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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.

JOSE LEON AGUILAR,

Defendant and Appellant.

E054988

(Super.Ct.No. FSB1101430)

OPINION

APPEAL from the Superior Court of San Bernardino County. Harold T. Wilson, Jr., Judge. Affirmed as modified.

John D. O’Loughlin, 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, and Garrett Beaumont and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

On August 15, 2011, a jury found defendant Jose Leon Aguilar guilty of operating a chop shop (Veh. Code, § 10801 (count 1)) and receiving stolen property (Pen. Code,

§ 496d, subd. (a) (count 2)). In a bifurcated trial, the court found true the allegations that defendant had a prior conviction for a violation of Vehicle Code section 10851, subdivision (a) (Pen. Code, § 666.5), and that he had a prior conviction for which he served a prison term (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to prison for a total term of four years. He appeals, contending the trial court erred in instructing the jury and ordering him to reimburse the county for court-appointed counsel.

I. FACTS

On December 24, 2010, Sha Li's 2003 Hyundai Elantra was stolen from her home garage in San Bernardino. Li did not give anyone permission to drive or be in possession of her car; she did not know either defendant or Victor Angulo.

Sandra Romero, a real estate owned asset manager for Wells Fargo, managed the two residences on Tippecanoe Avenue in San Bernardino coming out of foreclosure on behalf of Wells Fargo's client, Wachovia, for the purpose of trying to get the former owners and tenants out of the property. Angulo's girlfriend, Olga Varela, owned the property and defendant was a tenant. Romero visited the residences several times between November 2010 and March 2011.

During one of Romero's visits to the property in February 2011, she noticed a black four-door vehicle at defendant's residence. According to Romero, at that time the vehicle was "drivable." During her subsequent trips to the property, Romero noticed the vehicle change in appearance, becoming completely dismantled. On one visit, Romero had a confrontation with three men whom she identified as Octavio, Victor, and defendant. The men were removing parts from the vehicle and taking them to the house

next door. Romero witnessed this activity on two occasions. Romero also saw other car parts that did not belong to the vehicle. A shed on the property also had car parts inside.

In February and March 2011, Angulo lived at one of the residences on Tippecanoe Avenue. He admitted there was a vehicle in the backyard, but he denied that he or anyone else removed any parts from it. Angulo knew defendant but denied that he ever saw defendant at the residence or with the vehicle. At trial, Angulo could not recall telling Detective Manuel Gaitan that he had seen defendant driving the vehicle in question. Angulo did not recall telling Detective Gaitan that defendant parked the vehicle at the rear of the residence and began stripping the vehicle and scrapping the parts, or that defendant had said the vehicle was stolen. However, Angulo admitted he sold the motor from the vehicle for \$60. When asked how he got the motor, Angulo claimed that it was in the backyard and he just “took it and sold it.” He did not recall telling Detective Gaitan that defendant gave it to him. Rather, he claimed that he “took the rap for it.”

On March 29, 2011, Sergeant Lisa Trask was dispatched to one of the residences on Tippecanoe Avenue regarding a report of a “chopped up stolen car on the property.” When Trask arrived, she contacted Romero. Trask located a vehicle on the property that had been “surgically stripped,” i.e., the vehicle’s doors, engine, tires, transmission, and roof had been removed. Trask also noticed numerous car parts from other vehicles on the property. Trask subsequently learned that the chopped-up vehicle on the property was stolen.

Also on March 29, around 12:30 p.m., Detective Gaitan, an investigator with SANCATT, a specialized auto theft and “chop shop team,” was called to the scene.

Upon arrival, he located a dismantled vehicle between the rear of the two homes on the property, along with other vehicle parts. He was unable to locate the vehicle identification number (VIN) on the vehicle because it had been removed; however, through confidential means he was able to identify the vehicle. When he went to the house next door to look for Angulo, Angulo jumped out the back window, attempting to flee. He was stopped and detained.

Detective Gaitan, along with Detective James Helm present, spoke to Angulo. Angulo said that defendant had driven the vehicle for several months, parked it in the rear of the residence, and then stripped it and scrapped the parts. Defendant gave Angulo the car's engine because defendant owed Angulo money. Angulo sold the engine for scrap for \$60. Angulo told Detective Gaitan that defendant had said the car was stolen. Based on his experience, training, and investigation of the instant matter, Detective Gaitan opined that defendant and Angulo were operating a chop shop on the premises.

II. ACCOMPLICE INSTRUCTIONS

Defendant contends the trial court erred in failing to instruct, *sua sponte*, that Angulo was an accomplice as a matter of law. Alternatively, defendant argues that the court should have instructed the jury to decide whether Angulo was an accomplice, and if so, his testimony should be viewed with caution. More specifically, defendant faults the trial court for failing to give CALCRIM Nos. 334 and 335.

A. Applicable Law

The trial court has a duty to instruct the jury, *sua sponte*, to determine whether a witness was an accomplice in the charged offense, “““whenever the testimony given upon

the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice”” (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1218.) The pattern jury instruction to be given when the accomplice status of a witness is in dispute is CALCRIM No. 334 [Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice]. Alternatively, if the evidence establishes as a matter of law that a witness was an accomplice, the jury must be so instructed, and the applicable jury instruction is CALCRIM No. 335 [Accomplice Testimony: No Dispute Whether Witness Is Accomplice]. (*People v. Zapien* (1993) 4 Cal.4th 929, 982 (*Zapien*)). “In either case, the trial court also must instruct the jury, sua sponte, ‘(1) that the testimony of the accomplice witness is to be viewed with distrust [citations], and (2) that the defendant cannot be convicted on the basis of the accomplice’s testimony unless it is corroborated’ [Citation.]” (*Ibid.*)

“Nonetheless, ‘the failure to instruct on accomplice testimony pursuant to [Penal Code] section 1111 is harmless where there is sufficient corroborating evidence in the record. [Citations.] The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence “may be slight and entitled to little consideration when standing alone. [Citations.]” [Citation.] ‘Corroborating evidence “must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.” [Citation.]’ [Citation.]” (*Zapien, supra*, 4 Cal.4th at p. 982.) The corroborating evidence must also

be independent of the accomplice's testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562.)

B. Analysis

Here, the detectives testified about their initial interview with Angulo, when he admitted that defendant had driven the vehicle for several months, parked it in the rear of the residence, and then stripped it and scrapped the parts. Angulo also told the detectives that defendant had said the car was stolen. However, in contrast, Angulo denied ever seeing defendant at the residence or with the vehicle. Although Angulo admitted there was a vehicle in the backyard, he denied that he or anyone else removed any parts from it. He could not recall telling the detectives that he had seen defendant driving the vehicle, parking it on the property, and then stripping it and scrapping the parts. Angulo further denied that defendant had said the vehicle was stolen. According to Angulo, the motor was in the backyard, so he just "took it and sold it" and then "took the rap for it."

Clearly, there is a conflict in evidence. While the evidence of Angulo's conduct might have implicated him as an accessory, his status as such would not subject him to accomplice liability. (*People v. Horton* (1995) 11 Cal.4th 1068, 1116.) Although the detectives testified that Angulo told them that defendant had said the car was stolen, there is no direct evidence as to the time when defendant made such statement or that Angulo knew of the theft prior to its occurrence and intended to facilitate it. Rather, according to the detectives, defendant did not tell Angulo the car was stolen until after Angulo had sold the motor for \$60. Whether the evidence met the preponderance of the evidence standard that requires the trial court to submit the accomplice issue to the jury is a close

question. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 874.) We conclude it did not.

Nonetheless, even if we assume the trial court erred by failing to give accomplice instructions for Angulo, we find the error to be harmless. Other evidence in the case sufficiently connected defendant with receiving stolen property and operating a chop shop. Romero testified that she visited the property between November 2010 and March 2011 and defendant was a prior tenant. She saw the vehicle when it was drivable and then saw defendant removing parts from the vehicle and taking them to the house next door. Gaitan had to use a confidential means in order to confirm the identity of the vehicle's owner. Thus, outside of Angulo's testimony, there was sufficient independent evidence supporting the jury's verdict.

Moreover, we note the jury was instructed with CALCRIM Nos. 226 [Witnesses], 302 [Evaluating Conflicting Evidence], 316 [Additional Instructions on Witness Credibility-Other Conduct], 318 [Prior Statements as Evidence], 337 [Witness in Custody or Physically Restrained] and 359 [Corpus Delicti: Independent Evidence of a Charged Crime]. While Angulo's testimony at trial conflicted with the statements he made to the detectives, the jury would have used the above instructions in evaluating the truth of Angulo's testimony. "This provides an additional and alternative basis for our conclusion that any error in the trial court's failure to give the accomplice instructions was harmless." (*People v. Gonzales* (2011) 52 Cal.4th 254, 304.)

III. CALCRIM NO. 358

At trial, the jury was presented with evidence that after Angulo sold the engine for \$60, he talked to defendant, who said the vehicle was stolen. The jury was instructed with CALCRIM 359 [Corpus Delicti: Independent Evidence of a Charged Crime].¹ On appeal, defendant faults the trial court for failing to instruct the jury to view his out-of-court statement with caution pursuant to CALCRIM No. 358.²

“It is well established that the trial court must instruct the jury on its own motion that evidence of a defendant’s unrecorded, out-of-court oral admissions should be viewed with caution. [Citations.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 679 (*McKinnon*); see also Judicial Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 358, p. 133.) “The purpose of the cautionary language . . . is to assist the

¹ “The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant’s out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime may be proved by the defendant’s statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.”

² “You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]” (CALCRIM No. 358.)

jury in determining whether the defendant ever made the admissions. [Citations.]”

(*McKinnon, supra*, at p. 679.)

Clearly, the trial court erred in failing to instruct the jury with CALCRIM No. 358. “In determining whether [this particular] failure to instruct requires reversal, ‘[w]e apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.’ [Citations.]” (*McKinnon, supra*, 52 Cal.4th at p. 679.) The People argue the error was harmless.

“““Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]” [Citations.] [The California Supreme Court] has held to be harmless the erroneous omission of the cautionary language when, in the absence of such conflict, a defendant simply denies that he made the statements. [Citation.] Further, when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, [it has] concluded the jury was adequately warned to view their testimony with caution. [Citation.]” (*McKinnon, supra*, 52 Cal.4th at pp. 679-680.)

Here, the jury was otherwise fully instructed on how to evaluate the testimony of witnesses. It was given CALCRIM Nos. 226, 302, 316, 337 and 359. Thus, much as in *People v. Dickey* (2005) 35 Cal.4th 884, 906, distinguished on other grounds in *People v.*

Sanchez (2011) 53 Cal.4th 80, 91, “[t]he jury was instructed on the significance of prior consistent or inconsistent statements of witnesses, discrepancies in a witness’s testimony or between his . . . testimony and that of others, witnesses who were willfully false in one material part of their testimony being distrusted in other parts, weighing conflicting testimony, evidence of the character of a witness for honesty and truthfulness to be considered in determining the witness’s believability, and was given a general instruction on witness credibility that listed other factors to consider, including a witness’s bias, interest or other motive, ability to remember the matter in question, and admissions of untruthfulness.” The jury was also instructed to “carefully review all the evidence” before concluding that the testimony of any one witness proved any fact. (CALCRIM No. 301.) Finally, the jury was instructed: “You have heard evidence of statements that a witness made before the trial. *If you decide that the witness made those statements, you may use those statements . . . [¶] . . . [t]o evaluate whether the witness’s testimony in court is believable*” (CALCRIM No. 318, italics added.)

Based on the record before this court, there was only one witness who provided evidence of defendant’s out-of-court statement, namely, Angulo. And such evidence was presented through the testimony of the detectives. However, at the time of trial, Angulo could not recall any of his statements to the detectives. Even if there had been no evidence of defendant’s out-of-court statement that the vehicle was stolen, the case against him was strong. Defendant had lived at the property, he was seen driving the vehicle, he was seen removing parts from the vehicle, and the detectives learned that the vehicle was, in fact, stolen. It does not seem reasonably probable that a properly

instructed jury would have rejected the detectives' testimonies that defendant told Angulo the vehicle was stolen.

IV. REIMBURSEMENT OF COURT APPOINTED COUNSEL

In the probation report, the probation officer recommended, among other things, that the court find that defendant had the present ability to pay appointed counsel fees in the amount of \$500. Prior to sentencing, defense counsel filed a sentencing memorandum stating that defendant "appears to have no financial means to reimburse appointment counsel." At sentencing, the trial court stated it had reviewed the probation report and defendant's sentencing memorandum, and then, pursuant to Penal Code section 987.8, subdivision (b),³ the court imposed "[r]eimbursement for appointed counsel fees in the amount of \$500."

Defendant contends, and the People concede, that the record is "devoid of any evidence or finding to support the requirement that [defendant] had the ability to pay the fees." However, while defendant requests this court to vacate the order requiring him to pay \$500 for appointed counsel fees, the People contend the matter should be remanded with directions for the trial court to determine defendant's ability to pay \$500.

"Subdivision (b) of [Penal Code] section 987.8 . . . provides that, upon the conclusion of criminal proceedings in the trial court, the court may, after giving the defendant notice and a hearing, make a determination of his present ability to pay all or a portion of the cost of the legal assistance provided him." (*People v. Flores* (2003) 30

³ While the court did not cite the statutory basis of the order, we assume it was Penal Code, section 987.8.

Cal.4th 1059, 1061, fn. omitted.) “Subdivision (g)(2)(A), (B) of [Penal Code] section 987.8 defines “[a]bility to pay” as including a defendant’s ‘reasonably discernible future financial position,’ as well as his ‘present financial position,’ but stipulates that ‘[i]n no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernible future financial position.’” (*Id.* at p. 1063, fn. 2). “[T]here is a presumption under the statute that a defendant sentenced to prison does not have the ability to reimburse defense costs. Subdivision (g)(2)(B) of [Penal Code] section 987.8 provides in pertinent part: ‘Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.’” (*Id.* at p. 1068.)

“The court’s finding of the defendant’s present ability to pay need not be express, but may be implied through the content and conduct of the hearings. [Citation.] But any finding of ability to pay must be supported by substantial evidence. [Citations.]” (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398.)

Here, defendant was sentenced to prison for four years. Thus, he is presumed “not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.” (Pen. Code, § 987.8, subd. (g)(2)(B).) Nonetheless, at the sentencing hearing, the trial court impliedly found that defendant had the present ability to reimburse the costs of his defense. However, given the record before this court, we conclude that the evidence is insufficient to support the trial court’s finding. Furthermore, there is nothing in the probation officer’s report that indicates defendant’s circumstances were

unusual such that the presumption of inability to pay may be overcome. Defendant has no assets, is self-employed in landscaping making \$600 month, has a fourth grade education, and is married with five children. Furthermore, defense counsel stated that defendant “appears to have no financial means to reimburse appointment counsel.”

While the People ask this court to remand for a hearing on defendant’s ability to pay, we conclude that remand for further proceedings would be futile. (Cf. *People v. Flores*, *supra*, 30 Cal.4th at pp. 1068-1069.)

V. DISPOSITION

The order directing defendant to pay \$500 in attorney fees pursuant to Penal Code section 987.8 is hereby stricken. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy of the amended abstract to the Department of Rehabilitation and Corrections. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

KING

J.