Filed 5/21/02

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANDREW JOSEPH DELEON, Defendant and Appellant.	H021985 (Santa Clara County Super. Ct. No. CC062339)

Defendant Andrew Joseph Deleon appeals after conviction, by jury trial, of burglary of a vehicle (counts 1 & 2, Pen. Code, §§ 459, 460, subd. (a)),[1] possession of stolen property (counts 3 & 4, § 496, subd. (a)), misdemeanor possession of burglary tools (count 5, § 466), grand theft (count 6, §§ 484, 487, subd. (a)), and petty theft with a prior theft conviction (count 7, § 666). The trial court found true the allegation that defendant had suffered a prior juvenile adjudication that qualified as a "strike." (§§ 667, subds. (b)-(i), 1170.12.) Defendant was sentenced to a four-year prison term for count 1. The terms for the remaining counts were imposed concurrently or ordered stayed pursuant to section 654. The trial court also imposed a $4,800 restitution fine (§ 1202.4, subd. (b)) and a suspended parole revocation fine of $4,800 (§ 1202.45).

[1] Unspecified section references are to the Penal Code.

On appeal, defendant contends the trial court erred by: (1) denying his motions to suppress evidence; (2) restricting him from introducing evidence to impeach the credibility of a prosecution witness; (3) giving incomplete instructions on aiding and abetting; (4) giving incomplete instructions on voluntary intoxication; (5) instructing the jury on conscious possession of stolen property pursuant to CALJIC No. 2.15; (6) failing to instruct the jury that corroboration of accomplice testimony requires evidence that relates to an element of the offense; and (7) finding true the "strike" allegation. Defendant also claims that he received ineffective assistance of counsel at sentencing, causing the trial court to impose an erroneous restitution fine and parole revocation fine.

We conclude that trial counsel was ineffective at sentencing, and we will therefore reverse the judgment and remand for resentencing.

I. BACKGROUND

On November 17, 1999, Campbell Police Officer Harold Abbott pulled over a car being driven by defendant's 19-year-old girlfriend, Jacqueline Branson. Defendant was in the front passenger seat.

Officer Abbott looked into the vehicle and saw what appeared to be stolen car stereo equipment. He searched the vehicle and found a car stereo with its wires cut, as well as amplifiers, speakers, sleeping bags, and two walkie-talkies. In addition, he found a small crowbar, a bent antenna, wire cutters, and a flashlight.

Officer Abbott placed defendant and Branson under arrest. He searched defendant, and found 14 compact discs (CD's) in defendant's pocket. He also found a black beanie cap and a screwdriver in defendant's pocket.

Officer Abbott spoke with Branson, who admitted that she and defendant had been committing car thefts. She said that she and defendant went to the apartment parking lot together. She parked the car and slept while defendant got out to commit the thefts. After about 45 minutes, he woke her up and told her to pull the car closer to some other cars. She did so, and he loaded the stolen items into the car. Branson said that she and

defendant had committed similar auto thefts on two prior occasions. She would usually sleep in the car while defendant committed the thefts.

Defendant was charged, by information, with burglary of a vehicle (counts 1 & 2, §§ 459, 460, subd. (a)), possession of stolen property (counts 3 & 4, § 496, subd. (a)), misdemeanor possession of burglary tools (count 5, § 466), grand theft (count 6, §§ 484, 487, subd. (a)), and petty theft with a prior theft conviction (count 7, § 666). The information alleged that defendant had suffered a prior juvenile adjudication that qualified as a "strike." (§§ 667, subds. (b)-(i), 1170.12.)

At trial, Branson asserted that she had lied to Officer Abbott. Branson testified that she committed the charged offenses alone. She testified that on November 16, 1999, she and defendant had gone to a friend's home in San Jose. After their arrival, they fought because the keys to their car were lost. They realized that the keys were in the trunk of the car. They attempted to get the keys by reaching through the back seat, using a bent antenna. They succeeded by using a screwdriver to force open the trunk.

Later that night, Branson left the house because she was angry with defendant, who had been drinking. She drove around looking for another friend's house. When she came across the parking lot of the Heritage Village apartment complex, she decided to break into some vehicles. She needed money for drugs and to get home.

Branson parked the car and looked into vehicles for bags and other items to steal. The first car she broke into was an Oldsmobile with its windows down. She claimed that she took keys, a briefcase, and walkie-talkies. The second car was a Chevrolet Blazer. She claimed that she picked the lock of the hatchback with a knife and removed stereo equipment, bags, a tackle box, and CD's.

Branson put all of the items into her car and returned to get defendant. When defendant entered the car, the CD's were on the front passenger seat. He picked them up and put them into his pocket. Branson did not tell defendant that the CD's were stolen. She did not tell him what she had done.

A few weeks before trial, on June 1, 2000, probation officers searched Branson's home. They found several letters. The first letter was written by Branson to defendant. It read, in part: "And another thing. When I spoke with you over the phone I mentioned a dream I had about the case. I only meant that my love for you is so strong I would chance going back to jail for you to get out. Do you understand? I love you so much. I would do anything for you." At trial, Branson denied that she meant that she would lie for defendant in court.

The second letter was also written by Branson to defendant. It read, in part: "That cop is trying to fuck me. I never told him that you and I robbed cars in Tracy. It's bullshit. I'm backing you up a hundred and ten percent and unless they have me on tape, they can't prove anything and I'm fighting it." At trial, Branson explained that she meant that the police had made up much of her post-arrest statement.

The third letter was from defendant to Branson. It read, in part: "Baby, it's time for me to make my mom a grandma. And if we don't make any babies out of love now, you might never have one, or if I end up doing a third of ten years, seven, because of my record, then I won't ever have any at all because my life I will feel like is over. I won't be able to give or work and save like I want to. If I get out after San Joaquin, if you know what I mean, baby, that's if you can read between the lines and mean what you say when it all comes down to it. You're going to have to sound very sorry and sincere and be strong for me because I need you more than I've ever needed anyone before, if you know what I mean. I'm sorry it's under the circumstances, but I'm helpless, fucked up, stupid, selfish. That's how I feel. I'm asking too much, I know. I need a baby and you to bear it. I'll owe you the rest of our lives. I will take care of you." Branson asserted that nothing in defendant's letter had affected any of her testimony.

Branson admitted that she had been charged with some offenses as a result of the incident, that she had pled guilty, that she was on probation, and that she had been granted immunity in exchange for her testimony.

Branson's trial testimony was contradicted in several respects. First, although she testified that the lost car keys were found in the trunk, other witnesses testified that the keys were found in the house. Second, the owner of the Oldsmobile testified that only a cell phone was taken, whereas Branson claimed she took a briefcase, keys, and walkie-talkies from that vehicle. Third, the owner of the Chevrolet Blazer testified that the door of his car had been broken into, not the hatchback.

Defendant was convicted of all charged offenses. In a bifurcated proceeding, the trial court found true the "strike" allegation. At sentencing, the trial court imposed the middle term of two years for count 1, doubled to four years pursuant to the Three Strikes law. (§§ 667, subds. (b)-(i), 1170.12.) It imposed a concurrent four-year term for count 2 and stayed the remaining terms pursuant to section 654. The trial court also imposed a restitution fine of $4,800 pursuant to section 1202.4, subdivision (b) and a suspended parole revocation fine of $4,800 pursuant to section 1202.45.

II. DISCUSSION

A. Motions To Suppress

1. Compact Discs

On February 4, 2000, the trial court heard defendant's first motion to suppress evidence. (§ 1538.5.) It granted the motion, in part, finding defendant's detention unlawful and ordering suppression of "the contraband found upon the person of [defendant]" – namely, the CD's.

The People thereafter filed a request for reconsideration of the motion to suppress, pursuant to section 1538.5, subdivision (j).[2] They noted that they had failed to inform the

[2] Section 1538.5, subdivision (j) provides in relevant part: "If the defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or

trial court that defendant was on an active grant of probation at the time he was searched, and argued that the search was therefore reasonable under *In re Tyrell J.* (1994) 8 Cal.4th 68 (*Tyrell J.*), and *People v. Bravo* (1987) 43 Cal.3d 600 (*Bravo*). They attributed the error to "inadvertence."

Defendant opposed the request for reconsideration. He noted that section 1538.5, subdivision (j) permits the People to present additional evidence if they can "show good cause at the trial why such evidence was not presented" at the suppression motion. He argued that the request for reconsideration should be denied for two reasons: (1) the People had not shown good cause and (2) the People's request was untimely, as it was filed before trial.

On February 22, 2000, the trial court took the People's request for reconsideration off calendar "without prejudice" to refiling it in conformity with section 1538.5, subdivision (j). The People then dismissed the pending information and filed a new one.

Defendant filed another motion to suppress the CD's. He argued that the People were procedurally barred from relitigating the suppression motion, as they had elected to proceed by way of a request for reconsideration. He also argued that the motion should be granted on the merits.

At the hearing on the motion to suppress, the trial court found that the search of defendant's person was legal, based on the fact that defendant was subject to a probation search condition, even though the searching officer did not know about the condition at the time of the search. The trial court also rejected defendant's procedural argument. It

---

the people may seek appellate review as provided in subdivision (o), unless the court, prior to the time the review is sought, has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385, or if the people dismiss the case on their own motion after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). . . ."

found that section 1538.5, subdivision (j) permitted the People to dismiss the case and refile the information.

Defendant now reiterates both his procedural and substantive arguments. He first argues that the People should not have been permitted to proceed by way of dismissal and refiling. He asserts that once the People filed their motion for reconsideration, they were barred from utilizing any of the other procedures permitted by section 1538.5, subdivision (j).

In *People v. Gallegos* (1997) 54 Cal.App.4th 252, the court upheld "those provisions of Penal Code section 1538.5 which permit the prosecution, following the grant of a motion to suppress evidence first made in the superior court, to dismiss the case, refile the charges and oppose a subsequent superior court suppression motion without binding effect of the first ruling." (*Id*. at p. 255.)

Here, after defendant's motion to suppress was granted, the prosecution filed a request for reconsideration. However, as defendant pointed out, that motion was procedurally flawed because it was filed prior to trial. The trial court therefore took the motion off calendar without prejudice to the prosecution refiling it during trial. The trial court did not resolve the reconsideration motion in favor of either party. At the time the prosecution dismissed and refiled the charges, there was no motion for reconsideration pending. Indeed, the prosecution could have elected not to dismiss and refile, but to proceed to trial and then refile their request for reconsideration of the suppression motion.

Clearly, the prosecution did not receive a third chance to litigate the suppression motion. They chose only one of the options made available to them by section 1538.5, subdivision (j): they "dismiss[ed] the case on their own motion after the special hearing" and filed a new complaint. They did not pursue either of the other two options: "show[ing] good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding" or "seek[ing] appellate review."

Defendant's citation to Code of Civil Procedure section 1005.5 does not support his argument. That section provides: "A motion upon all the grounds stated in the written notice thereof is deemed to have been made and to be pending before the court for all purposes, upon the due service and filing of the notice of motion . . . ." Although the prosecution made a request for reconsideration, it was taken off calendar and was no longer pending at the time the prosecution dismissed the case and refiled the charges.

As we agree with the trial court's rejection of defendant's procedural argument, we now turn to a discussion of the substantive issue, namely, whether the search of defendant's person may be upheld by the fact that he was on probation at the time, even though the searching officer did not know that defendant was on probation.

Defendant himself acknowledges that such a search is lawful under *Tyrell J., supra,* 8 Cal.4th 68. However, he points out that the California Supreme Court has indicated it may reconsider its holding in that case. At the time of briefing in the instant case, the Supreme Court had granted review of *People v. Moss* , review granted June 28, 2000, S087478 (nonpub. opn.) and had indicated that it would be reconsidering the holding of *Tyrell J.* The Supreme Court dismissed *Moss* as improvidently granted, pursuant to California Rules of Court, rule 29.4(c), on January 16, 2002. On March 27, 2002, the Supreme Court ordered briefing in *People v. Sanders* (2000) 84 Cal.App.4th 1211, review granted February 28, 2001 (S094088), and specified that the issues it would consider in that case included whether to reconsider the holding of *Tyrell J.* Although the Supreme Court is apparently reconsidering *Tyrell J.*, the case remains binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In *Tyrell J.*, the court upheld the search of a juvenile probationer with a probation search clause, even though the searching officer was unaware of the probation search clause. The court explained: "[A] juvenile probationer subject to a valid search condition does not have a *reasonable* expectation of privacy over his or her person or property. In this case, Tyrell J. was subject to a valid . . . search condition, directly

imposed on him by the juvenile court in a prior matter. We presume he was aware of that limitation on his freedom, and that any police officer, probation officer, or school official could at any time stop him on the street, at school, or even enter his home, and ask that he submit to a warrantless search. There is no indication the minor was led to believe that only police officers who were aware of the condition would validly execute it. The minor certainly could not reasonably have believed Officer Villemin would *not* search him, for he did not know whether Villemin was aware of the search condition. Thus, any expectation the minor may have had concerning the privacy of his bag of marijuana was manifestly unreasonable." (*Tyrell J., supra*, 8 Cal.4th at p. 86, italics in original, fn. omitted.)

Here, defendant was subject to a valid probation search condition and therefore had no reasonable expectation of privacy over his person or property. We presume that he was aware of that condition – indeed, in agreeing to probation, he consented to the search condition (see *Bravo, supra*, 43 Cal.3d at p. 608) – and was aware that he could be stopped and subjected to a warrantless search by a police officer at any time. There is no indication that defendant was led to believe that only police officers who were aware of the condition could validly execute it, and he certainly could not reasonably have believed that Officer Abbott would not search him, as he was not aware whether Officer Abbott knew of the condition.

We conclude that the trial court properly denied defendant's motion to suppress the CD's.

2. Letters

During trial, defendant brought a motion to suppress the letters found during a probation search of Branson's bedroom. At the time, defendant was in jail and Branson was subject to "a standard search order" stating that she was subject to "search an seizure

at any time of the day or night by any peace officer with or without a warrant." She was not subject to any restrictions on contact with defendant.

The trial court denied the motion to suppress, finding that the search was valid and that defendant had "no right to object to the search" because the letters were in Branson's possession.

Defendant contends the search of Branson's bedroom was unlawful because it was not "reasonably related to the purposes of probation." (*People v. Robles* (2000) 23 Cal.4th 789, 797.) He notes that Branson was not prohibited from communicating with defendant, and claims that the search was invalid because the officers were specifically looking for such communication.

In *Bravo, supra*, 43 Cal.3d at p. 610, the court stated that searches of probationers must be conducted for reasons related to "the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes." By contrast, such a search may not be conducted for harassment or for arbitrary or capricious reasons. (*Ibid*.)

Contrary to defendant's claim, the fact that the officers were specifically searching for communication between Branson and defendant does not invalidate the probation search. The officers suspected that Branson might lie on defendant's behalf at trial and believed that a search of her residence might produce evidence to show such a plan. Certainly, discovery of such evidence in order to forestall the obstruction of justice and prove Branson's perjury constitutes a "legitimate law enforcement purpose[]." (*Bravo, supra*, 43 Cal.3d at p. 610.) The trial court specifically found that the search was not conducted for harassment purposes, and the evidence supports that finding.

We need not consider the trial court's ruling that defendant lacked standing to object to the search of Branson's bedroom, as we conclude the search was lawful.

B. Impeachment Evidence

During cross-examination of Branson, trial counsel asked whether she remembered speaking with defendant's mother from jail, after the incident. Branson acknowledged the conversation. Trial counsel asked, "Do you remember apologizing to her about what you had done to [defendant]?" Branson replied, "Yes," but the prosecutor objected on hearsay grounds. Trial counsel asserted, "Prior consistent statement." He explained, "Apologizing about what she did to [defendant] is [a] prior consistent statement to the inconsistent statements that are being introduced." The trial court sustained the hearsay objection, but noted that defendant could "call the mother later."

Defendant contends the trial court erred by sustaining the prosecutor's hearsay objection. He argues that Branson's apology was admissible as a prior consistent statement under Evidence Code section 791.

Evidence Code section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his [or her] testimony at the hearing is inadmissible to support his [or her] credibility unless it is offered after: [¶] (a) Evidence of a statement made by him [or her] that is inconsistent with any part of his [or her] testimony at the hearing has been admitted for the purpose of attacking his [or her] credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his [or her] testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

Here, Branson testified that she lied when she told Officer Abbott that defendant had participated in the auto thefts. The prosecution sought to show that Branson's testimony had been "recently fabricated." (Evid. Code, § 791, subd. (b).) The prosecution's theory was that Branson was lying because she had already pled guilty and

because of her correspondence with defendant. Defendant sought to introduce Branson's apology to defendant's mother as a prior statement that was consistent with her testimony about lying to the police, and which was "made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (*Ibid*.)

It is unclear whether Branson's apology for "what [she] had done to [defendant]" was consistent with her trial testimony about committing the crimes alone. The apology is vague and does not necessarily refer to the fact that she had wrongly implicated defendant in the crimes. The apology could also be interpreted as referring to the fact that she had truthfully told the police about defendant's participation.

Even assuming that the trial court erred by excluding the statement, reversal would not be required. Defendant asserts that the error violated his right to present a defense, his right to confrontation, and his right to due process. (Cal. Const., art. I, § 15; U.S. Const., 6th & 14th Amends.) He contends the error is therefore subject to analysis under *Chapman v. California* (1967) 386 U.S. 18. We believe that any error was harmless beyond a reasonable doubt. First, as noted, the statement was vague and easily susceptible to two different interpretations. Thus, while defendant could have argued that the apology was consistent with Branson's trial testimony, the prosecutor could have argued that the apology was consistent with Branson's confession to the police. Second, the evidence at trial was overwhelming. Significantly, the stolen CD's were found on defendant's person, and he was found in the car with all of the stolen items and burglary tools. It was not plausible that he did not realize that there were stolen items in the car or on his person. The letters found in Branson's apartment were also significant, strongly indicating that Branson would lie on defendant's behalf. Finally, Branson's testimony was inconsistent with other evidence, with regard to the method used to break into the cars and the specific items that were stolen. Under these circumstances, any error was harmless beyond a reasonable doubt.

C. Aiding and Abetting Instructions

The trial court instructed the jury on aiding and abetting as follows: "Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. Principals include: one, those who directly and actively commit or attempt to commit the act constituting the crime or, two, those who aid and abet the commission or attempted commission of the crime." (CALJIC No. 3.00.)

"A person aids and abets the commission or attempted commission of a crime when he or she: [¶] One, with knowledge of the unlawful purpose of the perpetrator and, [¶] Two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime and, [¶] Three, by act or advice, aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (CALJIC No. 3.01.)

Defendant claims these instructions were incomplete. He claims the trial court had a sua sponte duty to instruct the jury that his intent, knowledge, and act had to precede or coincide with the perpetrator's commission of the offense.

"It is settled that if a defendant's liability for an offense is predicated upon the theory that he or she aided and abetted the perpetrator, the defendant's intent to encourage or facilitate the actions of the perpetrator 'must be formed *prior to or during* "commission" of that offense.' " (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039, quoting *People v. Cooper* (1991) 53 Cal.3d 1158, 1164, italics in the original.) It is also "settled that, even in the absence of a request, a trial court must instruct on general

principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. [Citations.]" (*Id.* at p. 1047.)

In *People v. Montoya*, *supra*, 7 Cal.4th 1027, the defendant was charged with burglary and was prosecuted on an aiding and abetting theory. The perpetrator had entered and exited the building several times. On appeal, the court concluded that the defendant could be liable as an aider and abettor if his intent was formed "at any time prior to the perpetrator's final departure from the structure." (*Id*. at p. 1046.) The court concluded that the trial court had no sua sponte duty to explain this principle to the jury, however, because the prosecution's case was based largely on the theory that the defendant's intent to aid and abet arose prior to the commencement of the burglary. The court concluded, "In view of the evidence presented and the arguments advanced by the parties, the significance of the precise time at which defendant must have formed the requisite intent in order to be liable as an aider and abettor was not an issue 'closely and openly' connected with the case." (*Id*. at p. 1050.)

Here, too, there was no need for a sua sponte modification to the instructions. The prosecutor did not even argue that defendant was guilty as an aider and abettor; he argued that defendant had perpetrated the burglaries. Defendant refutes this, calling our attention to one paragraph of the prosecutor's rebuttal argument, where he asks, "is there any way possible that [defendant] doesn't know that that's stolen property when he gets in the car?" However, we do not read anything in that paragraph as indicating that the prosecutor was asking the jury to convict defendant based on an aiding and abetting theory. Rather, the prosecutor was reiterating the facts that made it clear that Branson was lying when she testified that she had committed the offenses herself.

Moreover, the jury instructions did inform the jury that defendant could be found guilty as an aider and abettor if he aided, promoted, encouraged, or instigated the commission of the crime "*with* knowledge of the unlawful purpose of the perpetrator"

and "*with* the intent or purpose of committing or encouraging or facilitating the commission of a crime." (CALJIC No. 3.01, italics added.) We believe this instruction adequately advised the jury that defendant's intent to aid and abet the vehicle theft had to coincide with or precede the perpetrator's commission of the offense.

D. Voluntary Intoxication Instruction

The trial court instructed the jury on voluntary intoxication as follows: "In the crimes charged in counts 1 through and including 7, a necessary element is the existence in the mind of the defendant of a specific intent or a mental state which are defined elsewhere in these instructions. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime or crimes, you should consider that fact in deciding whether defendant had the required specific intent or mental state. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed that specific intent or mental state, you must find that he did not have that specific intent or mental state. [¶] Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug or other substance, knowing that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect. [¶] Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug or other substance." (CALJIC No. 4.21.)

Defendant contends the trial court had a sua sponte duty to also instruct the jury pursuant to CALJIC No. 4.21.2, which provides: "In deciding whether a defendant is guilty as an aider and abettor, you may consider voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. [However, intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the [target] [originally contemplated] crime.]"

In *People v. Mendoza* (1998) 18 Cal.4th 1114 (*Mendoza*), the court explained: "[A] trial court has no sua sponte duty to instruct on the relevance of intoxication, but if it does instruct, as the court here did, it has to do so correctly. [Citation.] The appellate

court should review the instructions as a whole to determine whether it is 'reasonably likely the jury misconstrued the instructions as precluding it from considering' the intoxication evidence in deciding aiding and abetting liability. [Citation.] Any error would have the effect of excluding defense evidence and is thus subject to the usual standard for state law error: 'the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant.' [Citation.]" (*Id*. at pp. 1134-1135.)

In this case, assuming the trial court should have given CALJIC No. 4.21.2, the error was harmless. First, considering "the instructions as a whole," we do not believe that " 'it is reasonably likely the jury misconstrued the instructions as precluding it from considering' the intoxication evidence in deciding aiding and abetting liability." (*Mendoza, supra*, 18 Cal.4th at p. 1134.) The trial court did instruct the jury that it could consider evidence of defendant's intoxication in deciding whether defendant had the required mental state as to all seven counts. (Compare *id*. at pp. 1121-1122 [trial court instructed jury that it could not consider intoxication as to general intent crime, but could consider intoxication as to specific intent crime].)

Second, we are convinced that it is not reasonably probable that the jury's verdict was in any way affected by the trial court's failure to specifically instruct the jury that it could consider the evidence of defendant's intoxication in deciding his liability as an aider and abettor. There was minimal evidence that defendant was intoxicated. Several witnesses did testify that defendant had been drinking beer, but none mentioned the amount. Only Branson testified that defendant appeared to be affected by alcohol: she described him as being a little bit "buzzed." However, Officer Abbott testified that he observed no signs of intoxication when he arrested defendant. This evidence was not strong enough to create a reasonable probability that the jury would have found that defendant was unable to form the mental state required for aiding and abetting because of intoxication. Finally, as noted above, the prosecutor did not even pursue an aiding and

abetting theory. Therefore, it was not likely that the jury convicted defendant based on that theory of liability.

E. CALJIC No. 2.15

The trial court instructed the jury pursuant to CALJIC No. 2.15, as follows: "If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of burglary, receiving stolen property and/or theft. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt. [¶] As corroboration, you may consider the attributes of possession, that is time, place and manner, that the defendant had an opportunity to commit the crime charged, and any other evidence which tends to connect the defendant with the crime or crimes charged."

Defendant contends this instruction undercut the prosecution's burden of proving his guilt beyond a reasonable doubt and allowed the jury to infer defendant's guilt even if he satisfactorily explained his possession of the stolen property. He claims that as a result, the instruction violated his right to due process and denied him a fair jury trial. (U.S. Const., 5th & 6th Amends.)

In *People v. Williams* (2000) 79 Cal.App.4th 1157 (*Williams*), this court rejected a similar argument. We explained, "Defendant also claims that CALJIC No. 2.15 denied him due process. Citing *Barnes v. United States* (1973) 412 U.S. 837, he claims that the traditional, common law rule, recognized by the United States Supreme Court, permits an inference of guilt from three foundational facts: recently stolen property, the defendant's possession of it, and the lack of an explanation. Defendant points out that CALJIC No. 2.15 permits an inference from (1) a finding of 'conscious possession of recently stolen property' and (2) corroborating evidence, including a lack of explanation; the time, place,

and manner of possession; the defendant's opportunity to commit the charged offense; the defendant's conduct or statements concerning the property; a false explanation for possession; or other evidence connecting the defendant to the crime. Defendant claims that by shifting the 'lack of explanation' factor from a *foundational* requirement to merely one of any number of alternative corroborating factors, CALJIC No. 2.15 lessens the prosecution's burden of proof. Indeed, the prosecution need not establish the lack of an explanation at all. Thus, defendant claims the instruction denied him due process of law. This claim is meritless.

"*Barnes* does not suggest that the failure to explain possession of recently stolen property is a constitutionally-mandated foundational requirement for drawing an inference of guilt. Nor does *Barnes* suggest that no circumstances other than the lack of an explanation can combine with conscious possession of recently stolen property to support an inference of guilt. Rather, as CALJIC No. 2.15 acknowledges, an inference of guilt may rationally arise from the concurrence of conscious possession and many other circumstances. For example, where the evidence supports a finding that an arrestee had stolen property in his pocket a short time after a robbery and that the arrestee was seen approaching the victim a short time before the robbery, the inference of guilt is reasonable, if not compelling, regardless of whether or not the arrestee explained how he obtained the property. Moreover, this inference is reasonable even if the arrestee gives a plausible explanation for having the property. In our view, CALJIC No. 2.15 correctly prohibits the jury from drawing an inference of guilt solely from conscious possession of recently stolen property but properly permits the jury to draw such an inference where there is additional corroborating evidence. As long as the corroborating evidence together with the conscious possession could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a verdict beyond a reasonable doubt, we discern nothing that lessens the prosecution's burden of proof or implicates a defendant's right to due process. Indeed, CALJIC No. 2.15 has repeatedly withstood

challenges on the grounds that it lessens the burden of proof or otherwise denies a defendant due process of law. [Citations.]" (*Williams, supra,* 79 Cal.App.4th at pp. 1173-1174.)

Defendant requests we reconsider the position we took in *Williams*. However, we believe our prior opinion in *Williams* is correct and decline to revisit the issue.

F. Accomplice Instruction

The trial court instructed the jury pursuant to CALJIC No. 3.11 as follows: "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense. [¶] Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out of court was true."

Defendant contends the trial court erred by failing to instruct the jury that it could not convict him based on the testimony of an accomplice unless the accomplice's testimony was corroborated by evidence relating to an element of the offense.

In *People v. Jenkins* (1973) 34 Cal.App.3d 893, the defendant requested that the trial court modify the standard accomplice testimony instruction to add the following statement: " 'Such corroborative evidence must relate to some act or fact which is an element of the offense charged.' " (*Id*. at p. 899.) The court explained that "[t]he proposed amendment is a correct statement of law." (*Ibid*.; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1228.) Nonetheless, the court found no error. "[T]he test to be applied is not whether the proposed instruction was correct, but whether the jury was fully and fairly instructed on the applicable law. There is no requirement that the jury be instructed in the precise language requested by a party. [Citation.] Appellants argue that the instruction given by the court would allow corroboration to be of irrelevant parts of

the accomplice testimony. We have read the instruction and do not find it subject to that infirmity and find no error." (*People v. Jenkins*, *supra*, 34 Cal.App.3d at p. 899.)

While the instruction would have been legally correct if it had included the language defendant suggests, "defendant cites no authority that would have imposed on the trial court the sua sponte duty so to modify CALJIC No. [3.11]." (*People v. Lawley* (2002) 27 Cal.4th 102, 161.) "If defendant believed that a modification to CALJIC No. [3.11] was required, he was obligated to request it." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.)

In this case the accomplice testimony implicating defendant was Branson's post-arrest confession, in which she implicated defendant. Contrary to defendant's assertion, the prosecutor did not urge the jury to find corroboration from evidence that did not relate to an element of the charged crimes. Rather, the prosecutor focused on the fact that defendant was riding in a car that "was filled with stolen property" and that "[i]n his pocket were fourteen stolen CD's."

We conclude the trial court did not err by failing to modify CALJIC No. 3.11 sua sponte.

G. Three Strikes Law

Defendant contends there was insufficient evidence to support the trial court's finding that he suffered a "strike" within the meaning of section 667, subdivisions (b) through (i) and section 1170.12.

Section 667, subdivision (d)(3) provides: "A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony. [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the

juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

The list of offenses in Welfare and Institutions Code section 707, subdivision (b) includes "[a]ssault with a firearm or destructive device" and "[a]ssault by any means of force likely to produce great bodily injury." (Welf. & Inst. Code, § 707, subd. (b)(13) & (14).) It does not include assault with a deadly weapon.

The information alleged that defendant suffered a prior juvenile adjudication, namely, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)), and that in committing the assault he had personally inflicted great bodily injury on a person other than an accomplice (§ 12022.7).

To prove the "strike" allegation, the prosecution introduced the Welfare and Institutions Code section 602 petition in the prior juvenile case, which alleged that defendant committed "an assault upon [the victim] with a deadly weapon, to wit: a knife, and by means o[f] force likely to produce great bodily injury, thereby violating Section 245(a) . . . ." The petition further alleged that defendant personally inflicted great bodily injury upon the victim within the meaning of section 12022.7.

The prosecution also introduced a partial transcript of the jurisdictional hearing in the prior juvenile case. The victim testified that he and his friend John had two encounters with defendant on May 25, 1989. The first encounter was in a beach parking lot. Defendant and his friend Dave approached, indicated he was in a gang, made a threat, and pulled out a switchblade knife. He handed the knife to Dave, who made some comments and then returned the switchblade to defendant. Later that day, the victim and John encountered defendant and Dave in a restaurant. Dave told the victim, "This isn't your day, Dude." Dave accused the victim of being a "Blood." The victim said, "Don't call me 'Blood.' " Defendant walked up to John and said, "Let's take it outside, Pretty

Boy. I'm going to fuck you up." John told defendant to "chill." Defendant continued to taunt John. As John got up to get his food, defendant and Dave both ran at him. The victim grabbed defendant before he could get to John. The next thing he remembered was "standing in the corner and bleeding." He noticed he was bleeding and could not breathe. He was hospitalized for 29 days due to a severe puncture wound in his back. The wound was about three inches long and one inch wide.

The prosecution also introduced a document from the juvenile case indicating that, after the jurisdictional hearing, the trial court had found the allegations of the petition true beyond a reasonable doubt.

Trial counsel argued that the prosecution's evidence did not establish that defendant committed an assault by means of force likely to produce great bodily injury rather than an assault with a deadly weapon. He noted that the victim's testimony did not include anything "about the means or manner by which the knife was used."

The trial court disagreed, finding "beyond a reasonable doubt that the prior as alleged is a strike prior, not only within the [section] 667[, subdivision (b)] through [(i)] language, but also within the provisions of the Welfare and Institutions Code [section] 707[, subdivision (b)]."

Defendant reiterates his argument here, claiming that there was insufficient evidence to support the trial court's finding that his prior juvenile adjudication was for assault by means of force likely to produce great bodily injury – "an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." (§ 667, subd. (d)(3)(D).)

Here, the petition in the juvenile case was phrased in the conjunctive. It alleged that defendant committed "an assault upon [the victim] with a deadly weapon, to wit: a knife, *and* by means o[f] force likely to produce great bodily injury." (Italics added.) "Merely because the complaint is phrased in the conjunctive, however, does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged

acts. [Citation.]" (*In re Bushman* (1970) 1 Cal.3d 767, 775, disapproved on other grounds by *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.) Thus, the juvenile court could have sustained the petition based on a finding that defendant committed either an assault with a deadly weapon *or* an assault by means of force likely to produce great bodily injury.

The People point out that "a 'deadly' weapon is one that is used in such a manner as to be capable of producing death or great bodily injury. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1033, italics omitted (*Aguilar*).) They contend that an assault committed with a deadly weapon is inherently an assault committed by means of force likely to produce great bodily injury.

The People's argument is supported by *Aguilar*, *supra*, 16 Cal.4th 1023. In that case, the defendant was convicted of violating section 245, subdivision (a)(1). At trial, the prosecutor had argued that the jury could find that the defendant had committed an assault with a deadly weapon because he had used his hands and feet to commit the assault. The Supreme Court concluded that hands and feet were not deadly weapons; thus, the prosecutor had invited the jury to convict based on an incorrect theory. The conviction could stand, however, because the jury must have found that the defendant had committed an assault by means of force likely to produce great bodily injury. The court explained: "Ultimately (except in those cases involving an inherently dangerous weapon), the jury's decisionmaking process in an aggravated assault case under section 245, subdivision (a)(1), is functionally identical regardless of whether, in the particular case, the defendant employed a weapon alleged to be deadly as used or employed force likely to produce great bodily injury; in either instance, the decision turns on the nature of the force used." (*Id.* at p. 1035.) The court further observed that "despite the identity of the jury's reasoning processes under either the 'deadly weapon' clause or the 'force likely' clause in this case, our holding does not reduce the former clause to surplusage. There remain assaults involving weapons that are deadly per se,

such as dirks and blackjacks, in which the prosecutor may argue for, and the jury convict of, aggravated assault based on the mere character of the weapon. [Citation.]" (*Id.* at p. 1037, fn. 10; see also *People v. Flynn* (1995) 31 Cal.App.4th 1387, 1394 ["the allegation of assault with a deadly weapon, to wit, a knife and by means of force likely to produce great bodily injury placed appellant on notice that he was charged with committing the assault by wielding a knife with force likely to produce great bodily injury"].)

A knife is not an inherently deadly weapon. (*People v. Herd* (1963) 220 Cal.App.2d 847, 850.) Therefore, under the reasoning of *Aguilar*, because the juvenile court found defendant committed "an assault upon [the victim] with a deadly weapon, to wit: a knife, and by means o[f] force likely to produce great bodily injury, thereby violating Section 245(a)," it had to have found that defendant committed an assault by means of force likely to produce great bodily injury.

H. Ineffective Assistance of Counsel

Defendant contends he received ineffective assistance of counsel at sentencing. He claims that trial counsel should have objected to the trial court's manner of calculating the restitution fine (§ 1202.4) and parole revocation fine (§ 1202.45).

In order to establish that trial counsel was constitutionally ineffective, defendant must show (1) that he failed to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate and (2) that defendant was prejudiced thereby. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; *People v. Pope* (1979) 23 Cal.3d 412, 423-425; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)

Regarding the first prong, if trial counsel's omissions stemmed from an informed tactical choice that a reasonably competent attorney might make, the conviction must be affirmed. (*People v. Pope*, *supra*, 23 Cal.3d at p. 425; *People v. Lucas* (1995) 12 Cal.4th 415, 437; *People v. Diaz* (1992) 3 Cal.4th 495, 557.) We must be "highly deferential" to the tactical decisions made by counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at

p. 689.) There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Ibid*.)

As for the second prong, a defendant establishes prejudice by demonstrating that without the deficient performance there is a reasonable probability the result would have been more favorable. In other words, even if counsel's actions fall below the threshold of reasonableness, appellant must still demonstrate that counsel's actions were prejudicial. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 218.) In fact, we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . , that course should be followed." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

At the sentencing hearing, the trial court imposed a restitution fine of $4,800 pursuant to section 1202.4, subdivision (b), and imposed a suspended parole revocation fine equal to the amount of restitution fine, pursuant to section 1202.45. Although the trial court had discretion to consider any relevant factors in fixing the amount of the restitution fine (§ 1202.4, subd. (d)), the record indicates that the trial court explicitly relied upon the formula authorized by section 1202.4, subdivision (b)(2): "In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." Here, the trial court multiplied $200 times four (the number of years of imprisonment), times six (the number of felony counts) to reach the $4,800 figure.

Defendant asserts that the trial court erred by counting the convictions on counts 3, 4, 6, and 7 toward the total number of convictions for purposes of calculating the restitution fine since the sentences on those convictions were stayed pursuant to section 654. Recognizing that his failure to object results in waiver (see *People v. Scott* (1994) 9

Cal.4th 331), he argues that trial counsel was ineffective for failing to argue that, by counting those convictions, the trial court imposed multiple punishment in violation of section 654.[3]

The People argue that trial counsel was not ineffective for failing to object, because such an argument would have lacked merit. They claim that section 654 does not apply to restitution fines because restitution fines are not punishment, and because section 654 refers to a "term of imprisonment." Defendant points out that in *People v. Hanson* (2000) 23 Cal.4th 355, 362, the court held that a restitution fine constitutes punishment for double jeopardy purposes.

"Section 654 precludes multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 294.) While section 654 does not bar multiple convictions, it generally "prohibits the use of a conviction for any punitive purpose if the sentence on that conviction is stayed." (*People v. Pearson* (1986) 42 Cal.3d 351, 359-361 (*Pearson*).)

In *Pearson*, the court considered whether both convictions stemming from the same act could be used to impose a sentence enhancement in the future. The court concluded: "[C]onvictions for which service of sentence was stayed [pursuant to section 654] may not be so used unless the Legislature explicitly declares that subsequent penal or administrative action may be based on such stayed convictions. Without such a declaration, it is clear that section 654 prohibits defendant from being disadvantaged in any way as a result of the stayed convictions." (*Pearson, supra*, 42 Cal.3d at p. 361.)

In *People v. Gangemi* (1993) 13 Cal.App.4th 1790, the court determined that

[3] Section 654 provides, in relevant part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

separate penal fines for each filing of a false deed of trust on a single family residence did not violate section 654. The court focused on the statutory language of section 115, which provides in pertinent part: " '(d) For purposes of prosecution under this section, each act of procurement or of offering a false or forged instrument to be filed, registered, or recorded shall be considered a separately punishable offense.' " The court concluded that the Legislature had "authorized the imposition of separate penalties for each prohibited act even though they may be part of a continuous course of conduct and have the same objective." (*People v. Gangemi*, *supra*, 13 Cal.App.4th at p. 1800.)

Although a statute need not expressly refer to section 654 in order to override the prescription against multiple punishment (see *People v. Benson* (1998) 18 Cal.4th 24, 31-33), section 1202.4 contains nothing more than a reference to the felony counts of which the defendant was convicted. There is no explicit language in section 1202.4 that suggests that the Legislature intended an exception to section 654. In addition, we have not been directed to any legislative history suggesting intent to override section 654.

We hold that counting the convictions for which a sentence was stayed pursuant to section 654 toward the "number of felony counts of which the defendant is convicted" when calculating a restitution fine as provided by section 1202.4, subdivision (b)(2), amounts to impermissible " 'incremental punishment' " under section 654. (*Pearson*, *supra*, 42 Cal.3d at p. 362.)

Pursuant to section 1202.4, subdivision (b)(1), the trial court had discretion to set the restitution fine at an amount "commensurate with the seriousness of the offense." The People argued that the trial court therefore could have imposed the same amount of restitution without using the formula set forth in section 1202.4, subdivision (b)(2). However, there is no indication that the trial court would have done so. Rather, because the trial court relied on the statutory formula, it appears reasonably probable that the trial court may have set a smaller restitution fine if trial counsel had objected. Therefore, we will remand for resentencing.

Defendant also contends that trial counsel should have objected when the trial court counted the conviction on count 2 toward the total number of convictions for purposes of calculating the restitution fine, since the sentence for that conviction was imposed concurrently to the sentence for count 1. He argues that the trial court's imposition of a concurrent term for that count indicates that the trial court believed defendant should not suffer additional punishment. Nothing in section 654 or section 1202.4 precluded the trial court from imposing restitution on a count for which a concurrent term is imposed. However, the trial court may consider this argument upon remand.

We will remand for resentencing to allow the trial court to impose a new restitution fine (§ 1202.4, subd. (b)) and a new, corresponding parole revocation find (§ 1202.45).

III. DISPOSITION

The judgment is reversed and the matter is remanded for resentencing.

_____
BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

_____
RUSHING, J.