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

THE PEOPLE,

Plaintiff and Respondent,

v.

RAJNEEL RATTAN KUMAR,

Defendant and Appellant.

C068932

(Super. Ct. No.
10F07686)

A jury convicted defendant Rajneel Rattan Kumar of unlawful taking or driving of a vehicle (counts 1 & 2; Veh. Code, § 10851, subd. (a)), receiving stolen property (counts 3 & 6; Pen. Code, § 496d, subd. (a), § 496, subd. (a)),¹ and evading a police officer (count 4; Veh. Code, § 2800.2, subd. (a)). The jury

¹ Further undesignated section references are to the Penal Code.

acquitted defendant on count 7 (petty theft; § 484, subd. (a)), which was charged in the alternative to count 6. The jury hung on count 5 (deterring an executive officer; § 69), and the trial court declared a mistrial on that count.

In a bifurcated proceeding, the trial court found that defendant committed the offenses charged in counts 2, 3, 4, and 6 while out on bail. (§ 12022.1.)

The trial court sentenced defendant to an aggregate state prison term of four years four months, consisting of three years (the upper term) on count 4 plus eight months consecutive (one-third the midterm) on both counts 1 and 2. The court ran sentence on count 6 concurrently and stayed sentence on count 3 under section 654.² The court also imposed but stayed a two-year consecutive term for the on-bail enhancements, pending the outcome of other cases against defendant.

Defendant contends:

1. The trial court erred by not staying sentence on count 2 (unlawful driving) under section 654 because it formed part of a continuous course of conduct with count 4 (evading arrest).

2. Defendant's conviction on count 6 (receiving stolen property) must be reversed because the trial court failed to instruct sua sponte on aiding and abetting as to count 7 (petty theft), and if the jury had been so instructed it would have

² The abstract of judgment shows that sentence on count 6 was also stayed. However, the court's oral statement of sentencing controls.

convicted him on that count, a misdemeanor, instead of count 6, a felony.

3. The abstract of judgment must be amended to reflect the trial court's actual award of presentence custody credit. (The People correctly concede this point.)

We shall affirm, but remand the matter for correction of the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was accused of offenses occurring on two different dates. Count 1 charged the theft of a Sacramento Police Department "bait car" on April 14, 2010. Counts 2 through 7 charged a series of offenses on November 19, 2010. Because the issues on appeal concern only the later events, we omit the facts as to count 1.

Counts 2 (unlawful taking or driving of a vehicle) and 3 (receiving the vehicle as stolen property)

On the morning of November 19, 2010, defendant, driving a blue 1992 Honda Civic which had been reported stolen over a month before, parked in a residential neighborhood of Elk Grove. After defendant's arrest later that day, the police discovered that the car's ignition had been punched out and that the car bore defendant's license plate, which did not belong on that vehicle.³

³ The prosecutor told the jury that because there was no evidence who stole the car but ample evidence defendant knew it was stolen, count 2 concerned only unlawful driving.

Counts 6 (receiving a catalytic converter as stolen property) and 7 (petty theft of a catalytic converter)

After defendant parked the car, his passenger, Joe Vang, got out, walked over to a pickup truck parked in a driveway, got under the truck, removed its catalytic converter, ran back to the car carrying the converter, and got in. Defendant and Vang then drove off. After defendant's arrest, the converter was found in the car he had been driving.

Count 4 (evading arrest)

Around 11:35 a.m. on November 19, 2010, Elk Grove Police Detective Paul Grant and Police Sergeant Tim Albright were parked in separate patrol cars equipped with flashing lights and sirens, monitoring a four-way stop sign at the intersection of November Street and Seasons Drive. They observed a blue Honda Civic, traveling at a high rate of speed westbound on Seasons Drive, fail to stop at the stop sign before turning into an adjacent cul-de-sac.

Sergeant Albright entered the cul-de-sac to contact the Honda, while Detective Grant approached the cul-de-sac. Sergeant Albright, wearing a vest labeled "Police" and wearing his badge around his neck, pulled up behind the Honda, identified himself to the driver (defendant) as a police officer, and said they needed to talk. The driver accelerated, spinning his tires, burst out of the cul-de-sac at a high rate of speed, and again failed to stop at the stop sign as he proceeded westbound on Seasons Drive.

With Detective Grant in the lead, the officers pursued defendant, activating their lights and sirens. Defendant drove five or six blocks at 50 to 60 miles per hour in a 30-mile-an-hour zone, failing to yield to the officers. Without stopping or slowing down, defendant entered a school zone with a 25-mile-an-hour speed limit; many children and parents were in the crosswalks and on the sidewalks. Defendant continued through the school zone, still going 50 to 60 miles per hour, and went several more blocks.

Detective Grant saw a cloud of white smoke in the roadway, then saw the Honda in a four-wheel-lock skid; finally, it came to an abrupt stop. Defendant jumped out of the driver's seat and ran off; his passenger jumped out of the passenger seat. Defendant ran 200 or 300 yards, ignoring Detective Grant's commands to stop. After finally stopping, he turned and faced Detective Grant, ignored commands to get down on the ground, and assumed a fighting stance. Detective Grant subdued him by striking him several times with a collapsible baton.

Uncharged acts

On September 23, 2010, a Dixon police officer spotted a parked car matching the description of a suspect vehicle. Defendant and Vang were near the car; their hands were dirty. Spotting a catalytic converter in the back seat, the officer searched the car and found four more catalytic converters, bags of tools, and shaved keys. Owners of two of the converters were located.

On December 8, 2010, defendant and another man were spotted at around 1:00 a.m. in the act of attempting to steal a Honda Civic parked outside Darren Garcia's home in Lincoln; Garcia and others fended them off. About an hour later, Aristotle Reyes discovered his Honda Civic had been stolen from in front of his Lincoln home; it was found a few blocks away with a broken ignition and items missing from it.

Later that evening, police made a traffic stop of a car driven by defendant with two passengers. Defendant had a screwdriver and shaved keys in his pockets. The police found tools and latex gloves in the car, and paperwork and other items belonging to Reyes in the trunk. Garcia, brought to the scene, identified defendant and one of his passengers as the people who had tried to break into his car.

DISCUSSION

I

Defendant contends the trial court should have stayed sentence on count 2 (unlawful driving) because it formed part of a continuous course of conduct with his subsequent evasion of arrest (count 4). We disagree.

Section 654 prevents multiple punishments for criminal acts that form part of an indivisible transaction with a single intent and objective. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally

observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]

[¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.] Although the question of whether defendant harbored a 'single intent' within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law." (*People v. Harrison, supra*, 48 Cal.3d at p. 335.)

We review the trial court's findings as to section 654 for abuse of discretion and will not reverse if substantial evidence supports them. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

We conclude that substantial evidence supports the trial court's decision not to stay sentence on count 2 under section 654.

First, the offenses charged in counts 2 and 4 did not form an indivisible transaction. The first offense was complete before defendant began to commit the second, and defendant could have refrained from committing the second offense by complying when Sergeant Albright attempted to detain him in the cul-de-sac.

Second, the offenses had different intents and objectives. A person commits the offense charged in count 2 if he "drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle[.]" (Veh. Code, § 10851, subd. (a).) A person commits the offense charged in count 4 if he "[willfully] flees or attempts to elude a pursuing peace officer . . . and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property[.]" (Veh. Code, § 2800.2, subd. (a).) A person may unlawfully drive or take a vehicle without willfully or wantonly disregarding the safety of persons or property; alternatively, a person may willfully evade arrest, disregarding the safety of persons or property, while driving his or her own vehicle.

Finally, defendant's argument, if correct, would compel the conclusion that the crime of willfully evading arrest under Vehicle Code section 2800.2, subdivision (a), could never be punished separately from the initial crime for which a defendant sought to evade arrest, provided that the two offenses occurred in immediate succession. We cannot accept that proposition without authority, and defendant cites none so holding.

II

Defendant's second contention goes to counts 6 and 7 (receiving a catalytic converter as stolen property; petty theft of the catalytic converter), on which the jury was instructed that if it convicted on one count it must acquit on the other.

Defendant contends the trial court's erroneous failure to instruct the jury sua sponte as to aiding and abetting on count 7 -- the count on which he was *acquitted* -- prejudiced him. He reasons as follows: (1) if instructed on aiding and abetting as to count 7, the jury would "certainly" have chosen to convict him of that count rather than count 6; (2) petty theft is a misdemeanor, but receiving stolen property is a felony; (3) therefore, he suffered prejudice because he was convicted of the felony charged in count 6 rather than the misdemeanor charged in count 7.⁴ We conclude that any error was harmless.

Defendant was entitled to an aiding and abetting instruction on count 6 because the evidence showed that it was defendant's confederate Vang, not defendant himself, who physically removed the catalytic converter from the pickup truck and carried it back to the car. (See *People v. Jurado* (2006) 38 Cal.4th 72, 136; *People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) However, defendant's assertion that if so instructed the jury would "certainly" have opted for conviction on count 6 rather

⁴ In his opening brief, defendant asserts that his conviction on count 6 should be reversed. In his reply brief, he asserts that this court, "in the alternative," could reduce it to a misdemeanor. We do not consider arguments raised first in the reply brief without a showing of good cause for not raising them sooner. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) In any event, because we find defendant has shown no prejudice from his conviction on count 6 as a felony, we would not grant such relief.

than count 7 is pure speculation.⁵ Such speculation does not establish that it is reasonably probable defendant would have achieved a more favorable result had the omitted instruction been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

Defendant contends the abstract of judgment must be corrected to reflect the trial court's actual award of presentence custody credit. The People concede the point. We shall remand the matter to the trial court for this purpose.

The trial court awarded defendant 173 actual days and 173 conduct days of credit, for a total of 346 days of presentence custody credit. The abstract of judgment, however, though correctly stating the total number of credits, erroneously lists the credits as 176 actual days and 176 conduct days. The abstract must be corrected.

In addition, as noted above, the abstract must be amended to reflect the fact that the trial court did not stay sentence on count 6, but ran it concurrently.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with directions to correct the abstract of judgment as stated above in part III of the Discussion and to furnish a

⁵ Moreover, defendant's speculation is not even particularly plausible. Since his guilt on count 6 was open and shut, we see no reason why the jury would have been likely to reject that count in favor of count 7, on which they would have had to perform a legal analysis as to aiding and abetting not required by count 6.

certified copy of the corrected abstract of judgment to the
Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

HOCH, J.