable doubt, a union, or joint operation of act and intent. [Citation.] No specific criminal intent is required for this crime; general intent to commit the proscribed act is sufficient to sustain a conviction. [Citations.] [W]hether possession is actual or constructive, it must be intentional.” (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.)

Thus, a convicted felon who owns, possesses, or has custody or control of a firearm commits a felony. “Implicitly, the crime is committed the instant the felon in any way has a firearm within his control.” (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410; italics omitted.)

Kattie testified that she saw two different firearms in the car: one was a revolver in a pocket on the back of the driver’s seat inches in front of defendant. She witnessed a discussion between defendant and the driver concerning two pistols, one of which was described as “dirty.” Following this discussion, the driver handed defendant a second, silver gun. At that point,

defendant said, “‘I’m going to take one [gun] and I’m going to leave one.’” After trying to hide one gun under the driver’s seat, defendant took off running with the other gun. The revolver was later found by law enforcement officers, partially concealed on the floorboard beneath the driver’s seat. The other gun was found on the path of defendant’s flight from the car.

The jury impliedly credited this evidence and testimony when it found defendant guilty on both counts. Both convictions are supported by substantial evidence. (*People v. Boyer, supra*, 38 Cal.4th at pp. 479-480.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

_____ ROBIE _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MURRAY _____, J.