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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN NICHOLAS FREELAND,

Defendant and Appellant.

C077945

(Super. Ct. No. CRF131817)

A jury found defendant Brian Nicholas Freeland guilty of second degree burglary (Pen. Code, § 459)<sup>1</sup> and misdemeanor receipt of stolen property (§ 496, subd. (a)) in connection with items taken from a storage locker in April 2013. The trial court found true a prior serious felony (§ 667, subds. (c)-(e)) and prior prison term (§ 667.5, subd.

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

(b)). The court sentenced defendant to five years in state prison, including an (unstayed) concurrent 180-day term on the misdemeanor.

Defendant filed a timely notice of appeal, and now contends: (1) the People failed to disclose newly discovered exculpatory evidence, thereby violating his due process rights under *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215]; (2) the prosecutor committed misconduct in closing argument, denying him due process; and (3) his misdemeanor sentence should have been stayed pursuant to section 654.

We modify the judgment to stay the misdemeanor sentence and otherwise affirm.

### **FACTS**

Defendant and his wife, Brandy Freeland (Brandy, because she shares defendant's surname), rented storage unit 1138 at Pioneer Self-Storage in Woodland. Unit 1138 was next to unit 1139, which was rented by Karen Ashworth. Ashworth stored personal checks, prescription medications, designer handbags, perfume, personal papers, and other items in unit 1139, which was secured by a double-key lock. Ashworth had sole possession of both keys, and was the only one with access to her unit. Ashworth checked and rechecked the lock two to three times every time she accessed the unit.

Kristie Oropeza was the manager at the storage facility. Her duties included monitoring every person entering and exiting through the gate, patrolling the facility, and making sure all the units were locked. The facility's security system included alarmed doors on each individual unit and individual tenant gate codes which, when entered, temporarily deactivated the alarm on the unit door. If not properly deactivated, the alarm would go off when the unit door was opened. Each unit door was secured with a six-pin lock.

On April 9, 2013, Ashworth went to her storage unit. She immediately noticed a bag containing personal checks was missing. The unit was ransacked. She relocked the door and attempted to open it, but found that the door opened despite having been locked. Ashworth immediately notified Oropeza about the burglary. When she and Oropeza

returned to the unit, she realized more of her belongings were missing, including some designer handbags and a black leather bag containing personal paperwork. There were cardboard boxes stacked in the back corner against the wall separating Ashworth's unit and unit 1138. At the top of that wall, the metal had been cut and bent down approximately 18 inches and some of the metal screws had been removed.

Oropeza testified at trial that, several weeks prior to the incident, she noticed the door to unit 1138 was half open. When defendant emerged from the unit, Oropeza informed him of the facility's policy that the door was to remain open whenever a tenant was in the unit. Defendant, who appeared to be agitated, called her attention to a half-inch gap between the ceiling and the wall inside unit 1138 and told Oropeza he was concerned someone might steal his belongings. Oropeza gave him permission to cover the gap with wire.

On April 10, 2013, City of Woodland Police Detective Greg Ford met Ashworth at the storage facility. He observed that the boxes stacked against the wall adjacent to unit 1138 were smashed as if someone had stood or climbed on them. He saw that the sheet metal on the wall had been cut and pulled back and the sheet metal screws pulled away from the metal stud, pulling the corner of the wall down and leaving a space approximately two and a half feet by two and a half feet. Ford climbed up a ladder and, "with very minimal effort, pushed the sheet metal over" and fit his entire upper body through the gap and into unit 1138.

Later that day, Oropeza told Ford that defendant was at the storage facility. When Ford arrived, he spoke with defendant inside unit 1138. Ford noticed a prescription pill bottle lying near defendant's foot. He could make out part of a name, "Karen Ash---," on the bottle. Defendant appeared agitated and began pacing and fidgeting. While Ford made a telephone call, defendant placed a mattress on top of the pill bottle in a manner that led Ford to believe defendant was attempting to conceal the bottle.

Brandy arrived at unit 1138. When Ford spoke with her, he noticed she appeared “upset” and “frustrated.” Eventually, Ford arrested defendant and transported him to the police station. Unit 1138 was searched but no stolen property other than the pill bottle was recovered. Both defendant and Brandy told Ford that they were the only ones who had keys to unit 1138.

Meanwhile, Ford’s partner, Detective Jameson encountered Jesse “Smiley” Rodriguez in another part of the facility. Rodriguez told both detectives he was helping defendant move some items. The detectives saw no need to detain him. Brandy later told Paul Hillegass, an investigator for the district attorney’s office, that Rodriguez was an acquaintance who helped her move items into unit 1138 and that she had given Rodriguez the gate code but not a key to the unit. She also told Hillegass that she or defendant was always with Rodriguez if he accessed unit 1138. At trial, however, she testified that Rodriguez had permission to access her unit and frequently took loads to storage for her by himself.

## **DISCUSSION**

### **I**

#### *Brady Violation*

Defendant first contends the prosecution’s failure to disclose material evidence regarding a nametag found during a subsequent (January 2014) search of a residence in Woodland--102 Railroad Street--violated his due process rights under *Brady*. He argues this evidence implicates Rodriguez, and had defendant known about the nametag, he would have adjusted his strategy at trial.

The People respond cursorily that defendant forfeited this claim. They add the claim lacks merit because there was no failure to disclose material evidence, the evidence neither exonerated nor mitigated defendant’s crimes, and the evidence did not undermine confidence in the jury’s verdict.

As we explain, defendant's claim in the trial court was adequate to preserve it on appeal. However, he has not established *Brady* error. We begin with a brief background.

*A. Evidence of Rodriguez's Involvement and New Trial Motion*

During their motions in limine, the People sought to exclude as inadmissible hearsay Brandy's proposed testimony that, on the date of defendant's arrest, Rodriguez admitted to her that he committed the burglary and said "he was sorry." The trial court concluded defendant had not shown due diligence in trying to locate Rodriguez or establish his unavailability, but reserved ruling until the close of the People's case. During the People's case, defense counsel informed the court he had made a tactical decision not to offer this proposed testimony, noting: "there's [*sic*] ways of identifying [Rodriguez] on this record as somebody who had access."

On August 6, 2014, the jury found defendant guilty after hearing the evidence described above.

Prior to sentencing, defendant filed a motion for new trial. It claimed the defense had recently discovered that property belonging to Ashworth was found during service of a search warrant in January 2014 at a residence identified as 102 Railroad Street in Woodland. According to the motion, "information was obtained that Rodriguez was staying" at that residence, and defendant maintained it was Rodriguez who had burglarized the storage unit in 2013. Defense counsel had asked the prosecutor assigned to the case about the items recovered during the execution of the warrant before the April 2014 trial, but was told no related evidence was found. After the verdict, counsel obtained a copy of the warrant return and discovered the return referenced "indicia of Karen Ashworth." The motion asserted that had counsel been aware of this evidence he would have used it to show a connection between Rodriguez and the items stolen from Ashworth's storage unit at trial.

The People's opposition pointed out that defendant himself was arrested (on drug charges) at the Railroad Street residence in May 2014 (presumably while out on bail in

the instant case. It clarified that among the many items seized at that address in the January 2014 warrant was a single paper nametag bearing Ashworth's name. The People asserted they had not been told by law enforcement about this evidence despite timely inquiry, and argued that the evidence was immaterial and that a different result at trial was not reasonably probable had the evidence been timely disclosed.

At the hearing on the motion, defense counsel asserted that he had verified through "witnesses" that Rodriguez "frequented" 102 Railroad Street, although none of these witnesses could tie Rodriguez to the nametag found there. Counsel clarified that these witnesses would also associate *defendant* with 102 Railroad Street.

The trial court denied the motion for new trial, concluding the "evidence at trial was overwhelming for conviction" and it was not probable the result would change had the jury heard the additional information.

#### B. *Law and Analysis*

*Brady* imposes on the prosecution a constitutional duty to disclose exculpatory information to the defense (*Brady, supra*, 373 U.S. 83 [10 L.Ed.2d 215]), including information known only to police investigators acting on the prosecution's behalf. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438 [131 L.Ed.2d 490, 508-509]; *In re Brown* (1998) 17 Cal.4th 873, 879 & fn. 3.) *Brady* imputes to the prosecutor information known to police investigators involved in the case, and responsibility for *Brady* compliance lies exclusively with the prosecution. (*In re Brown*, at p. 878.) The duty to disclose is violated even if the prosecutor's failure to do so was negligent or inadvertent. (*Id.* at pp. 878-879; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1381.)

To establish a *Brady* violation, a defendant must show (1) the evidence at issue is favorable to the accused, either exculpatory or impeaching; (2) the evidence was suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282 [144 L.Ed.2d 286, 302]; *People v. Salazar* (2005) 35 Cal.4th 1031, 1043.) "Prejudice, in this context, focuses on

‘the materiality of the evidence to the issue of guilt or innocence.’ [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction ‘more likely’ [citation], or that using the suppressed evidence to discredit a witness’s testimony ‘might have changed the outcome of the trial’ [citation]. A defendant instead ‘must show a “reasonable probability of a different result.”’ [Citation.]” (*Salazar*, at p. 1043.) “The requisite *reasonable probability* is a probability sufficient to undermine confidence in the outcome on the part of the reviewing court. It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.]” (*People v. Dickey* (2005) 35 Cal.4th 884, 907-908.) A discovery violation is not necessarily a due process violation. (*People v. Ochoa* (1998) 19 Cal.4th 353, 474.)

As we have described, defendant’s written motion and subsequent argument in the trial court adequately raised the *Brady* claim and preserved it for appeal. However, as we explain, the undisclosed evidence does not qualify as *Brady* material, nor was its nondisclosure a *Brady* violation.

First and foremost, the evidence at issue here--a tag bearing Ashworth’s name found during the search of 102 Railroad Street, an address frequented by both Rodriguez and defendant--is not favorable to defendant. Even assuming Rodriguez frequented the Railroad Street residence, the fact remains that defendant was arrested on drug charges *at that same address*.

Further, even assuming the evidence of the nametag was favorable and material, defendant has failed to demonstrate prejudice from the prosecution’s failure to disclose it. The defense strategy at trial included vigorously advancing the theory that Rodriguez was the burglar. To achieve that end, defendant offered evidence that Rodriguez often helped Brandy move items in and out of unit 1138 and had access to the unit even when alone. He was at the facility when defendant was arrested. He was smaller than defendant,

suggesting he could more easily access Ashcroft's unit through the gap the detectives had found. The added fact that Rodriguez was linked--together with defendant--to a residence where an Ashcroft nametag was found would not have contributed anything meaningful to this evidence of Rodriguez's connection to the storage facility already at play. Thus it is not reasonably probable the jury would have reached a different result had defendant known before trial about the nametag discovered at 102 Railroad Street.

## II

### *Prosecutorial Misconduct*

Defendant next contends the prosecutor misstated the law on aiding and abetting, committing misconduct and thus denying him due process. We disagree.

#### *A. The Prosecutor's Argument, Court's Ruling, and Instructions*

During closing argument, the prosecutor argued in part as follows: "The last thing we would have to establish is that the [d]efendant's words or conduct somehow aided. Certainly that exists here, because the [d]efendant, every single time we have him accessing that facility when he's with anyone else, is the one driving, except for one time [Brandy] is driving. [¶] He's driving; that in and of itself -- if you're driving someone to commit a burglary, you're aiding and abetting in that burglary. [¶] He let the person into the unit; that in and of itself is aiding and abetting, a substantial factor towards that person committing that burglary. [¶] *He's hiding the pill bottle -- again, that's a substantial step towards aiding and abetting that crime --*"

Defense counsel objected to the italicized portion, stating in relevant part: "That's not the law." The court overruled the objection but admonished the jury to follow the court's instructions. The prosecutor continued, "He's got to do something to aid and abet the completion of that burglary, and *by hiding that pill bottle he is trying to aid and abet by concealing that burglary.*"

Outside the presence of the jury, the court explained its ruling as follows: "I took that as the People were arguing circumstantial evidence in that the covering up the pill

bottle was circumstantial evidence, pieced together with other evidence, that could lead to an aid and abet, so I thought that was the argument . . . that's why the Court made the ruling that it did.”

As relevant to this contention, the court instructed the jury at length on circumstantial evidence (CALCRIM Nos. 223, 224, 225), specific intent (CALCRIM No. 251), possession of recently stolen property (CALCRIM No. 376), aiding and abetting (CALCRIM Nos. 400, 401), and burglary, including intent of aider and abettor. (CALCRIM Nos. 1700, 1702.) Defendant raises no issues with these instructions on appeal.

#### B. *Law and Analysis*

Defendant contends the italicized portions of the argument above were misstatements of the law and therefore misconduct because a burglary is complete when the perpetrator first enters a location with the requisite intent. Because aiding and abetting requires involvement in commission of the crime, he could not have aided and abetted the burglary merely by hiding the proceeds after the crime was complete.

“When attacking the prosecutor's remarks to the jury, the defendant must show that, ‘[i]n the context of the *whole argument and the instructions*’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.’ (*People v. Centeno* (2014) 60 Cal.4th 659, 667, italics added.)

In order to establish aiding and abetting, the People must prove defendant is “someone who, with the necessary mental state, ‘by act or advice aid[ed], promote[ed], encourage[d] or instigate[d], the commission of the crime.’ [Citation.]” (*People v. Smith* (2014) 60 Cal.4th 603, 616.) “Among the factors which may be considered in determining aiding and abetting are: presence at the crime scene, companionship, and

*conduct before and after the offense.*” (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5, italics added.)

While the fact that defendant hid the pill bottle was not *dispositive* of whether he aided and abetted the burglary, it was certainly a proper factor for the jury to consider in making that determination. We agree with the trial court that the prosecutor’s clumsy characterization of this evidence as a “substantial step” toward aiding and abetting, coupled with his rather confusing but brief statement that “by hiding that pill bottle” defendant was “trying to aid and abet by concealing,” when viewed in *context*, was an attempt to argue that the jury should consider the pill bottle as one of many pieces of evidence of aiding and abetting.

The prosecutor argued the fact that defendant drove others to the storage facility was “in and of itself -- if you’re driving someone to commit a burglary, you’re aiding and abetting in that burglary.” He argued the fact that defendant gave others access to the unit was “in and of itself” aiding and abetting and “a substantial factor towards that person committing that burglary.” With respect to defendant hiding the pill bottle, however, as we have detailed, the prosecutor did not make that claim. The prosecutor’s argument did not tell the jury that defendant’s attempt to hide the pill bottle proved *alone* that he aided and abetted the burglary; rather, the argument characterized the pill bottle as evidence of defendant’s aiding and abetting. The brief comments did not comprise a pattern of conduct, not did the comments render the trial unfair. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Although any suggestion that concealing the bottle was part and parcel of the aiding charge, rather than merely evidence of it, was incorrect, defendant does not show that any misstatement was misleading to the degree that the court’s admonishment to follow the many instructions on aiding and abetting and related topics did not cure it. Given the judge’s admonition to the jury and the comprehensive instructions the jury subsequently received, including instruction the People needed to prove that “*before or*

during the commission of the crime, the [d]efendant intended to aid and abet the perpetrator in committing the crime” (italics added), there was no “reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.) We conclude the challenged argument did not amount to prosecutorial misconduct.

### III

#### *Section 654*

Lastly the parties agree that the concurrent 180-day term imposed for receiving stolen property (§ 496, subd. (a)) should have been stayed pursuant to section 654. We agree with the parties.

Defendant was convicted of both burglary and receipt of stolen property. While a defendant may be convicted of both burglary and receipt of stolen property taken during that burglary, section 654 precludes double punishment where both are incident to one objective. (*People v. Allen* (1999) 21 Cal.4th 846, 862-867; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) “Imposition of concurrent sentences is not the correct method of implementing section 654, because a concurrent sentence is still punishment.” (*Alford*, at p. 1468.) The trial court must impose and stay sentence to correctly implement section 654 (see *Alford*, at p. 1469) and it did not do so here, thus resulting in an unauthorized sentence.

Exercising our inherent authority to correct a legal error resulting in an unauthorized sentence (*People v. Scott* (1994) 9 Cal.4th 331, 354), we modify the judgment accordingly. As the misdemeanor sentence is not required to be included in the abstract of judgment, we recommend that the trial court correct its internal records to reflect the stay.

