

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN ALMENDAREZ,

Defendant and Appellant.

E057267

(Super.Ct.No. FSB1200534)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

Mark L. Christiansen, 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, Peter Quon, Jr., and Julianne Karr Reizen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Sean David Almendarez guilty of receiving stolen property. (Pen. Code, § 496, subd. (a).)<sup>1</sup> The trial court found true the allegations that defendant suffered: (1) two prior strike convictions (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)); and (2) five prior convictions for which he served prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to prison for a term of 11 years. Defendant raises two issues on appeal. First, defendant contends the trial court erred by not instructing the jury on the law of specific intent. Second, defendant asserts the trial court erred by excluding evidence relating to the location of some of the stolen goods. We affirm the judgment.<sup>2</sup>

### **FACTUAL AND PROCEDURAL HISTORY**

On February 3, 2012, at approximately 2:00 p.m., Tina Hatfield was at home in San Bernardino, when she saw defendant and another man, Diamond Ozier, riding their bicycles down the street. The men were riding their bicycles side by side. There was a “big and full” duffle bag “on the front” of one of the bicycles. Hatfield called 911 to report the men’s suspicious activity.

---

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The trial court originally sentenced defendant to prison for an indeterminate term of 25 years to life. In defendant’s opening brief he raised a third contention, asserting he should be resentenced under the Three Strikes Reform Act of 2012. On January 16, 2013, while this appeal was pending, the trial court recalled defendant’s sentence. On February 27, 2013, the trial court resentenced defendant to prison for a term of 11 years. In defendant’s reply brief, he concedes that his third contention is now moot and withdraws the argument.

Hatfield observed defendant and Ozier go to a house on her cul-de-sac. As one of the men stood in front of the house, the second man went to an area outside the house where the trashcans were stored. Hatfield saw the man “put a bunch of stuff in a big, big, green trash can.” The men then rode away on their bicycles without the duffle bag.

San Bernardino Police Sergeant Aranda saw two men matching the description given by Hatfield riding bicycles in an area near the cul-de-sac. Defendant was one of the men stopped by Sergeant Aranda. During a field identification, Hatfield identified defendant as one of the men she saw riding a bicycle down the cul-de-sac.

Another officer went to the house where items were placed in a trashcan. The officer found a duffle bag and personal property in the trashcan. The property in the trashcan belonged to the victim, who lived approximately four houses away. Ozier admitted taking the property from the victim’s garage. The property from the trashcan was returned to the victim. The victim did not give defendant permission to take property from his garage.

During closing argument, the prosecutor asserted, “It’s reasonable to conclude that the defendant concealed or aided in concealing the property that was stolen, [the victim’s] property.” The jury was instructed on the law of aiding and abetting.

(CALCRIM No. 401.)

## **DISCUSSION**

### **A. INTENT INSTRUCTION**

Defendant contends the trial court erred by instructing the jury on the law of general intent because receiving stolen property is a specific intent offense when a

theory of aiding and abetting is raised. We conclude the trial court erred, but that the error was harmless.<sup>3</sup>

“We independently assess whether instructions correctly state the law [citation], keeping in mind that ‘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. [Citations.] “[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial.” [Citation.] “The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.” [Citation.]’ [Citation.]” (*Hernandez, supra*, 181 Cal.App.4th at p. 1499.)

The elements of receiving stolen property are: (1) the property at issue was stolen, (2) the defendant knew the property was stolen, and (3) the defendant possessed the stolen property. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.) Receiving stolen property is a general intent crime. (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 494.) However, the second element of the crime does involve knowledge. A general intent crime can involve a particular knowledge requirement. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 983.)

---

<sup>3</sup> The People contend defendant forfeited this issue for appeal by not requesting the specific intent instruction in the trial court. A trial court has a sua sponte duty to instruct the jury on the relevant law. (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1499 (*Hernandez*)). Thus, it could reasonably be argued that defendant did not forfeit the issue because it was the trial court’s responsibility to provide all the necessary instructions regardless of defendant’s lack of a request. As a result, we will address the merits of defendant’s assertion.

Aiding and abetting requires proof the defendant “‘act[ed] 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.’ [Citation.]” (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123 (*Mendoza*).)

Our Supreme Court has given the following explanation regarding specific intent in relation to an aiding and abetting theory of guilt: “The intent requirement for an aider and abettor fits within the . . . definition of specific intent. To be culpable, an aider and abettor must intend not only the act of encouraging and facilitating but also the additional criminal act the perpetrator commits. . . . [I]f the alleged aider and abettor intended only the act of handing a bat to another person, and did not intend ‘to do a further act or achieve a future consequence’ [citation], that person would not intend that any criminal act at all be committed. Aiding and abetting liability attaches only with the intent that the direct perpetrator commit a further, criminal, act in order to achieve the future consequence of that act.” (*Mendoza, supra*, 18 Cal.4th at p. 1129.) Thus, our Supreme Court has concluded that an aiding and abetting theory of guilt involves a specific intent component, in particular, the specific intent that the direct perpetrator commit a criminal act.

The People, relying on *People v. Torres* (1990) 224 Cal.App.3d 763, 770, assert aiding and abetting does not involve an intent requirement, and therefore, the intent requirement for aiding and abetting is the same as that for the underlying crime. Accordingly, since receiving stolen property is a general intent offense, aiding and abetting the receipt of stolen property would only require a general criminal intent.

Given our Supreme Court’s discussion detailed *ante*, we find the People’s argument to be unpersuasive because it directly contradicts the conclusion reached in *Mendoza*.

The People assert *Mendoza* is distinguishable because the issue in that case was whether voluntary intoxication was a defense to guilt as an aider and abettor. (*Mendoza, supra*, 18 Cal.4th at p. 1126.) The People contend the *Mendoza* court did not hold a specific intent instruction is required when relying on a theory of aiding and abetting. The People’s argument is not persuasive because we are bound by our Supreme Court’s conclusion that aiding and abetting requires proof of specific intent. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) If this court were to conclude that specific intent were not a required component of aiding and abetting, then we would be directly contradicting our Supreme Court’s conclusion that “[t]he intent requirement for an aider and abettor fits within the . . . definition of specific intent.” (*Mendoza, supra*, 18 Cal.4th at p. 1129.)

We cannot overrule our Supreme Court’s conclusion. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County, supra*, 57 Cal.3d at p. 455.) Since specific intent is a component of aiding and abetting, an instruction concerning the law of specific intent should have been given to the jury. (*Hernandez, supra*, 181 Cal.App.4th at p. 1499 [a trial court has a sua sponte duty to instruct the jury on the relevant law].) Accordingly, we conclude the trial court erred by not giving the jury a specific intent instruction.

“[O]mission of instructions on an element of an offense is not reversible per se, but rather may be found harmless on a *Chapman* standard. [Citation.]” (*People v.*

*Reyes* (1992) 2 Cal.App.4th at p. 1602.) Thus, we must consider whether the trial court's error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

A specific intent instruction would have informed the jury that defendant must have aided and abetted the direct perpetrator with the specific intent described in the aiding and abetting instruction. (CALCRIM No. 251.) The intent instruction sets forth the required union of act and intent. (CALCRIM No. 251.)

The aiding and abetting instruction, which the jury received, informed the jury that, in order to find defendant guilty, it must conclude “[b]efore or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime.” (CALCRIM No. 401.) The instruction further explained, “Someone *aids and abets* a crime if he knows of the perpetrator’s unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.” (CALCRIM No. 401.)

The aiding and abetting instruction described the type of specific intent required, e.g., the specific intent that the direct perpetrator commit a crime. The instruction also explained that the intent must be formed before or during the crime, thus creating a union of act and intent, as opposed to being an accessory after the fact. The instruction explained the temporal element of the intent requirement. Accordingly, since the aiding and abetting instruction described the type of specific intent required and the temporal aspect of the intent formation, we conclude beyond a reasonable doubt that the failure to instruct the jury with a separate specific intent instruction was harmless beyond a

reasonable doubt, because the jury received the necessary information from the aiding and abetting instruction.

B. EXCLUSION OF EVIDENCE

1. *PROCEDURAL HISTORY*

During the victim's testimony, he stated that not all the items taken from his garage were returned at the same time. The victim explained that some items were returned in the afternoon, while some tools were returned at approximately 8:00 p.m.

During Sergeant Aranda's cross-examination testimony, the following exchange took place:

"[Defense Counsel]: Wasn't there some tools that were located at Mr. Ozier's house that day that were taken to [the victim's house] that day?"

"[Prosecutor]: Objection. Your Honor, relevance.

"[Defense Counsel]: It's the same line as what I talked about or brought out originally.

"[Prosecutor]: May we approach?"

"The Court: I think I'm going to sustain that objection, [Defense Counsel]."

During a break, outside the presence of the jury, the prosecutor requested statements about "further property being recovered from Mr. Ozier's house" "be stricken from the record as being [ir]relevant because [defendant] is not being charged with that property . . . ." The trial court reminded the prosecutor that it had sustained the objection concerning property being found at Ozier's house. The prosecutor did not recall the objection being sustained, so the trial court agreed "to strike any question that

the tools which were given to [the victim] were recovered from Mr. Ozier's house.”

The trial court found the information to be irrelevant.

The court explained, “I think it raises serious [Evidence Code section] 352 questions in terms of distracting the jury from the issues in this case which are limited to ‘Did the defendant possess the property that was stolen and recovered from the trash can?’ The report seems to agree but did not include tools. Whether those tools were taken, and how they ended up at Mr. Ozier's house are [a] fairly narrow set of facts that are being alleged as showing this defendant's guilt.”

Defense counsel asserted the evidence was relevant because it “substantiate[d] Mr. Ozier[’s] statements that he was responsib[le] for the burglary at that location, the burglary had been accomplished earlier that day.” The trial court explained that since the evidence reflected Ozier confessed to burglarizing the victim's house there was little value to the evidence of the victim's tools being found at Ozier's home. The trial court concluded, “exploring th[e] question of how the tools ended up” at Ozier's house would consume an undue amount of time given the slight relevance of the evidence.

## 2. ANALYSIS

Defendant contends the trial court erred by excluding the evidence concerning tools being found at Ozier's house because “resolution of the timing problem was significantly relevant and probative.” Defendant asserts that by failing to include this evidence there was a false impression that “the disposal of the property took place immediately after its theft,” which gave an impression that defendant participated in the burglary.

A trial court “in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) ““A trial court’s exercise of discretion in admitting or rejecting evidence pursuant to Evidence Code section 352 “will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice.” [Citation.]’ [Citation].” (*People v. Thomas* (2011) 51 Cal.4th 449, 485.)

As set forth *ante*, the elements of receiving stolen property are: (1) the property at issue was stolen, (2) the defendant knew the property was stolen, and (3) the defendant possessed the stolen property. (*In re Anthony J.*, *supra*, 117 Cal.App.4th at p. 728.) Exactly when the property was originally stolen is not relevant to the charge. Thus, whether Ozier had time to return to his house before hiding or disposing of the remaining items was not relevant to the issue of whether defendant was guilty of receiving stolen property. Since the evidence was irrelevant, we conclude the trial court acted within its discretion by excluding it.

Defendant contends that the evidentiary ruling also constitutes a due process violation because he was not permitted to fully present his defense. “[G]enerally, violations of state evidentiary rules do not rise to the level of federal constitutional error. [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 91, fn. omitted.) Since we have concluded *ante*, that evidence about the timing of the original burglary was irrelevant, we conclude defendant’s due process rights were not violated.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER  
J.

We concur:

McKINSTER  
Acting P. J.

RICHLI  
J.