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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND E. FUGATE, Defendant and Appellant.	D048422 (Super. Ct. No. SCN197102)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

Raymond E. Fugate was arrested and his van was impounded. Upon his release from jail Fugate broke into the impound yard where his van was held and took the van. While in the impound yard Fugate broke into three other vehicles in the yard and took a number of valuables from those vehicles. A few days later sheriff's deputies found Fugate and his van. The items taken from the other vehicles in the impound yard were in Fugate's van. Fugate was convicted of two counts of grand theft, one count of petty theft

and one count of trespass with the intent to interfere with a lawful business. The trial court sentenced him to two 6-year sentences on the grand theft charges and two 180-day sentences on the petty theft and trespass charges. The court ordered that all sentences run concurrently.

On appeal we find with respect to both grand theft convictions there was substantial evidence the value of the items appellant stole was in excess of $400. We also find there was substantial evidence appellant broke into the impound yard with the intent to interfere with the business of the towing company. Because each theft conviction was related to a separate vehicle from which appellant took valuables, the trial court could impose sentence on each of the three theft convictions. Finally, in light of appellant's concession he suffered eight prior convictions for which probation was not available, the trial court did not infringe upon his Sixth Amendment rights in imposing the upper term on the grand theft convictions.

FACTUAL AND PROCEDURAL BACKGROUND

At 1:30 a.m. on the morning of July 2, 2005, appellant was arrested by a San Diego County Sheriff's Deputy. At the time of the arrest the deputy arranged to impound appellant's van. Appellant was released from jail at some point before 8 a.m. on July 2, 2005, and appeared at the towing yard where his van was impounded.

Appellant asked a tow truck driver who was at the yard for access to his van so he could retrieve some tools. The tow truck driver told appellant he would have to make arrangements with the company's main office to retrieve any items from his van.

Early in the morning of July 3, 2005, another tow truck driver arrived at the towing yard and discovered someone had broken into the yard. Appellant's van was missing as was property from other cars stored at the lot. Further inspection by another employee of the towing company revealed barbed wire had been detached from the chain link fencing which surrounded the yard and bolts had been taken off interior and exterior gates in the yard.

On July 7, 2005, sheriff's deputies responded to the report of a suspicious person working on a disabled car in the street. The deputies found a sedan which had parts laid out around it parked near appellant's van. Upon inspection, the deputies found appellant crouched in his van and a number of the items reported stolen from the cars stored at the towing yard in the van.

Appellant was charged by information with two counts of grand theft, one count of receiving stolen property, one count of petty theft and one count of trespass with intent to interfere with a business.

At trial the prosecution supported its case as to the first count of grand theft with the testimony of Samuel Cardenas. Cardenas owned a car which was impounded at the towing yard and from which a JVC stereo receiver, an MTX amplifier and Eclipse 12-inch speaker was stolen. Cardenas testified it would cost between $530 and $680 to replace the stereo receiver, amplifier and speaker. Cardenas testified he believed it would cost between $80 and $100 to replace the receiver, between $100 to $300 to replace the amplifier and between $300 and $400 to replace the speaker. Cardenas testified that although the receiver was his, he borrowed the amplifier and a speaker from a friend.

They went out the night before the car was impounded and plugged his friend's amplifier and speaker into his stereo. According to Cardenas he was with his friend a year earlier when his friend bought the speaker and his friend told him it cost $400. Cardenas testified his estimates were based on what he saw in stores.

In addition to Cardenas's testimony, the prosecution presented testimony from a sheriff's detective who went to a number of stereo stores in the area and priced the receiver, amplifier and speaker. The detective testified the retail price of the receiver was between $85 and $120. The detective was unable to find a retail price for the amplifier, but located a wholesale price for it of $135. The detective testified the retail cost of the speaker was likely $299 because the detective believed it had a brushed aluminum cone rather than a plastic cone.

Although the console in Cardenas's car was stolen, the prosecution did not offer any evidence as to its value.

As to the second count of grand theft, the prosecution presented testimony from Billy Norman. Norman testified he was in the auto parts business for 50 years and he stored seven nearly complete Laforza SUV's at the towing yard. The SUV's were stored at the towing yard until American-made engines could be installed in them. Two leather seats, a steering wheel and floor mats were taken from the Laforza SUV's and found in appellant's van. Norman valued the seats, steering wheel and mats at $1,000. Norman stated that if he were selling the leather seats, he would ask for between $1,500 and $1,800 and his price would be based on the fact he just sold a pair of General Motors seats, which were not leather, for between $1,300 and $1,350.

In support of the petty theft charge, the prosecution presented testimony from Jorge Castillo. Castillo's car was also impounded at the towing yard on the morning of July 3, 2005. Castillo's immigration papers, a bottle of whiskey and a CD case holding between 30 and 40 CD's were stolen from Castillo's car. Sheriff's deputies found the whiskey bottle outside the sedan appellant was working on at the time of his arrest; the deputies found the immigration papers and CD case and CD's in appellant's van. Castillo valued the whiskey, CD case and CD's at between $180 and $195.

An employee of the towing company testified it cost $250 to repair the fencing and gates damaged when appellant broke into the yard and took his van. The employee also testified that at a minimum it would have cost appellant $206 to get his van released from the tow yard.

The jury found appellant guilty on all counts except for the allegation he received stolen property. As to that count he was found not guilty. As to each count of grand theft, appellant was sentenced to the upper term of three years, which, because of prior strikes, was doubled to six years. The trial court sentenced appellant to 180 days for each of the two misdemeanor counts. As we indicated at the outset, the trial court ordered that all the sentences run concurrently.

DISCUSSION

I

In his principal argument on appeal, appellant contends the prosecution did not present sufficient evidence the value of the items which were the subject of his grand

theft convictions exceeded $400, the statutory minimum for that crime. (Pen. Code,[1] § 487, subd. (a).) Our review of the record discloses the prosecution's evidence was sufficient to sustain both grand theft convictions.

It is axiomatic that "[i]n addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence−evidence that is reasonable, credible and of solid value−such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] . . . ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" ' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Here, the value element of the crime of grand theft is set forth in section 487, which provides in pertinent part: "Grand theft is theft committed . . . [¶] (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400)." For purposes of applying section 487, subdivision (a), value is determined by ascertaining "the reasonable and fair market value" of the property obtained. (§ 484, subd. (a).) " '[F]air market value' means the highest price obtainable in

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

the market place rather than the lowest price or average price. [T]he 'fair market price' is the highest price obtainable from a willing buyer by a willing seller, neither of whom is forced to act. It is not the highest price in the market but the highest price a willing buyer and a willing seller will arrive at." (*People v. Pena* (1977) 68 Cal.App.3d 100, 104; see also CALJIC No. 14.26.)

In general, when new items have been stolen, their value can be established by simple reference to their retail price. (See *People v. Tijerina* (1969) 1 Cal.3d 41, 45; *People v. Cook* (1965) 223 Cal.App.2d 435, 438.) Establishing the value of used items can be somewhat more difficult. In *People v. Haney* (1932) 126 Cal.App. 473 the defendant and a confederate stole horse riding equipment which the owner valued at slightly above the then-applicable $200 minimum value for grand theft. The court found the owner's testimony as to value of the equipment was sufficient to support the defendant's grand theft conviction. The court stated: "The owner of personal property who is familiar with its original cost and use is qualified to testify regarding its value, independently of his knowledge of recent sales of similar second-hand property. [Citations.] [¶] . . . [¶]

"In the present case Mr. Flournoy testified that he was the owner of the stolen property and knew the approximate value thereof, although he had not known of recent sales of such second-hand property in that vicinity. He said: 'Any farmer has . . . some idea of the value of harness and other property on the ranch, or he would not be able to do business.' He testified that the saddle cost him $104, but fixed the value $75. He estimated the aggregate value of the stolen articles at $240. This does not seem

unreasonable. A harness-maker of Alturas, who examined most of the stolen articles, estimated their aggregate value at slightly less than $200. He thought the saddle was worth only about $50. The testimony of Flournoy regarding the value of the stolen property was competent to be considered by the jury. The question of the actual value of the property was a problem for the determination of the jury. The jury found the appellant guilty of grand theft. By implication, we must assume, the jury thought the stolen property worth in excess of $200. The evidence is ample to support this finding." (*People v. Haney*, *supra*, 126 Cal.App. at pp. 475-476.)

In contrast, in *People v. Simpson* (1938) 26 Cal.App.2d 223 the defendant stole 12 magnetos from a group of used tractors the owner purchased as used equipment. The prosecution presented evidence from a number of witnesses, including the owner of the tractors. The prosecution witnesses placed a value on the used magnetos which exceeded the then-applicable $200 minimum value for grand theft. However, the prosecution witnesses assumed the magnetos were in working order. The defense presented witnesses who placed the value of the magnetos below $200. There was no dispute that in order to determine whether the magnetos were in working order they would have to be disassembled and inspected. None of the witnesses had disassembled the magnetos to determine whether they were in working order. In light of this defect in the record, as well as the erroneous admission of the cost of reinstalling the magnetos, the Court of Appeal found there was insufficient evidence the value of the magnetos exceeded the statutory minimum. (*People v. Simpson*, *supra*, 26 Cal.App.2d at pp. 228-229.)

In *People v. Coleman* (1963) 222 Cal.App.2d 358, 361, the defendant stole tools from the trunk of a car. The owner of the tools testified he recently paid $600 for some of the tools and was still making payments on the other tools. Because the owner recently purchased the tools and was familiar with their use, the court found the owner's testimony was sufficient to establish a value in excess of the $200 statutory minimum. (*Id*. at p. 36.)

Here, the information Cardenas and the sheriff's detective provided gave the jury a sufficient basis upon which it could conclude the value of the items stolen from Cardenas's car exceeded $400. Cardenas's testimony as to the fact the stereo equipment was plugged in on the night before his car was impounded permitted the jury to infer the equipment was working at the time it was stolen. Thus, this is not the case, as in *People v. Simpson*, where additional information as to the condition of the property was needed to determine its value. Cardenas and the detective further provided evidence which supported the conclusion the retail price of the equipment ranged from $600 to $800. Given that range for the retail price of new stereo equipment, the jury could reasonably conclude a buyer of the used equipment which was in Cardenas's car would be willing to pay an amount in excess of $400 for it. In this regard we reject appellant's suggestion the prosecution was required to produce evidence of a market in used stereo equipment. Rather, the prosecution met its burden by producing evidence of the retail value of the equipment and its general condition. From those facts the jury could determine whether, as used equipment, the property in question exceeded the statutory minimum. (See *People v. Haney*, *supra*, 126 Cal.App. at pp. 475-476.) In this regard we note the jury

was not required to determine the precise value of the property, but only whether its value exceeded $400. (*Ibid*., see also CALJIC No. 14.21.)

The same is true with respect to the testimony Norman provided. First, we note the seats stolen from his vehicles were not used seats but in fact new seats, which were still in their plastic wrapping. We also note Norman had recently sold what Norman believed were less desirable seats for far in excess of the statutory minimum. Given this evidence the jury could easily conclude the value of the seats alone exceeded $400.

In sum then there was sufficient evidence to support appellant's grand theft convictions.

II

Relying on section 654,[2] appellant argues sentencing should have been stayed as to two of his three theft convictions. We find no error.

Where a defendant is guilty of similar and related crimes committed over a short period of time but nonetheless entertained multiple intents and purposes, sentencing may be imposed on each crime. (See *People v. Nubla* (1999) 74 Cal.App.4th 719, 730-731.) Although in cases where property crimes have been committed, the court has applied section 654 more liberally (see *People v. Bauer* (1969) 1 Cal.3d 368, 378), where, as here, the defendant made a distinct effort with respect to distinct victims, punishment

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2 Section 654 states in pertinent part: "An act or omission that is made punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential perm of imprisonment, but in no case shall the act or omission be punished under more than one."

may be imposed as to each victim. In *People v. James* (1977) 19 Cal.3d 99, 119, the defendant burgled three separate offices in a single building. In holding the defendant could be punished for each burglary, the court stated: "Here defendant forcibly broke into three different rented premises occupied by tenants who had no common interest other than the fortuitous circumstance that they happened to lease office suites in the same commercial building. There is no doubt that if the premises had been located in three separate buildings, defendant could have been punished for three separate burglaries; he is not entitled to two exempt burglaries merely because his victims chose the same landlord. If the rule were otherwise, a thief, who broke into and ransacked every store in a shopping center under one roof, or every apartment in an apartment building, or every room or suite in a hotel, could claim immunity for all but one of the burglaries thus perpetrated. Nothing in the statute or case law on multiple punishment compels such an incongruous result." (*Ibid*., fn. omitted.)

The facts here are similar to those discussed in *People v. James*. Appellant entered one towing yard and then proceeded to break into three separate vehicles and steal items from each of the three vehicles. The vehicles were owned by separate victims and the victims had nothing in common other than the fact their vehicles were stored at the towing yard. If the three vehicles had been parked on the street instead of in the towing yard, there is no doubt appellant could have been punished for three thefts; like the defendant in *People v. James*, appellant is not entitled to an exemption for two of the thefts because his victims' vehicles happened to be parked in the same towing yard.

III

Appellant contends there is insufficient evidence he was guilty of violating section 602, subdivision (k).

A trespass in violation of section 602, subdivision (k), is committed by "[e]ntering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession." Here the record shows appellant broke fencing going into the towing yard and the gate on his way out. Because one of his obvious purposes was to retrieve his car, which was locked in the yard, it is clear that at the time he entered the yard he intended to break out of it with his car. That intention and the property he damaged were sufficient to sustain his trespass conviction.

IV

Finally, appellant argues that in sentencing him to the upper term on the theft convictions the trial court violated appellant's Sixth Amendment right to a jury trial.

The record discloses appellant admitted he suffered eight prior felony convictions. In sentencing appellant to the upper term, the trial court made the following statement: "I do find under rule 4.421 (b)(2) the defendant's prior convictions as an adult are numerous. Under rule (b)(3), the defendant has served several prior prison terms, and under (b)(5) the defendant's past performance on probation and parole have been unsatisfactory. Any one of those factors would be sufficient to outweigh the lack of any mitigating factors, thus justifying the upper term in this case." Although the jury did not

make any findings with respect to appellant's prior record, in sentencing appellant the trial court was free, as it did, to nonetheless rely on appellant's recidivism without offending the appellant's right to a jury trial. California courts and courts from other jurisdictions have repeatedly held that in sentencing a defendant a trial judge may consider prior convictions and this exception to what is otherwise required by the Sixth Amendment " 'is not limited simply to the bare *fact* of a defendant's prior conviction' [citation], but applies to 'matters involving the more broadly framed issue of "recidivism." ' " (*People v. Banks* (2007) 149 Cal.App.4th 969, 973; see *People v. McGee* (2006) 38 Cal.4th 682, 706-707; *People v. Waymire* (2007) 149 Cal.App.4th 1448, 1455-1456; *People v. Thomas* (2001) 91 Cal.App.4th 212, 221; *United States v. Cordero* (5th Cir.2006) 465 F.3d 626, 632-633; *United States v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820; *United States v. Fagans* (2d Cir. 2005) 406 F.3d 138, 141-142 .) In particular, in *McGee* the California Supreme Court specifically rejected attempts to narrow this exception "in advance of such a decision by the [United States Supreme Court]." (*People v. McGee, supra*, 38 Cal.4th at p. 709.)

Moreover, even if we believed the Sixth Amendment required the jury to consider appellant's prior record, given that prior record, including in particular eight prior convictions which appellant admitted, any error would have been harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546]; see also *People v. Lozano* (May 18, 2007, B189649) ___ Cal.App.4th ___ [2007 WL 1453756].)

Judgment affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.