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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTOINETTE VIRGINIA MILLER,

Defendant and Appellant.

D058928

(Super. Ct. No. SCE295719)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

A jury convicted Antionette Virginia Miller of three counts of aiding and abetting the sale of marijuana and one count of maintaining a place for the purpose of selling marijuana. She appeals, contending: (1) the trial court prejudicially erred in instructing the jury with CALCRIM No. 401 regarding aiding and abetting; and (2) insufficient evidence supported the guilty verdicts that she aided and abetted the sale of marijuana. We reject her arguments and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Miller owned and operated a bar in El Cajon called "Cheers & Beers" (the bar). After receiving a complaint about narcotic sales at the bar, the California Alcohol Beverage Control agency conducted an undercover investigation of the bar. Starting in July 2009, agent Miguel Rios and various partners went to the bar about 10 times. (All further dates are in 2009.) During this time Rios got to know Miller and observed patrons using the back patio of the bar to smoke or purchase marijuana.

On July 23, Rios and his partner introduced themselves to codefendant, Robert Keith, and started up a conversation about needing marijuana because Rios had previously seen Keith selling narcotics. Keith showed the men some marijuana, wrote his phone number on a napkin and told Rios to call him if he needed any.

On August 14, Miller was tending the bar when Rios asked Keith whether he had some of the "stuff" that Keith had showed him the prior week. The men then went to the back patio of the bar where Rios purchased \$60 worth of marijuana from Keith. Rios did not believe that Miller knew anything about this transaction.

On August 20, Miller and a bartender named Joe were working when Rios visited the bar. Miller asked Rios if he needed anything before she left. Rios responded that he needed "some of that stuff" he got from Keith last week. Miller understood what Rios was referring to, and volunteered to call Keith on Rios's behalf, noting that Keith lived around the corner. Miller told Joe that when Keith called back he should give Rios the phone. After Keith returned the call, Joe acted as a go-between for Rios's purchase of marijuana from Keith.

On September 11, Rios asked Miller about getting some "blow" or cocaine from Keith. Using her own cell phone, Miller called Keith and told him that Rios was there and wanted some "stuff." About 30 to 45 minutes later, Keith entered the bar and Rios followed him to the back patio. When Keith could not make change for a \$100 bill, Rios went back to the bar and asked Miller to make change, telling her he needed change to pay Keith for the "blow." Miller removed five \$20 bills from her bra and exchanged them for the \$100 bill. Ultimately, Rios purchased marijuana from Keith.

On October 8, Rios purchased marijuana from Keith "in the middle of the bar in plain view" of other bar patrons. Because Rios wanted to let Miller know what had happened, he held the odorous bag of marijuana in his closed fist up to Miller's nose and asked her if she wanted to smoke it with him. Miller declined, stating she did not smoke while on duty, but did not mind when other people did. Rios understood her to mean that she smoked marijuana when off-duty.

On October 28, Rios asked Miller to call Keith because he needed some "weed," meaning marijuana. Miller called Keith from her cell phone and left him a message about Rios wanting to buy some "stuff." When Keith returned the call, Miller handed her cell phone to Rios. Rios arranged to purchase "two eighths" of marijuana from Keith. Later, Keith's brother, Tony Keith, came to the bar, approached Miller and told her that Keith "sent . . . a package for you." When Miller stated that she did not order anything, Rios and his partner confirmed that Tony Keith had "two eighths" of marijuana for them. When Tony Keith started to hand Rios the marijuana, Miller told the men to go outside. The men went to the back patio where Rios purchased the marijuana.

The San Diego District Attorney's Office filed an information charging Miller, Keith, and Tony Keith with various counts relating to the drug transactions that took place at the bar. After Keith and Tony Keith pleaded guilty to the charges against them, the matter proceeded to trial against Miller for: (1) maintaining a place for selling marijuana on August 14 and October 28 (count 1); and (2) aiding and abetting Keith in selling Rios marijuana on August 20 (count 2), September 11 (count 3), and October 28 (count 4). A jury found Miller guilty as charged and the trial court later granted her supervised probation, staying an order for 365 days of custody pending the successful completion of probation. Miller timely appealed.

## DISCUSSION

### *I. Alleged Instructional Error*

Miller asserts the trial court prejudicially erred in instructing the jury with CALCRIM No. 401 regarding aiding and abetting. She contends the instruction improperly allowed the jury to convict her based on a finding that she aided the sale of marijuana, without also requiring that there be a finding that she abetted the sale. In response to the Attorney General's argument that she forfeited her objection to this instruction by failing to object on this basis at trial, Miller asserts that the purported instructional error was not one merely of an ambiguous, albeit correct, instruction that may have warranted clarification, but rather involves a fundamentally erroneous instruction on an element of the charged offense.

"Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Because Miller contends that the instruction incorrectly stated the law and that any error affected her substantial rights, we assume her claim of error was not forfeited and address the merits. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

CALCRIM No. 401 provides in relevant part:

"To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, *or* instigate the perpetrator's commission of that crime." (Italics added.)

Miller argues the instruction is not in accord with Penal Code section 31, which requires a person "aid and abet" the actual perpetrator of a crime. (Undesignated statutory references are to the Penal Code.) She contends that the second paragraph of the instruction unraveled the bond between the verbs "aid" and "abet" by introducing the disjunctive "or." Thus, the jury could have convicted her for assisting Keith's actions when she did not intend to encourage his actions. She acknowledges that the court in *People v. Campbell* (1994) 25 Cal.App.4th 402 (*Campbell*) rejected this argument, but asserts the conclusion in *Campbell* does not follow from its analysis and undermines it as persuasive authority.

Persons that directly commit a crime or "aid and abet" its commission "are principals in any crime so committed." (§ 31.) As our high court noted, "an aider and abettor must have criminal intent in order to be convicted of a criminal offense. [Citations.] Decisions of this court dating back to 1898 hold that 'the word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime' and that it is therefore error to instruct a jury that one may be found guilty as a principal if one aided *or* abetted. [Citations.] The act of encouraging or counseling itself implies a purpose or goal of furthering the encouraged result. 'An aider and abettor's fundamental purpose, motive and intent is to aid and assist the perpetrator in

the latter's commission of the crime.' [Citation.]" *People v. Beeman* (1984) 35 Cal.3d 547, 556 (*Beeman*).

In *Beeman*, the court noted a conflict in appellate opinions between cases stating that an aider and abettor must have an intent or purpose to commit or assist in the commission of the criminal offenses, and cases finding it sufficient that the aider and abettor engage in the required acts with knowledge of the perpetrator's criminal purpose. (*Beeman, supra*, 35 Cal.3d at p. 556.) It resolved this conflict by concluding that the law requires "that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*Id.* at p. 560.)

As the *Campbell* court stated: "the phrase 'aid and abet' represents a legal theory. Each term therein performs a function necessary to justify the imposition of criminal liability. 'Aid' requires some conduct by which one becomes 'concerned in the commission of a crime' (§ 31), whether it be to aid (i.e., assist or supplement), promote, encourage, or instigate. [Citation.] 'Abet,' on the other hand, requires that this conduct be accompanied by the requisite criminal state of mind, i.e., knowledge of the perpetrator's unlawful purpose and with the intent that it be facilitated. [Citation.]" (*Campbell, supra*, 25 Cal.App.4th at pp. 413-414, footnote omitted.) The *Campbell* court rejected the argument Miller now makes, stating "our research has revealed, no case holding, or even suggesting, that 'aid and abet' requires separate findings concerning two distinct types of *acts* (assisting and encouraging) before a jury may properly convict a

defendant as an aider and abettor." (*Id.* at p. 411.) Miller has not tendered any authority to support her argument and we have found none.

The language of CALCRIM No. 401 accurately states the law that to be liable for aiding and abetting there must be a concurrence of knowledge and intent. Accordingly, we reject her argument that the trial court incorrectly instructed the jury on aiding and abetting liability.

## II. *Sufficiency of the Evidence*

Miller contends there is insufficient evidence to support her convictions for aiding and abetting Keith in selling Rios marijuana on August 20, September 11, and October 28 as alleged in counts 2, 3 and 4 because she did not encourage or incite Keith in the sale of marijuana. Thus, she asserts the trial court erred in denying her section 1118.1 motion for an acquittal on these counts.

Where a defendant challenges the sufficiency of the evidence supporting a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34.)

A person aids and abets the commission of a crime when she, acting (1) with knowledge of the perpetrator's unlawful purpose, and (2) with intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or

advice aids, promotes, encourages or instigates the commission of the crime. (*People v. Croy* (1985) 41 Cal.3d 1, 11-12; *Beeman, supra*, 35 Cal.3d at p. 561; also, CALCRIM No. 401.) Direct evidence of the mental state is rarely available and may be shown with circumstantial evidence. (*Beeman, supra*, at pp. 558-559.)

Here, the evidence clearly established that Miller knew Keith dealt drugs. On August 20, knowing that Rios had previously obtained marijuana from Keith and that Rios wanted more marijuana, Miller voluntarily offered to put Rios in contact with Keith and then called Keith on Rios's behalf. On September 11, Miller called Keith from her cell phone on Rios's behalf knowing that Rios wanted some "blow" or cocaine from Keith. After Keith arrived at the bar to make the transaction, Miller gave Rios change from her personal funds knowing he needed it to purchase drugs, and then allowed the drug transaction to occur on the back patio. On October 28, Miller called Keith from her cell phone to inform him that Rios wanted to purchase marijuana. Miller then allowed the drug transaction to occur on the back patio.

This evidence established that Miller committed acts that facilitated the sale of marijuana on August 20, September 11, and October 28 as alleged in counts 2, 3 and 4. The trier of fact could also reasonably infer that Miller shared Keith's criminal intent on each date. Reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.