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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.

LARRY WADE DAVIS,

Defendant and Appellant.

E056171

(Super.Ct.No. FSB1003754)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed in part; reversed in part with directions.

Gregory L. Cannon, 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, Senior Assistant Attorney General, William M. Wood and Ifeolu E. Hassan, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Larry Wade Davis was stopped on the street at 2:00 a.m. in San Bernardino. A search of his admitted residence was conducted based on his parole status. Checks belonging to other persons were found in a room that he occupied with his girlfriend. He was arrested, and on the way to the police station, he told the transporting officer that he was going to snap her neck and kill her when they got to the jail. Defendant was convicted of two counts of aiding in the concealment of stolen property.

Defendant now contends on appeal as follows:

1. The trial court erred by instructing the jury that they need only find he possessed the general intent to aid in the concealment of stolen property rather than specific intent.
2. One of his convictions of aiding the concealment of stolen property must be reversed because the People proved only a single act of concealing stolen property.
3. Independent review by this court of the *Pitchess*¹ materials reviewed by the trial court is necessary.

We reverse one of defendant's convictions of aiding in the concealment of stolen property and remand for resentencing. We otherwise affirm the judgment in its entirety.

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

I

PROCEDURAL BACKGROUND

Defendant was charged with making criminal threats (Pen. Code, § 422; count 1)²; threatening a public officer (§ 71; count 2); resisting an executive officer (§ 69; count 3); and two counts of receiving or concealing stolen property (§ 496, subd. (a); counts 4 and 5). The jury found defendant guilty of counts 4 and 5. The jury was unable to reach a verdict on the first three counts and the People subsequently dismissed the charges pursuant to section 1385. In a bifurcated proceeding, defendant waived his right to a jury trial and he admitted that he had suffered two prior serious or violent felony convictions (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)).

Defendant was originally sentenced to the three-strike sentence of 25 years to life. While this appeal was pending, defendant filed a motion for recall of his sentence pursuant to section 1170.126, subdivision (e). The trial court found that defendant was not a danger to society and he was resentenced to the upper term of six years on count 4. The sentence on count 5 was stayed pursuant to section 654. Defendant received a total sentence of six years in state prison.³

² All further statutory references are to the Penal Code unless otherwise indicated.

³ Defendant originally argued in his opening brief that he was entitled to be resentenced under section 1170.126, subdivision (e). As pointed out by defendant's counsel in a letter dated November 27, 2013, the issue is moot because he has since been resentenced.

II

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

San Bernardino Police Officer Frank Fuentes was working patrol on September 2, 2010. At around 2:00 a.m., he was driving a marked patrol car in the area of Lynwood Drive and Park Avenue in San Bernardino. He observed defendant and another male walking on Lynwood Drive. Officer Fuentes stopped to talk to them. This was a high-crime area known for drug activity and was frequented by gang members. Defendant immediately admitted to Officer Fuentes that he was on parole. Officer Sharon Bonshire arrived to help Officer Fuentes.

Officer Bonshire observed a WSV tattoo on defendant's head. WSV stood for Westside Verdugo, which was a local gang. The male with defendant was also a WSV gang member. Defendant was known as Joker.

Defendant told Officer Bonshire that he lived at 1525 East Eureka, Apartment 104 in San Bernardino (Eureka apartment). The apartment was four blocks from where defendant was initially stopped by Officer Fuentes. Defendant told Officer Bonshire that he was coming from the apartment. He had an altercation with his girlfriend, Angie Matthews, and was walking around to "cool off."

Officer Bonshire transported defendant back to the Eureka apartment in order to search it.⁴ Defendant was handcuffed and placed in the backseat. Officer Fuentes also went to the location. Defendant never got out of the patrol car while Officers Fuentes and Bonshire were at the Eureka apartment.

Matthews and defendant were living together in the apartment. Officer Bonshire had been called to the apartment on two prior occasions because of reports of arguments between defendant and Matthews, and that defendant had beat her up. However, during these prior occasions, defendant had not been present at the apartment when officers arrived.

Officers Fuentes and Bonshire knocked on the front door of the Eureka apartment. Matthews answered the door. Officer Bonshire informed Matthews, and several other persons in the apartment, that a parole search for defendant was going to be conducted on the residence. Some of the individuals in the apartment were WSV members. Two of the individuals were arrested. Officer Fuentes transported the two individuals to the Central Detention Center (CDC).

Officer Bonshire searched the one bedroom that was in the apartment. The bedroom contained a bed, a small entertainment center and a desk. There was men's and women's clothing in the bedroom.

Officer Bonshire searched the desk. Some checks were located on the desk. The checks did not belong to defendant and were in different names. A scrap of paper was

⁴ As a parolee, defendant and his residence were subject to search at any time.

intermingled with the checks. The paper had the name Joker and Lorenzo on it. The words West Side were also on the paper. Two of the checks were in the names of Frank and Linda Long. There were also five personal checks bearing the name Donald Williams. There were other checks with person's names that were not in the apartment. There were also several identification cards with different names other than Matthews and defendant.

On that same desk, Officer Bonshire found two electricity bills in defendant's name (as Lorenzo Davis).⁵ The bill was for the address of the Eureka apartment. Letters from defendant to other persons were found on the desk. After speaking with Matthews, Officer Bonshire decided to arrest defendant.

Defendant was still in the back of the patrol car. Officer Bonshire approached the car with the checks in her hand. She showed the checks to defendant, and he immediately stated, "Those aren't mine. Those are that bitch's." Officer Bonshire then informed defendant she was going to transport him to the CDC.

Defendant was initially cooperative. However, during the ride he started yelling at Officer Bonshire that he could not go back to jail. He became more anxious as they got closer to the CDC. As they got on the street for the CDC, he screamed that he was going to kill Officer Bonshire. He also told her three or four times that when she opened the door to get him out of the car, he was going to snap her neck. Defendant called her a

⁵ Matthews had referred to defendant as Lorenzo to Officer Bonshire.

“fucking bitch” and a “cunt.” Defendant banged his head on the Plexiglas separating him and Officer Bonshire. He continued to yell at her as they pulled into the CDC.

As Officer Fuentes was parked at the CDC, Officer Bonshire pulled up next to him. Officer Fuentes heard defendant yelling inside Officer Bonshire’s patrol car. Officer Fuentes clearly heard defendant say “I’ll kill you.” Officer Bonshire asked Officer Fuentes to talk to defendant to try to calm him down. Defendant calmed down enough to be booked into the CDC. Despite having pepper spray, a gun, a baton and taser gun, Officer Bonshire was afraid of defendant’s threats.

Frank Long had transferred ownership of a house located at 5342 Newberry Avenue in San Bernardino to his son in 2009. At some point, Long’s son moved out of the residence, and in late 2010, Long went to the unoccupied residence. The air conditioner, stove and refrigerator had been taken from the residence. A room that contained items belonging to Long had been ransacked.

Long kept checks and bank documents in the house. Two checks found in the Eureka apartment were identified by Long as checks from an account belonging to him. Long did not know when the room had been ransacked or when the checks were stolen. Long did not know defendant and defendant did not have permission to possess Long’s checks. Long did not know anyone who was in defendant’s residence the night defendant was arrested. It was not until Long received a call that the checks had been found in the Eureka apartment that he realized the checks were missing.

Donald Williams had a safe stolen from his apartment located at 1614 Genevieve in San Bernardino. Williams was unsure when the safe was taken but thought it was in June 2010. He became aware that it was missing in August 2010. He received a telephone call from an officer from the San Bernardino Police Department on September 2, 2010. He was advised that checks belonging to him were found. Williams identified five checks found in the Eureka apartment as belonging to him. Williams did not know defendant or any of the other persons in defendant's apartment that night.

Defendant was released on parole on January 17, 2010. He was returned to prison custody on April 23, 2010 on a possible parole violation. Defendant was released back on parole on July 22, 2010. Upon being released in July, defendant reported his address as the Eureka apartment and that he was living with Angie Matthews.

B. *Defense*

Martha Rubio was the manager of the apartment complex where defendant and Matthews resided. Matthews was the only one who signed the lease. Rubio was unaware that defendant was living in the apartment although she admitted she had seen him at the apartment on several occasions. Matthews had attempted to pay her rent with what Rubio believed was a fake money order. Matthews was evicted from the apartment. When the apartment was vacated, Rubio found several social security cards, checkbooks and identification that had other person's names than Matthews. Rubio destroyed the items.

III

INSTRUCTION ON SPECIFIC INTENT FOR AIDING CONCEALMENT OF STOLEN PROPERTY

Defendant contends that the jury should have been instructed on specific intent for the crime of aiding concealment of stolen property — the theory upon which he was prosecuted on counts 4 and 5 — rather than general intent. The instructional error requires reversal of his convictions.

A. *Additional Factual Background*

Discussion of the jury instructions was conducted off-the-record, but the trial court put some of the issues discussed on the record. The trial court noted that the People had requested as to counts 4 and 5 that the jury be instructed on aiding and abetting as a theory of liability. The trial court rejected the instructions stating, “[Defendant] is guilty as a direct perpetrator if he aided and - - aided in concealing the property, knowing that it was stolen. That’s a substance development of the charge, and there’s not, sort of, vicarious liabilities that would typically be seen through aiding and abetting.”

Thereafter, the jury was instructed as follows: “The following crime requires general criminal intent: receiving stolen property, as charged in counts 4 and 5. For you to find a person guilty of this crime, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act, however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime.” The jury was also instructed that the prosecution had to prove as follows for counts 4 and 5: “. . .

The defendant aided in concealing or withholding property that had been stolen; . . .

When the defendant aided in concealing or withholding the property, he knew that the property had been stolen; . . . AND . . . The defendant actually knew of the presence of the property.” The jury was also instructed that “[t]o *receive property* means to take possession and control of it. Mere presence near or access to the property is not enough. Two or more people can possess the property at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person had control over it, either personally or through another person.”

During argument, the prosecutor reiterated that the victim in count 4 was Long, and the victim in count 5 was Williams. The prosecutor stated that in order to be guilty, the jury had to find that defendant aided in concealing or withholding the property. The prosecutor argued that two people can simultaneously possess property and that defendant knew exactly where the checks were and what was going on. Defendant knew the checks were stolen because he immediately told Officer Bonshire that the checks belonged to Matthews.

Defendant argued that the checks were stolen from Williams when defendant was in custody and Long was unsure when his checks were stolen. There was no evidence as to how long the checks had been in the apartment or who brought them to the apartment.

The prosecutor reiterated that defendant was not charged with receiving stolen property; he was charged with concealing or withholding stolen property. The prosecutor argued that Matthews could have also been arrested for possession of the stolen checks.

B. *Analysis*

For the first time on appeal, defendant raises that the jury should have been instructed on specific intent, rather than general intent, for the crime of aiding the concealment of stolen property. Despite this failure to raise the issue below, it is well-established that “[i]n criminal cases, even absent a request, a trial court must instruct on the general principles of law relevant to the issues the evidence raises. [Citation.]” (*People v. Taylor* (2010) 48 Cal.4th 574, 623.)

“Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or *aids in concealing*, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.” (§ 496, subd. (a), italics added.) “[T]he elements of receiving stolen property are: (1) that the particular property was stolen; (2) that the accused received, concealed or withheld it from the owner thereof; and (3) that the accused knew that the property was stolen.” (*People v. Johnson* (1980) 104 Cal.App.3d 598, 605.)

“When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant’s intent to do some

further act or achieve some additional consequence, the crime is deemed to be one of specific intent.” (*People v. Hood* (1969) 1 Cal.3d 444, 456-457.)

Receiving stolen property has been found to be a general intent crime. (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 494.) However, the second element of the crime — that defendant knew the property was stolen — does involve the specific mental state of knowledge. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 983.)

As noted by defendant, there are no cases discussing the intent requirement for “aids” in concealing stolen property. Based on the use of the word “aids” in the statute, defendant insists that the jury had to be instructed that he possessed the specific intent to conceal the stolen property. In other words, the jury had to be instructed that the prosecutor had to prove that defendant “specifically intended his act, whatever that may have been, to aid in the concealment of the stolen property. . . .”

We need not decide the intent required for aiding the concealment of stolen property, because the evidence presented for counts 4 and 5 supported that defendant had the specific intent to aid in the concealment of stolen property. Even if we were to consider that the jury was not properly instructed on the elements of the crime of aiding in the concealment of stolen property, it is well-established that “[O]mission of instructions on an element of an offense is not reversible per se, but rather may be found harmless on a *Chapman* [*Chapman v. California* (1967) 386 U.S. 18, 24] standard. [Citation.]” (*People v. Reyes* (1992) 2 Cal.App.4th 1598, 1602.)

Defendant claims that he was prejudiced by the general intent instruction because there were other persons who had access to the bedroom undercutting the prosecutor’s

argument that defendant also possessed the checks. The jury could have found him guilty because he provided “incidental aid” to Matthews in the concealment of the property, rather than specifically intending to aid Matthews in the concealing of stolen property.

The evidence provides otherwise. Defendant and Matthews shared the bedroom where the checks were found. The evidence showed that defendant stayed in the patrol car when he was brought back to the Eureka apartment. When he was shown the checks by Officer Bonshire, he never questioned where they were found or what they were. He merely claimed they belonged to Matthews. This showed the checks could not have been placed on the desk by other individuals in the apartment. He had specific knowledge of the presence of the checks in the room.

Defendant clearly was aware of the checks that were on the desk. A scrap of paper bearing his name and gang moniker was intermingled with the checks. He shared the room with Matthews. His immediate claim that the checks did not belong to him could reasonably be interpreted as his acknowledgment that he knew he should not possess the checks. This was strong circumstantial evidence that defendant had knowledge of the checks and specifically intended to aid Matthews in the concealment of the checks. (See *People v. Ferrell* (1990) 218 Cal.App.3d 828, 834 [“Evidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.]’ [Citation.] A jury may infer a defendant’s specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors. [Citation.]”].) It is inconceivable the jury could conclude that defendant had knowledge of the checks and

that he knew they were stolen, but that he did not specifically intend to aid Matthews with the concealment when he clearly kept them on the desk with his other personal documents. The evidence clearly established that defendant specifically intended to personally conceal the stolen checks or intended to aid Matthews in the concealment of the checks. Notwithstanding the failure to instruct on specific intent even under *Chapman* the error is harmless.

IV

SINGLE ACT OF CONCEALMENT OF STOLEN PROPERTY

Defendant contends that one of his two convictions must be reversed because the prosecution failed to prove that the checks subject to those counts were concealed by defendant on two separate occasions.

The information alleged in count 4 was that on or about September 2, 2010, defendant received or concealed stolen property belonging to Long. The information alleged as to count 5 was that on or about September 2, 2010, defendant concealed or received the stolen property belonging to Williams.

“Where a defendant receives multiple articles of stolen property at the same time, this amounts to but one offense of receiving stolen property.” (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 461.) When the People’s theory is that the defendant concealed or withheld stolen property from the owner, the People need not prove when the defendant received the property. Under this theory, if the People prove the defendant possessed and held items of stolen property on the same date, even if the items were stolen from

different owners at different times, the defendant can be convicted of only one violation of section 496, subdivision (a). (See *Mitchell, supra*, at pp. 462-463.)

The People's theory in this case was that defendant aided in the concealment of the stolen checks. Those checks were found on September 2, 2010, and the information alleged the crimes were committed on that date. No evidence was presented when the checks were brought to the apartment. Moreover, no evidence established when defendant became aware of the stolen checks and formed the intent to conceal them. Hence, the evidence only established that he possessed the two checks at the same time when they were seized by Officer Bonshire. There was no evidence that defendant concealed the property on any other date. As such, he could not be convicted of multiple counts of violating section 496.

The People rely on *People v. Morelos* (2008) 168 Cal.App.4th 758 (*Morelos*) to contend defendant was properly convicted of two counts of aiding in the concealment of stolen property. In *Morelos*, the defendants were convicted of multiple counts of receiving stolen property based on their possession of property stolen from multiple victims. In rejecting the defendants' contention that the evidence did not support multiple convictions for receiving stolen property, the court stated: "Here, where the receiving counts involve different property stolen from different victims at different times and where nothing in the record shows [the defendants] received the property on a single occasion, 'the record reasonably supports the inference that appellant[s] received the various stolen goods at different times and in different transactions.'" [Citation.]

Conviction of and sentencing on all the receiving counts were proper as to each.”

(*Morelos, supra*, 168 Cal.App.4th at p. 763.)

This case is distinguishable. Here, defendant was not convicted of receiving stolen property. Rather, he was convicted of aiding in the concealment of stolen property. The only evidence in this case was that Long’s checks were stolen sometime in “late” 2010 and that Williams noticed the checks were missing in August 2010. Defendant was released from custody on July 22, 2010, and the checks were found on September 2010.

There was no evidence presented as to when defendant came into possession of the checks. Despite being stolen at different times from different victims, there is absolutely nothing to support that defendant received the checks on different dates, or commenced aiding in the concealment of the checks on different dates. Moreover, the information alleged that both crimes were committed on September 2, 2010.

We conclude that one of his convictions of violating section 496 must be reversed. We remand for resentencing.

V

PITCHESS REVIEW

Defendant asks this court to independently review the in camera ruling on his *Pitchess* motion.

On May 5, 2011, defendant filed a motion for discovery of information in the police files and records for Officer Bonshire. The San Bernardino Police Department filed opposition. The trial court agreed that it would review the personnel record for

“complaints of dishonesty limited to the five years preceding the event.” On June 2, 2011, the trial court conducted an in camera review of the personnel files of Officer Bonshire. The trial court found there was no discoverable information and the *Pitchess* motion was denied.

Under *Pitchess*, “on a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] . . . If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], ‘the trial court should then disclose to the defendant “such information [that] is relevant to the subject matter involved in the pending litigation.”’ [Citations.]” (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

When the trial court reviews an officer’s files in camera and then denies disclosure of information, the reviewing court should examine the materials to determine whether the lower court abused its discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1232-1233.) The trial court has broad discretion in ruling on both the good cause and disclosure components of a *Pitchess* motion, and a reviewing court will not reverse the trial court’s rulings absent a showing that the trial court abused its discretion. (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086.)

We have reviewed the reporter’s transcript of the in camera hearing on defendant’s *Pitchess* motion. We have also reviewed the records considered by the trial court, which were provided to this court by the custodian of records from the San Bernardino Police

Department. We have determined the trial court did not abuse its discretion when it found no discoverable material in Officer Bonshire's personnel records. (*People v. Mooc, supra*, 26 Cal.4th at p. 1232.)

VI

DISPOSITION

We order that one of defendant's convictions of violating section 496 be reversed. We remand for resentencing and order the trial court to choose which violation of section 496 shall be reversed and resentence defendant in light of his single conviction of violating section 496. In all other respects, the judgment is affirmed.

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RICHLI
Acting P. J.

We concur:

KING
J.

MILLER
J.