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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE ROBERT HAMILTON,

Defendant and Appellant.

H042449

(Santa Clara County

Super. Ct. No. C1371829)

I. INTRODUCTION

Defendant Eugene Robert Hamilton pleaded no contest to two counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b))¹ and one count of committing grand theft by acquiring and retaining access card account information with fraudulent intent (§ 484e, subd. (d)). Defendant admitted he had suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and had served a prior prison term (§ 667.5, subd. (b)).

After Proposition 47 was passed in November of 2014, defendant requested the trial court reduce his two burglary convictions to misdemeanors, asserting that the value of the stolen goods was less than \$950 as to each count and that the burglaries therefore qualified as “shoplifting” offenses under newly-enacted section 459.5. The trial court

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

declined to do so, finding that defendant was an aider and abettor in the burglary offenses committed by his codefendants, which involved stolen goods with a value of more than \$950. The trial court then sentenced defendant to a four-year prison term.

On appeal, defendant contends the trial court erred by failing to reduce his burglary convictions to misdemeanors pursuant to Proposition 47. For reasons that we will explain, we will affirm the judgment.

II. BACKGROUND

A. *The Offenses*

Defendant, Anthony Lyde, and Jason Arnsworth were jointly charged with two counts of committing second degree burglary of Macy's (counts 1 & 2; §§ 459, 460, subd. (b)), two counts of committing second degree burglary of Nordstrom (counts 3 & 4; §§ 459, 460, subd. (b)), one count of using personal identifying information without authorization (count 5; § 530.5, subd. (a)), one count of acquiring and retaining access card account information with fraudulent intent (count 6; § 484e, subd. (d)), and one count of possessing or using a reencoder with intent to defraud (count 7; § 502.6, subd. (b)²).

On July 16, 2014, defendant pleaded no contest to count 1 (one of the Macy's burglaries), count 3 (one of the Nordstrom burglaries), and count 6 (acquiring and retaining access card account information with fraudulent intent). Defendant admitted an allegation that he had served a prior prison term (§ 667.5, subd. (b)), and he admitted an allegation that he had suffered a prior federal conviction for robbery, which qualified as a strike (§§ 667, subs. (b)-(i), 1170.12).

² “ ‘Reencoder’ means an electronic device that places encoded information from the magnetic strip or stripe of a payment card on to the magnetic strip or stripe of a different payment card.” (§ 502.6, subd. (e)(2).)

1. Count 1 (Burglary of Macy's)³

On December 19, 2013, police were called to Macy's at Valley Fair Mall after the store's loss prevention staff saw Lyde and Arnsworth making "suspicious purchases." Lyde and Arnsworth had been using multiple credit cards, many of which had been declined, to make purchases of gift cards and other merchandise. Defendant had arrived at the mall with Lyde and Arnsworth, and he had also made purchases at Macy's, but he had been alone when he did so.

The police contacted the three men as they returned to their vehicle. Lyde was in possession of gift cards and several credit cards, including one that had been used at Macy's. Defendant possessed several credit and debit cards, including credit cards with Lyde and Arnsworth's names on them, as well as gift cards. Defendant also possessed a device that extracts information from credit cards and can add information onto credit cards. Additional credit cards, gift cards, and merchandise were found in the vehicle. Some of the gift cards and merchandise had been purchased at Nordstrom.

Investigation revealed that defendant had purchased two items, which had a combined value of \$946.98 before tax. Lyde had purchased two items, which had a combined value of \$898.48, and he had attempted to make a purchase of merchandise worth \$676.64. Arnsworth had purchased merchandise with a combined value of \$3,683.77.

2. Count 3 (Burglary of Nordstrom)

When defendant was arrested in the Valley Fair parking lot, he had a Nordstrom shopping bag in addition to a Macy's shopping bag. Further investigation showed

³ The facts underlying counts 1 and 3 are taken primarily from what the parties refer to as the "stipulated facts," which are contained in defendant's memorandum of points and authorities in support of his motion to redesignate his felony convictions. Some facts are also taken from the probation report.

defendant had purchased six items with a total value of \$844.50. Lyde had also made purchases in Nordstrom; his two transactions totaled \$1,061.81 and \$880.88. Defendant was not present when Lyde made those purchases.

B. Motions and Responses

On January 26, 2015, defendant filed a motion requesting the trial court dismiss the strike allegation. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)). The People filed an initial response to defendant's *Romero* motion, opposing the dismissal of the strike allegation. The People noted that Proposition 47 had passed since the time of defendant's pleas and conceded "that under current law, the two burglary counts must be reduced to Misdemeanors."

The People withdrew the concession regarding the reduction of the burglary charges in a supplemental response. The People asserted, "Proposition 47 does not affect [defendant's] burglary pleas because the offenses involved takings of more than \$950." The People suggested that the trial court hold a hearing at which it could hear evidence concerning the value of the property. The People noted that the combined value of the items taken from Macy's by the three codefendants was \$6,287.87 and that the combined value of the items taken from Nordstrom by the three codefendants was \$2,861.08.

On March 23, 2015, defendant filed a motion to reduce his burglary convictions to misdemeanors pursuant to Proposition 47. Defendant noted that he was not seen inside Macy's or Nordstrom when the codefendants made their purchases and that he made his purchases alone, and he argued that the value of the property taken by all three codefendants could not be aggregated to establish that the property had a value of over \$950. The People filed a response to defendant's motion, arguing that defendant had been an aider and abettor who did not need to be present in order to be liable for his codefendants' takings.

C. Sentencing Hearing

On May 15, 2015, the trial court denied defendant's *Romero* motion and his motion to reduce the burglary convictions to misdemeanors pursuant to Proposition 47. The trial court imposed a four-year prison term: the lower term of 16 months for count 1, doubled to 32 months pursuant to the Three Strikes law; and a consecutive term of eight months for count 3, doubled to 16 months pursuant to the Three Strikes law. The trial court reduced count 6 to a misdemeanor pursuant to section 17, subdivision (b) and struck the prior prison term allegation pursuant to section 1385.

The trial court explained that it was denying defendant's motion to reduce his burglary convictions to misdemeanors pursuant to Proposition 47 because "the amount taken, when you take into consideration the co-defendants, is clearly in excess of \$950." The trial court found that "a defendant who is charged with co-defendants [is] responsible for the actions of [his] co-participants in crime."

III. DISCUSSION

On November 4, 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) Proposition 47 reclassified certain drug and theft related offenses as misdemeanors instead of felonies or alternative felony misdemeanors. (§ 1170.18, subd. (a); *People v. Shabazz* (2015) 237 Cal.App.4th 303, 308.) "Among those crimes are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5.^[4] Shoplifting is now a misdemeanor unless the

⁴ Section 459.5 provides: "(a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. (continued)

prosecution proves the value of the items stolen exceeds \$950. [Citations.]” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.)

A. The Trial Court Properly Considered Defendant’s Motion

Defendant contends the statutory changes effectuated by Proposition 47 applied retroactively to him because although he had entered his pleas, he had not yet been sentenced at the time Proposition 47 was enacted. He relies on *In re Estrada* (1965) 63 Cal.2d 740 for the proposition that in general, a statutory amendment is retroactive if it reduces the punishment for a particular criminal offense.

The People contend that Proposition 47 does not apply retroactively in this circumstance and that the trial court therefore “acted in excess of its jurisdiction” when it considered defendant’s motion before sentencing. However, the People did not object on this basis in the trial court but “effectively signaled” consent to the trial court’s consideration of defendant’s Proposition 47 motion by filing several responses to the motion. (See *People v. Ford* (2015) 61 Cal.4th 282, 289.) The People are therefore estopped from challenging the trial court’s authority to grant defendant’s motion. (*Ibid.*; see also *People v. Williams* (1999) 77 Cal.App.4th 436, 447 [although “fundamental jurisdiction cannot be conferred by waiver, estoppel, or consent,” a party may be estopped from challenging an act in excess of jurisdiction].) Thus, in this case we need not determine whether Proposition 47 applies retroactively to cases in which a defendant has pleaded to one or more felonies but has not yet been sentenced. (Cf. *People v. Davis* (2016) 246 Cal.App.4th 127, 137 [Proposition 47 does not apply retroactively to

Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170. [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”

defendants who were “currently serving a sentence” or who had served their sentences at the time Proposition 47 was enacted; such defendants must petition for recall of sentence pursuant to section 1170.18, subdivision (a) or apply for redesignation pursuant to section 1170.18, subdivision (f)].)

B. The Trial Court was not Limited to the Record of Conviction

Defendant asserts that the trial court was limited to the “record of conviction” in determining whether the burglary convictions qualified as shoplifting offenses. However, as the Attorney General points out, defendant did not object on this ground in the trial court, and defendant himself relied on the “stipulated facts” in his Proposition 47 motion. Thus, not only was this claim forfeited (see Evid. Code, § 353), but any error was invited (see *Horsemen’s Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1555 [“If an appellant offers inadmissible matters into evidence, he cannot complain of its admission on appeal.”]; *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744 (*Salmorin*) [in determining whether defendant was entitled to Proposition 47 relief, trial court did not err by considering police report where defendant had relied on report and agreed to its admission]).

On the merits, defendant’s evidentiary claim lacks merit. Defendant’s reliance on *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*) is misplaced, since that case did not involve Proposition 47. *Bradford* held that a trial court is limited to considering the record of conviction when making an initial determination of eligibility for resentencing under Proposition 36, the Three Strikes Reform Act of 2012. (*Bradford, supra*, at pp. 1338-1339.) Several other cases have rejected the idea that trial courts are similarly limited when considering Proposition 47 petitions, reasoning that eligibility for Proposition 47 relief “often cannot be established merely from the record of conviction of the felony.” (*People v. Johnson* (2016) 1 Cal.App.5th 953, 966; see also *People v. Perkins* (2016) 244 Cal.App.4th 129, 140, fn. 5 (*Perkins*) [“we do not believe the

Bradford court’s reasons for limiting evidence to the record of conviction are applicable in Proposition 47 cases”]; *Salmorin, supra*, 1 Cal.App.5th at p. 744 [following *Perkins*].)

C. Proposition 47 Contains No Pleading and Proof Requirement

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), defendant contends that in determining the nature of his offenses, the trial court was precluded from increasing the penalty for his crimes based on facts that were not pleaded and proved—either by defendant’s admission or a jury trial. Defendant argues that the trial court erroneously relied on facts that he did not admit when determining that his sentence should be “increased” above the statutory maximum provided for shoplifting.

We disagree. As explained in *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444 at page 451 (*Rivas-Colon*), *Apprendi* and *Blakely* are not applicable to situations where a defendant has “ ‘already been proved guilty of [his or her] offenses beyond a reasonable doubt,’ ” such as this case, where defendant admitted, by his pleas, that he was guilty of two counts of second degree burglary. The question presented by defendant’s motion to reduce his burglary convictions to misdemeanors was “not whether to increase the punishment for his offense,” but whether he was eligible for a reduction of his felony conviction to a misdemeanor. (*Rivas-Colon, supra*, at p. 451.) Defendant did not have the right to a jury determination of that issue.

D. As an Aider and Abettor, Defendant Was Liable for the Aggregate Value of the Property

Citing to *People v. Hoffman* (2015) 241 Cal.App.4th 1304 (*Hoffman*), defendant contends it was improper for the trial court to aggregate the value of all the property taken by the three defendants from each store. *Hoffman* is distinguishable, however. In that case, the defendant was convicted of seven forgery counts, and each count related to a check with a value of under \$950. (*Id.* at p. 1307.) The trial court denied the defendant’s Proposition 47 petition, reasoning that if the checks were aggregated, the

total amount was over \$950. (*Hoffman, supra*, at p. 1308.) The appellate court reversed, explaining that “[t]he misdemeanor/felony characterization for forgery depends on ‘the value of the check’ or other instrument” in each count. (*Id.* at p. 1310.) In the instant case, the trial court did not similarly aggregate multiple *counts*. Rather, as the stipulated facts show, the burglaries charged in counts 1 and 3 each encompassed the taking of multiple items.

Defendant also contends that even under the stipulated facts, the evidence does not support a finding that he was an aider and abettor of the codefendants. Defendant points out that he was “by himself” when he made the purchases at each store, and he asserts that the evidence does not show that he “worked in a coordinated effort with his codefendants to steal properly valued over \$950.”

“Because section 31 defines as principals all who directly commit a given offense or who aid and abet *in its commission*, the same criminal liability attaches whether a defendant directly perpetrates the offense or aids and abets the perpetrator. [Citations.]” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1038-1039, fn. omitted (*Montoya*)). “ ‘An aider and abettor is one who acts “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.]’ [Citation.]” (*People v. Smith* (2014) 60 Cal.4th 603, 611.) “[F]or the purpose of assessing the liability of an aider and abettor, a burglary is considered ongoing during the time the perpetrator[s] remain[] inside the structure.” (*Montoya, supra*, at p. 1045.)

In this case, the three codefendants were jointly charged with each count of burglary. Thus, the trial court could find that defendant admitted, by his plea, that he jointly participated in the two burglaries with Lyde and Arnsworth, such that the value of the property taken during each burglary was over \$950. The stipulated facts also support a finding that the burglaries were committed jointly by the three codefendants, or a finding that defendant aided and abetted the burglaries committed by Lyde and

Arnsworth. Defendant arrived at the mall with Lyde and Arnsworth. Defendant possessed a device for extracting information from credit cards and adding information onto credit cards. Defendant and Lyde both made purchases at Nordstrom using fraudulent credit cards, and all three codefendants made purchases at Macy's using fraudulent credit cards. After Lyde and Arnsworth made their purchases at Macy's, defendant followed them out of the mall and back to their car, which contained additional fraudulent credit cards and debit cards. This evidence supports a finding that defendant acted together with his codefendants, a finding that defendant had knowledge of the codefendants' intent, and a finding that defendant encouraged or facilitated the commission of the codefendants' burglaries, which involved property with a value of over \$950.

Because we conclude the evidence supports the trial court's determination that each burglary involved goods with a value of over \$950, we need not consider the Attorney General's remaining contentions: (1) that defendant's second degree burglary offenses do not qualify as shoplifting under section 459.5 because the offenses involved a fraudulent transaction rather than larceny;⁵ and (2) that if defendant's second degree burglary convictions are reduced to misdemeanors, the prosecution is entitled to reinstate the previously dismissed charges and withdraw from the plea bargain.⁶

IV. DISPOSITION

The judgment is affirmed.

⁵ That question is currently pending before the California Supreme Court. (See *People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171.)

⁶ The California Supreme Court has now held that the People are not entitled to have a plea agreement set aside when a defendant seeks to have his or her sentence recalled under Proposition 47. (See *Harris v. Superior Court* (Nov. 10, 2016, S231489) __ Cal.5th __.)

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

People v. Hamilton
H042449