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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRELL DAVENPORT,

Defendant and Appellant.

G045366

(Super. Ct. No. 10NF2861)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Suzanne G. Wrubel, 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, Melissa Mandel and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Tyrell Davenport was convicted of first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a))¹ and resisting and obstructing an officer (§148, subd. (a)(1).) He argues the trial court, having instructed the jury with general principles on aiding and abetting, was also required to instruct on its definition. He also argues that a statement from his companion during the crime was wrongly excluded. We find no reversible error, and therefore affirm.

I

FACTS

On September 14, 2010, Matt Clark, a retired California Highway Patrol officer, was living in Anaheim Hills. Clark was in his backyard at approximately 10:45 a.m. when he heard a car pull up on the street below his, but he did not see the car or who was driving. From about 100 feet away, Clark observed an African-American male in his early 20's wearing a white tank top and long, black, baggy shorts walk up to the front door of the home owned by William Scott. Clark later identified the man he saw as defendant. Clark saw defendant knock on the door, look into the front window, and knock a second time before slamming his shoulder into the door. As Clark was going into his home to call 911, he heard voices and observed a second individual walk towards the front door of the same residence. Shortly after calling the police, Clark heard the sound of glass breaking.

At the same time, Sergeant Bryan Santy of the Anaheim Air Support Unit was patrolling the area by helicopter. From his aerial view, Santy was able to see through the residence's sliding glass door. He observed an African-American male inside wearing a white T-shirt and long dark shorts with white, sock-like clothing covering both hands. A few minutes later, the man exited from the rear sliding door followed by a second man very similar in appearance. The second individual exiting the residence was

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

also an African-American male in his early 20's wearing a white tank top and long dark shorts.

Both suspects jumped the fence into the yard next door and began to run. Anaheim Patrol Officer Carlos Haynie, who had responded to the original police dispatch, followed the suspects in his vehicle at the direction of the helicopter unit. Haynie caught up with one of the fleeing suspects and commanded him to stop. He later identified this man as defendant. Defendant saw the pursuing police officers, both in uniform, and ran in the opposite direction.

From the helicopter unit's PA system, Santy told the suspects to stop running and that they were surrounded by police officers. At that point, both suspects stopped in a creekbed and the pursuing officers on the ground took defendant and his partner into custody.

After being read his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, defendant told Haynie that he had been staying in the Motel 6 off of Euclid and Highway 91 in Anaheim, and that he had walked to his present location. He denied breaking into anyone's home. He stated that he started running because someone, not in uniform, was chasing him with a gun.

When William Scott returned to his residence later that afternoon, he observed that his front window was broken. The house had been rummaged through, the television was in the middle of the living room, items were pulled off the bookcase, and drawers were opened. A black Mercedes-Benz SUV was found outside the Scott residence. Inside the car was a wallet, several pieces of jewelry, a bolt cutter, and a Blackberry cell phone belonging to a woman named Claire Bradford. Defendant's fingerprints were found on the Mercedes.

Detective George Barraza of the Anaheim Police Department interviewed defendant at the police station. Defendant identified his partner as his cousin, Marquice Easley. He claimed that he and Easley borrowed the car from his aunt (Easley's mother)

and they were headed to Moreno Valley to visit his grandmother when they ran out of gas. Defendant said he and Easley stopped in the vicinity of Scott's residence to ask for directions. Defendant told Barraza that he was driving the Mercedes.

During Easley's interview with Detective Mau Huynh, Easley confessed that he broke into the house because he needed money. Easley also stated that he was the one who had knocked on the door and broke the window. He told the detective that he purchased the Blackberry phone in Los Angeles, and intended to resell it for a profit.

On November 23, 2010, the Orange County District Attorney filed an information alleging four counts: first degree residential burglary (§§ 459, 460, subd. (a), count one); receiving stolen property, jewelry and a cell phone (§ 496, subd. (a), count two); possession of burglary tools (§ 466, count three); and resisting and obstructing an officer (§ 148, subd. (a)(1), count four). It was further alleged that defendant had a prior strike (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)), a serious prior felony (§§ 667, subd. (a)(1), 1192.7) and a prison prior (§ 667.5, subd. (b)).

The jury found defendant guilty on counts one and four and not guilty on counts two and three. The court sentenced defendant to 13 years in state prison, consisting of the middle term of four years on count one, which was doubled to eight years pursuant to the "Three Strikes" law (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)), plus an additional five years for his prior serious felony § (667.5, subd. (a)(1)). Defendant now appeals.

II

DISCUSSION

Aiding and Abetting Instruction

During the trial, the court stated that an aiding and abetting instruction would need to be added to the jury instructions in this case, though such an instruction had not been requested by either party. After both sides presented their case, the court instructed the jury that defendant could be found guilty of the charged crimes either as a

perpetrator or as an aider and abettor pursuant to CALCRIM No. 400. The judge did not provide CALCRIM No. 401, the instruction that defines aiding and abetting. Defendant claims this was error, while respondent asserts that CALCRIM No. 400 was mere surplusage, because the prosecution did not proceed on a theory of aiding and abetting. Therefore, respondent argues, any error was harmless.

CALCRIM No. 400, as given, states: “A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.”

CALCRIM No. 401 states: “To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant’s words or conduct did in fact aid and abet the perpetrator’s commission of the crime.”

The prosecutor mentioned aiding and abetting only once during closing argument: “Aiding and abetting. You received this instruction as well. This is just an instruction you are given more if you are going to accept a rather novel view of this case. I don’t think it really is applicable here, but if you do believe that the defendant was there just to assist in the crime, he is still guilty. Even if you believe the defendant was merely aiding his cousin, he is still guilty.” The prosecutor did repeatedly argue, however, that defendant committed residential burglary by entering the home with the required intent. Defense counsel never mentioned aiding and abetting. Among other things, counsel argued that defendant entered the residence, but the prosecutor had not proved beyond a reasonable doubt that defendant intended to steal.

We review jury instructions de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn.1.) “Even absent a request, the trial court must instruct on the general principles of law applicable to the case. [Citation.] . . . The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant’s theory of the case. [Citation.] Evidence is ‘substantial’ only if a reasonable jury could find it persuasive. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1200.)

Given the facts here, we conclude the court erred in its determination that an aiding and abetting instruction was necessary. “[O]ne who engages in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor, of the completed crime. . . . If the defendant performed an element of the offense, the jury need not be instructed on aiding and abetting, even if an accomplice performed other acts that completed the crime.” (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1371.) The relevant charged crime here is residential burglary. The elements of that crime are: 1) unlawfully entering a building; 2) the intent to commit theft or another felony. (See, e.g., CALCRIM No. 1700; *In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) It was undisputed that defendant entered the building, thereby committing an element of the charged crime.

It was therefore unnecessary to instruct the jury on a theory of aiding and abetting. The additional instruction was an “‘abstract’ instruction, i.e., ‘one which is correct in law but irrelevant[.]’ [Citations.]” (*People v. Roland* (1992) 4 Cal.4th 238, 282.) “[I]n most cases the giving of an abstract instruction is only a technical error which does not constitute ground for reversal.” (*Ibid.*) We find this to be such a case, but nonetheless, we evaluate the error for potential prejudice and conclude it was harmless under even the most stringent standard. (*Chapman v. California* (1967) 386 U.S. 18.)

Defendant's contention that a reasonable juror could have found that defendant merely followed Easley into the house and "got caught up in Easley's actions" is pure conjecture, based entirely on the contention that Clark mistook defendant for Easley. The only question from the jury during deliberations showed it was focused on the issue raised by defense counsel during closing argument, specifically, whether defendant had the intent to steal when he entered the residence. Further, the evidence against defendant was overwhelming, including his presence in the house, the fact the house had been quickly ransacked, and defendant's flight and lies to the police. There is simply not the slightest indication that had the jury been further instructed on aiding and abetting, a different outcome would have resulted. Thus, we find no prejudice and no reversible error.

Easley's Hearsay Statement

Defendant's next contention is that the court erred in excluding a statement by Easley that he drove the car on the day of the burglary. Defendant apparently believes this evidence would be helpful in establishing that he was just along for the ride on the day in question, and he had no intent to commit a felony when he entered the home. He argues this statement was admissible over a hearsay objection as a statement against penal interest (Evid. Code, §1230) and that its exclusion was prejudicial. Respondent claims the statement failed to satisfy Evidence Code section 1230's requirements, and any error was not prejudicial.

This issue arose during trial when the defense indicated it wished to introduce several of Easley's statements to Huynh, the detective who interviewed him. The defense wanted to introduce Easley's statements that it was he rather than defendant who knocked on the door and hit the door with his shoulder, broke the glass, climbed through the window, as well as who drove the car to the site of the burglary. Counsel argued these statements were against Easley's penal interest.

The prosecution filed an opposition, arguing the hearsay exception did not apply to collateral assertions within statements against penal interest. The opposition also argued a number of other points, including the reliability of the statements. Ultimately, the court found Easley unavailable (he was in Wasco State Prison) and concluded that Easley's statements that he knocked on the door, needed money, tried to break the door, threw a brick through the window, and entered the house by going through a hole in the window were all admissible as declarations against penal interest.

The only statement the court disallowed was Easley's statement about driving. The court found it "is unreliable because it is contradicted when first Mr. Easley says that he, Easley was the driver and then later in the report . . . he says [defendant] was driving at one point in the morning and he was driving later. [¶] So I don't think that that would be admissible as a clear, unequivocal statement against penal interest." Defendant admitted Easley's statements through Huynh's testimony that he broke into the residence because he needed money, and that he was the one who knocked on the door, broke the window and went into the house through the window.

A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197.) Evidence Code section 1230 states, in relevant part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made . . . so far subjected him to the risk of civil or criminal liability. . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

The statement regarding who was driving the car simply fails to qualify as a statement against interest. "[A] declaration against penal interest must be 'distinctly' against the declarant's penal interest [citation] . . ." (*People v. Shipe* (1975) 49 Cal.App.3d 343, 354.) The exception "should not apply to collateral assertions within declarations against penal interest." [Citation.]" (*People v. Duarte* (2000) 24 Cal.4th

603, 612.) There is simply nothing regarding who was driving the car that subjects Easley to criminal liability. It is a collateral matter and therefore, not admissible under the penal interest exception of the hearsay rule. We need not consider the parties' remaining arguments regarding reliability and unavailability, because the statement does not qualify for the exception. The trial court did not err. Accordingly, we also reject defendant's claim of cumulative error.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.