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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MONIQUE LOUISE DELACORTE,

Defendant and Appellant.

E053455

(Super.Ct.No. FVA1001408)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed.

Daniel R. McCarthy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christine Levingston Bergman, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant, Monique Delacorte, of receiving stolen property (Pen. Code, § 496, subd. (a)).¹ In bifurcated proceedings, she admitted having suffered six prior convictions for which she served prison terms, although she was sentenced here for only four of the six. She was sentenced to prison for six years and appeals, claiming evidence was improperly admitted, the jury was misinstructed and sentencing error occurred. We reject her contentions and affirm.

FACTS

During a September 6, 2010 compliance check of a male parolee, the case agent discovered defendant in the bedroom of a Fontana home with that parolee. Defendant lied about her name to the case agent, then admitted her real name. After defendant, another female and two males were in the living room at the direction of the officers present, the case agent searched the bedroom in which defendant and the parolee had been and found a woman's purse. The agent brought the purse out to the living room and in response to his question, defendant admitted that the purse was hers. She consented to having the case agent search the purse and when he did, he found inside a driver's license that belonged to another woman and paperwork in defendant's name. In response to the agent's question, defendant said that she had been holding the driver's license for a few weeks and she did not steal it but her friend had. The case agent asked defendant if she knew the license was stolen, why she was holding it. Defendant said she made a mistake, she did not know why she did it and she was stupid. The agent called the owner of the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

license and she said her home had been burglarized in January 2010. The agent then arrested defendant and she was booked. After she was given and waived her *Miranda*² rights, she repeated that she had not stolen the license but she knew it was stolen.

ISSUES AND DISCUSSION

1. *Admission of Evidence*

Before trial began, defendant moved to have statements she made to the police before her arrest³ excluded because she had not been given and waived her *Miranda* rights before she made them. At the hearing on the motion,⁴ the case agent testified that he went in a marked patrol car to a Fontana home on December 6, 2010 to assist in a

² *Miranda v. Arizona* (1966) 384 U.S. 436.

³ It is clear from the argument of defense counsel at the hearing and the fact that no evidence was adduced at the hearing concerning defendant's post arrest statements to the police that the motion was directed only at her pre-arrest statements. Defendant's attempt, at this point to also contest the admission of her post arrest statements is pointless as she waived her objection to them when she failed to move below to exclude them. (*People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13 [disapproved on other ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22].) Defendant's attempt, in her reply brief, to resurrect this contention on the basis that her trial counsel was incompetent for failing to object to the admission of her post-arrest statements is equally unmeritorious, given our conclusion that her pre-arrest statements were properly admitted and she was given and waived her *Miranda* rights before making her post-arrest statements.

⁴ Defendant's repeated attempts throughout her brief to use evidence adduced at trial in her argument about the propriety of the trial court's pretrial order is pointless. The trial court can be charged only with what it knew at the time it made its ruling, and this was *before* trial. If defendant wished to renew her motion based on evidence that was adduced during trial, she was free to do so, but did not.

parole check for Anthony Reynoso. The officer⁵ the agent was with knocked on the front door, while a third officer went to the back of the house. Whoever answered the door said that Reynoso was in a particular bedroom in the house. The agent went to this bedroom and also saw defendant there and he asked her her name. She said it was Myra, then admitted that she had lied to him and gave him her real name. Defendant, along with everyone else in the house, was told to go into the living room. By then, the agent knew that defendant was on parole. In the living room, where the door to the outside was located, the agent stood close to the kitchen and defendant stood between the agent and the front door. One of the three officers present at the home was outside with another parolee who had been arrested and the remaining officer was questioning yet another parolee in one of the bedrooms. While defendant was in the living room, the agent searched the bedroom in which he had observed defendant earlier and he discovered a purse there. The agent brought the purse out to the living room and in response to the agent's question, defendant said that the purse was hers. She consented to have the agent search it, which he did, finding inside the driver's license belonging to another woman at an address in Oxnard. In response to the agent's question, defendant said she was holding the license for someone else and she was not the person who stole it. The agent stepped outside the house, leaving defendant in the living room without handcuffs on and not yet having been arrested. The agent called defendant's parole agent and told him or

⁵ This officer also had driven a marked car to the home.

her that defendant had lied about her name. Defendant's parole agent wanted defendant arrested for violating her parole.⁶

The trial court concluded that defendant was not in custody for purposes of *Miranda* at the time she made her statements in the living room, therefore, there was no need for *Miranda* warnings to be given and waived and her statements were admissible at trial. Defendant here, however, contests the admission of those statements.⁷

We independently determine if the interrogation was custodial under the objective standard whether a reasonable person would have felt she was not at liberty to terminate the interrogation and leave (*People v. Ochoa* (1998) 19 Cal.4th 353, 401, 402).

General, on-the-scene questioning as to facts surrounding a suspected crime by officers who do not have probable cause to arrest is not subject to *Miranda* (*People v. Milham* (1984) 159 Cal.App.3d 487, 500). Here, the agent did not have probable cause to arrest defendant at the time she made her statements, however, the fact that she was a parolee herself, in the company of another parolee, and she had lied to the agent about her identity created a reasonable suspicion that she was engaged in criminal activity, or a violation of her parole, entitling him to ask her a few questions. It was not until later, after checking with defendant's parole agent, that the case agent made the determination to arrest defendant.

⁶ Defendant was out of the county where her parole was established, presumably without her parole agent's permission.

⁷ See footnote three, *ante*, page three.

Where there has been no formal arrest, as in this case, courts consider the length of the detention, its location, the ratio of officers to suspects, and the demeanor of the officers, including the nature of the questioning, in determining whether the defendant is in custody for purposes of *Miranda* (*Thompson v. Keohane* (1995) 516 U.S. 99, 112; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753). Here, defendant was being questioned in a private home where she either lived or was a guest.⁸ She was in the company of other people who either lived at or were guests of the home. Defendant was not handcuffed. She and the others were left alone in the living room while the agent searched the bedroom. It is impossible to tell from the agent's testimony at the hearing on the motion how many people were in the living room at the time defendant made her statements, but the agents testimony that "all" the people in the house were in the living room suggests that it was more than two and perhaps more than that. Therefore, the ratio of police to "suspects" was one to at least three and defendant stood closer to the door to the outside than the agent. It cannot be determined based on the agent's testimony how long defendant was detained before she made her statements. There is no suggestion that the agent's questioning was particularly pointed. At the time the statements were made, defendant had already admitted to the agent that she had lied to him and he already knew that she was a parolee. The fact that she was asked for her consent to have her purse searched suggested to her that her rights had not been eclipsed by the circumstances.

⁸ As it turns out, prosecution evidence at trial established that she lived there.

Therefore, a reasonable person would have felt at liberty to terminate the case agent's questioning of her and leave.

2. *Jury Instruction*

a. *Judicial Council of California Criminal Jury Instruction CALCRIM No. 250*

The jury was given CALCRIM No. 250, the standard instruction on general intent, which provides, "The crime charged in this case requires proof of the union or joint operation of act and wrongful intent. For you to find [defendant] guilty of the crime of receiving stolen property as charged in Count 1, [defendant] must not only commit the prohibited act, but must do so with wrongful intent. [¶] [Defendant] acts with wrongful intent when she intentionally does a prohibited act. However, it is not required that she intend to break the law. The act required is explained in the instruction for that crime." The jury was also given the standard instruction on possessing stolen property, which is, "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant received property that had been stolen; and [¶] 2. When the defendant received the property, she knew that the property had been stolen."

Defendant here correctly points out that the Bench Notes for the first above-quoted instruction state that it must not be used if the crime requires a specific mental state, such as knowledge, even if the crime is a general intent crime.⁹ Receiving stolen property is

⁹ Defendant correctly points out that the jury should have been instructed, "The crime charged in this case requires proof of the union, or joint operation, of act and wrongful intent. For you to find defendant guilty of the crime of receiving stolen property, [the defendant] must not only intentionally commit the prohibited act, but must

[footnote continued on next page]

such a crime. Assuming for purposes of this discussion only that the Bench Note is correct, the question is whether the jury was misled by the instructions given such that it applied them in an impermissible manner (*People v. Wilson* (2008) 44 Cal.4th 758, 803, 804). The two instructions given, taken together, as they must be (*id.*) required the jury to find that defendant intentionally received property and when she so received it, she knew it had been stolen. Defendant contends that the first above-quoted instruction should not have been given because of its inclusion of the sentence, “. . . [I]t is not required that [defendant] intend to break the law.” Defendant argues that this sentence could have “misled [the] jury . . . to convict [defendant] . . . , so long as the jury was satisfied that [defendant] in fact intended to possess the driver’s license.” If by this, defendant is suggesting that the jury only had to find that defendant intended to possess the driver’s license in order to be guilty, that ignores the requirement that was clearly conveyed in the instructions given that defendant had to intentionally receive the driver’s license and when she received it, she had to know that it had been stolen. While giving the instruction the Bench Note states should have been given,¹⁰ instead of the instruction at issue here that was given, this sentence would not have been put before the jury, we fail to see how, and defendant fails to explain how, its inclusion in any way detracted from the jury’s obligation to find the elements of the crime of receiving stolen property.

[footnote continued from previous page]

do so with a specific mental state. The act and specific mental state required are explained in the instruction for that crime.” (Adaptation of CALCRIM No. 251.)

¹⁰ See footnote nine, *ante*, page seven.

Defendant also asserts that the jury would have equated intending to break the law, which it was told was not required, with the knowledge that the property must have been stolen, which the jury was told had to be established, and the jury would ignore this requirement. There is no logic to this assertion.¹¹

b. Trial Court's Response to Jury Questions

The jury sent the trial court the following question during deliberation, “496(a) does not mention intent for guilty verdict[.] [T]he jury description instruction does mention intent[.] Is intent a factor[?]” Neither party had any objection to the trial court referring the jury to above-quoted instructions in response to this question. Later,¹² the jury also sent a second question which read, “Please clarify what [is] meant by ‘union of act and general intent’ [in CALCRIM No.] 250 first paragraph[.] [¶] Do we need [the

¹¹ Neither is there logic to defendant's assertion that the questions the jury asked the trial court, which are discussed in the next section of this opinion, suggested that the jury believed that knowledge that the property was stolen was not required. Finally, defendant's assertion that markings made on the instructions (underlines, circles and stars) showed that the jury was confused is unmeritorious. We have no way of knowing who made the markings (they appear to all have been made by the same person), and neither does appellate counsel for defendant. Moreover, trying to discern confusion from these markings is akin to reading tea leaves. If the jury was confused, it knew quite well to send an inquiry to the trial court. If it was still confused after those inquiries were answered by the trial court, it knew to send more. The fact that it did not suggests that it was not confused.

¹² It is difficult to determine whether the jury had an opportunity to consider the trial court's response to the first question before writing the second and third. The minute order states that the jury resumed deliberations after the trial court had written the answer to the first question at 9:14 a.m., but at 9:22 a.m., the court reporter began a read back of testimony the jury had also requested, concluding it at 10:40 a.m., at which point the jury recessed. The second and third questions were submitted eleven minutes later, at 10:51 a.m.

People to establish ‘wrongful intent?’]” The trial court said it was going to respond to the first question, “‘For the jury’s interpretation, not the Court’s” and it wrote next to the question for the jury to read, “For jury’s interpretation of 250, no clarification.” The trial court said it was going to respond to the second question, “‘Please clarify the meaning” and it wrote next to the question for the jury to read, “Please clarify meaning . . . of question[.]” Neither party objected to the trial court’s proposed responses to these two questions.

Defendant now contends that the trial court’s responses were inadequate. Having concluded that there was nothing confusing, contradictory or incorrect in the instructions given the jury, we necessarily conclude that the trial court directing the jury’s attention back to those instructions was not error. If the jury needed more information, it knew to request it but it did not, suggesting that after reading the trial court’s responses to its three questions, it was no longer confused.

Having concluded there was nothing confusing, contradictory or incorrect in the instructions given, we also reject defendant’s fall-back contention that her trial attorney was incompetent for failing to object to them or to the trial court’s responses to the jury’s questions.

3. *Sentencing*

a. *Section 17, subdivision (b) Motion*

Defendant moved, pursuant to section 17, subdivision (b), to have her felony conviction for receiving stolen property reduced to a misdemeanor. She asserted that the nature of the offense was relatively minor, its punishment was disproportionate to its

severity, there was no evidence that defendant used or attempted to use the license or the identity of its owner and defendant's criminal history was the result of her addiction to controlled substances. The People opposed the motion, noting that defendant had six prior felony convictions, was on parole when she committed this offense and committed a new offense while on bail in this case. The trial court denied the motion, saying, "[T]his is not the case of the century, however, it was a concerning case for this [c]ourt. Namely, the fact that [defendant] had somebody's ID, when identity theft is such a prevalent and alarming offense in this county [and] country. It's running rampant. So I don't think that her behavior is quite suitable to be a misdemeanor. That's not even mentioning her very extensive criminal history, which also this court took into account. [¶] The [c]ourt counts . . . six felonies. Her very first offense was a felony. And then subsequent misdemeanors later on. But I'm concerned with the fact that of her six felonies, four involve fraudulent behavior; the welfare fraud, the taking of the car, burglary, and forgery; all fall right neatly into place with the current offense. For that reason the court will deny the 17(b)."

Defendant asserts that the trial court failed to exercise its discretion in denying her section 17, subdivision (b) motion. However, the afore-quoted remarks of the court belie this.

Defendant then launches into the same arguments she presented the trial court in her motion in an effort to persuade us that the trial court abused its discretion in denying her motion. Defendant pounds away at the fact that she received a total term of six years, ignoring the fact that four of those years were for prior convictions for which she served

prison terms. Simply stated, she presents nothing new or persuasive to show that the trial court abused its discretion in denying her motion.

b. Motion to Dismiss Priors

As part of her motion under section 17, subdivision (b), defendant also asked the trial court to dismiss her priors. Although she did not state in her moving papers, we assume she relied on the same grounds that she cited for having her conviction reduced to a misdemeanor, with the additional “factors in mitigation” of her having minor children dependent on her (letters from them were attached to the moving papers), having an ailing father, displaying remorse for what she said was her “criminal” and the fact that she was employed at the time of the offense. We note that in the probation report, defendant denied culpability for this offense, therefore, we have difficulty agreeing with her that she was remorseful. The probation report also states that defendant successfully completed a drug and alcohol program in 2008. Despite this, and while on bail in this case, she was arrested for being under the influence of a controlled substance. The presence of her children and her father in her life has not provided sufficient deterrent for defendant. The prosecutor pointed out that defendant was on parole out of Huntington Park and had no business being in Fontana at the time of this crime. After denying defendant’s motion under section 17, subdivision (b), the court said, “And with counsel’s comments with respect to the [c]ourt’s sentencing, the [c]ourt’s also reviewed [defense counsel’s] papers and the several letters from [defendant’s] children. And these young people probably are not aware of their mother’s history. It is heartbreaking that they will be suffering as a result of [her] conviction. [¶] The [c]ourt has empathy for the children

but the [c]ourt cannot neglect its obligation to make the punishment fit the crime and her prior crimes.”

Defendant presents no convincing argument that the court abused its discretion in failing to dismiss her prior convictions. The record demonstrates that the trial court reviewed all the information submitted by defendant and carefully reached a reasonable conclusion that she was not entitled to have any of her priors dismissed.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

RICHLI
J.