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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO ATINAJA ABSOLOR,

Defendant and Appellant.

D059219

(Super. Ct. No. SCS242769)

APPEAL from a judgment of the Superior Court of San Diego County,  
Kathleen M. Lewis, Judge. Reversed.

A jury found Mario Atinaja Absolor guilty of possessing marijuana for sale and transporting more than 28.5 grams of marijuana. He appeals, contending: (1) there was insufficient evidence to prove he aided and abetted the crimes; and (2) the court erred in admitting evidence regarding the transfer of a bag from his vehicle to another. We agree the evidence was insufficient to support the convictions and thus reverse the judgment, rendering the evidentiary issue moot.

## FACTUAL AND PROCEDURAL BACKGROUND

In September 2010, several Chula Vista Police Department officers were involved in a surveillance operation. During the operation, Detective Scott Adkins observed a black Pontiac vehicle and a white Chevy van pull up to a curb. The driver of the Pontiac got out of the car and walked up the driveway of a residence. After a few minutes, the driver of the van, who appeared to be on and off the phone, drove away. Detective Adkins followed the van and saw the driver constantly looking in his mirrors to observe the vehicles behind him. The van pulled over to the curb multiple times, stopped, and then pulled into traffic again. Detective Adkins believed that the driver was performing counter-surveillance of the area to insure he was not being followed.

The van eventually pulled into the residence driveway where the Pontiac driver was seen earlier. The van's driver then walked to a nearby market and returned about 20 minutes later with the Pontiac driver. Absolor arrived in a green Kia. All three men went into the residence and then left in three separate vehicles that did not include the van. A short while later, the men returned to the residence and then left again in the same vehicles.

During this time, Officer Peter Stevens was conducting surveillance at a nearby store and observed Absolor, the driver of the van and a third person talking at a picnic bench in the parking lot. The men left that location and then returned 15 minutes later. At this point, Officer Stevens observed the Kia and Pontiac parked next to each other. Absolor took a dark bag from the trunk of the Kia and placed it in the Pontiac. The

bag was a "woman's type book bag" and appeared to have something in it. After Absolor placed the bag inside the Pontiac, the vehicles left.

Officers later conducted a search of the residence and found 1,134 pounds of marijuana in the van, which was parked in the garage. Officers also found paperwork in the van showing that Absolor had insurance on it. Inside the residence, officers found two shoe boxes in a bedroom closet that contained \$24,500 in cash, seven vehicle titles with an address for a Postal Annex in San Ysidro, auto insurance documents with Absolor's name on them, and a registration for the van in the name of Cupertino Ramirez. Two of the vehicle titles, one for a Toyota and another for a Nissan, were in Absolor's name. A records check revealed that the Kia was also registered to Absolor.

At some point in the day, Officer Rosio Gardea conducted a traffic stop on the Kia that Absolor was driving. Officer Gardea observed that Absolor had a "pay and go" cell phone. When Officer Gardea searched the phone, she saw that there was an incoming call from "125\*139\*11961." Later, Officer Gardea saw that number on a phone "start up box" in the residence.

Officer Mark Meredith testified as a narcotics expert. He opined that the van and Pontiac were connected in conducting counter-surveillance and explained that the meeting in the store parking lot was significant because drug transfers often occur in public places. Officer Meredith also explained that the numerous vehicle titles and insurance documents found in this case with different names on them fit in with the drug smuggling culture because the names were "disposable" and protected the leaders

from being connected to the illegal activity. According to Officer Meredith, 1,134 pounds of marijuana could be sold for over \$340,000 in San Diego County and almost \$1,000,000 on the East Coast.

Based on the addresses on documents found in the residence, the phone number on Absolor's phone and at the house, the auto insurance documents, Absolor's meeting at the place where there was some kind of exchange, and Absolor's later return to the house where the marijuana was found, Officer Meredith opined that Absolor was involved in a drug deal.

## DISCUSSION

### I. *Standard of Review*

When a defendant challenges a conviction for insufficient evidence, we apply the substantial evidence standard of review. We presume all reasonable inferences in favor of the judgment. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633 (Kuhn).) The evidence must be reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260 (*Cuevas*).) Substantial evidence "cannot be deemed synonymous with "any" evidence." (*Kuhn*, at p. 1633.) "'A decision supported by a mere scintilla of evidence need not be affirmed on review.'" (*Ibid.*) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652; *Cuevas*, at p. 261.)

## II. *Sufficiency of the Evidence*

Absolor contends there was insufficient evidence to support his convictions for possessing marijuana for sale and transporting marijuana. We agree.

### A. Possessing Marijuana for Sale

In general, unlawful possession of marijuana for sale requires proof that the defendant possessed the marijuana with the intent of selling it and with knowledge of both its presence and its illegal character. (Health & Saf. Code, § 11359; *People v. Harris* (2000) 83 Cal.App.4th 371, 374 (*Harris*); *People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746 (*Meza*).) To prove a defendant is guilty of that offense, the prosecution must prove beyond a reasonable doubt the following elements: (1) the defendant exercised dominion and control over the marijuana; (2) the defendant was aware he or she was in possession of marijuana; (3) the defendant knew the nature or character of marijuana as a controlled substance; (4) the marijuana was in an amount sufficient to be used for sale or consumption as a controlled substance; and (5) the defendant possessed the marijuana with the specific intent to sell it. (CALCRIM No. 2352; cf. *People v. Parra* (1999) 70 Cal.App.4th 222, 225-226 [elements of possession of a controlled substance for sale].) The offense, including the intent to sell, "can be established by circumstantial evidence and any reasonable inferences drawn from that evidence." (*Meza*, at p. 1746; see also *Harris*, at p. 374.)

Here, Absolor's criminal liability was based on an aiding and abetting theory. "A principal in the commission of a crime is one who directly commits the crime or who aids and abets the perpetrator." (*In re Michael T.* (1978) 84 Cal.App.3d 907, 910

(*Michael T.*); Pen. Code, § 31.) "[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225 (*Perez*)). "Whether a person has aided and abetted in the commission of a crime ordinarily is a question of fact. [Citations.] . . . ¶ . . . Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense. [Citations.]" (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094-1095.) However, "[m]ere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. [Citation.]" (*Michael T.*, at pp. 910-911.)

After considering the entire record, we conclude the evidence was insufficient to support Absolor's conviction for possessing marijuana for sale. The People were required to prove beyond a reasonable doubt that (1) the direct perpetrators possessed marijuana with the intent of selling it and with knowledge of both its presence and illegal character; (2) Absolor had knowledge of the direct perpetrators' unlawful intent and purpose; and (3) Absolor's conduct in fact assisted in the direct perpetrators' achievement of the crime. (*Perez, supra*, 35 Cal.4th at p. 1225.)

The evidence was sufficient to establish the direct perpetrators' criminal actus reus and, although very thin, it was also sufficient to establish that Absolor had knowledge of their intent and purpose. However, the evidence was insufficient to establish beyond a reasonable doubt that Absolor's conduct assisted in the commission of the direct perpetrators' crimes. The evidence showed that Absolor arrived at and left the residence multiple times, had a conversation in a parking lot with the driver of the van in which marijuana was later discovered, placed a bag from the trunk of his vehicle into another vehicle, and had a cell phone that matched a box found in the residence with a number on it that was also on the phone. The evidence also showed Absolor had insurance on the van, and his name was on other auto insurance documents and vehicle titles found in the residence. This evidence does not prove an affirmative act that assisted in achieving the crime of possessing marijuana for sale. Further, Absolor's presence at the residence and failure to prevent the crimes, does not satisfy the requirements of being an aider and abetter. (*Michael T.*, *supra*, 84 Cal.App.3d at pp. 910-911.) The People needed to prove Absolor's conduct assisted in achieving the crime, which they did not. Unlike others involved in the incident, Absolor was not conducting counter-surveillance and was never seen in the van or with the marijuana. Moreover, the police never recovered the bag that Absolor took from his trunk and placed in another vehicle and there was no evidence regarding the contents of the bag. Viewing the record as a whole, we conclude that although the evidence is suspicious, it was insufficient to support Absolor's conviction for possessing marijuana for sale.

## B. Transporting Marijuana

In general, the offense of "[t]ransportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character." (*Meza, supra*, 38 Cal.App.4th at p. 1746; see also *People v. Rogers* (1971) 5 Cal.3d 129, 133-134 (*Rogers*)). Possession is not required for a conviction of transporting a controlled substance. (*Rogers*, at p. 134 [aiding and abetting the transportation, without possession, of a controlled substance is sufficient].) The offense of transportation may be committed even if the distance the controlled substance is carried or conveyed is short. (CALCRIM No. 2361.)

As with the possession charge, the People based Absolor's criminal liability for transporting marijuana on an aiding and abetting theory. Thus, the prosecutor was required to prove beyond a reasonable doubt that (1) the direct perpetrators transported marijuana with knowledge of its presence and illegal character; (2) Absolor had knowledge of the direct perpetrators' unlawful intent and purpose; and (3) Absolor's conduct in fact assisted in the direct perpetrators' achievement of the crime. (*Perez, supra*, 35 Cal.4th at p. 1225.)

Without repeating our discussion above, we conclude the People failed to establish that Absolor's conduct assisted in achieving the transportation of marijuana. In fact, we find no evidence in the record establishing that the marijuana was transported at all. The van was seen conducting counter-surveillance, and then later found in the garage of the residence with 1,134 pounds of marijuana in it. This

evidence was not sufficient to establish that the marijuana was carried or conveyed. Even if the marijuana was in the van when the van was conducting counter-surveillance, there was no evidence that Absolor assisted the transportation in any way. He was not seen while the van was driving around or at the residence when it arrived. Absolor's conversation in a parking lot with the driver of the van, his insurance of the van, and presence at the residence where the van containing marijuana was eventually found do not establish that Absolor assisted in transporting marijuana. Thus, we conclude there was insufficient evidence to support Absolor's conviction for transporting marijuana.

#### DISPOSITION

The judgment is reversed.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.