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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MANUEL GONZALEZ, Defendant and Appellant.	B187922 (Los Angeles County Super. Ct. No. VA088345)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters, Michael R. Johnsen and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Manuel Gonzalez was convicted of robbing three store clerks with an accomplice who displayed a firearm. Appellant contends the trial court was required to give, sua sponte, an instruction regarding aider and abettor liability, because he was not holding the gun during the robbery. We disagree and affirm appellant's conviction, as the record shows that the jury necessarily found under other correct instructions that appellant harbored the requisite specific intent, both as an aider and abettor and as a direct perpetrator. Appellant also contends the trial court impermissibly imposed the upper term under California's indeterminate sentencing law, using factors condemned by the United States Supreme Court in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*). We agree as to two such factors, planning and sophistication, but find the error harmless beyond a reasonable doubt.

BACKGROUND

Appellant was charged with three counts of second degree robbery, each count involving a separate victim in the robbery that occurred January 28, 2004, at the J.C. Sales store in the City of Vernon. Sometime after 11:30 a.m., two men entered the store. One pointed a gun at several employees and a customer, while the other jumped over the counter near the cash register and demanded money. Two store employees, Maria Carmen Luna and Rosa Vasquez, complied, giving him money from the cash registers. He stole approximately $700 and took the purse of a third employee, Brenda Sandoval, before fleeing with his armed

accomplice. Appellant was identified as the robber who jumped over the counter and took the money and purse.[1]

Appellant was convicted of all three counts. In addition, the jury found that in the commission of each crime, a principal was armed with a handgun within the meaning of Penal Code section 12022, subdivision (a)(1), as specially alleged in the information.[2] In bifurcated proceedings, appellant admitted a 2003 felony conviction for receiving stolen property, for which he served a prison term, also alleged in the information. Appellant admitted that a juvenile petition was sustained in 1992, after he was found to have committed a robbery, and his motion to strike this prior was denied. A second alleged juvenile adjudication was stricken.

On December 15, 2005, the trial court sentenced appellant to prison for a total of 12 years, which included the upper term of five years as to count 1, doubled pursuant to section 1170.12 due to the juvenile robbery, with a one-year enhancement due to the prior prison term, pursuant to section 667.5,

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[1] The witnesses expressed uncertainty in their identifications, with one unable to identify appellant, and others testifying that appellant resembled the robber. Appellant proffered an alibi defense, but does not contend the evidence was insufficient to identify him as the robber who jumped over the counter. Other evidence linked him to the robbery -- the getaway car belonged to appellant's relatives, and the gun and a J.C. Sales deposit slip were found in it. Further, Detective Nicholas Perez testified that he had stills made from the store's surveillance tape and showed them to appellant's mother, Carmen Orozco, who upon seeing the photographs, said, "*Es mi hijo*" ("that's my son"). At trial, Orozco testified that she falsely identified the person depicted in the photograph as her son, only because she was forced to do so under duress exercised by the interrogating detective. Detective Perez denied that he or his Spanish interpreter, Detective Daniel Santos, used any means to force Orozco to identify her son, and testified that appellant was not a suspect until she identified him.

[2] All further statutory references are to the Penal Code, unless otherwise noted.

subdivision (b), and another one-year enhancement for the finding that a principal used a firearm, pursuant to section 12022, subdivision (a)(1). Appellant timely filed a notice of appeal.

DISCUSSION

1. *Aiding and Abetting Instruction*

Appellant contends the trial court erred in failing to give, sua sponte, an instruction defining aiding and abetting, such as CALJIC No. 3.01, in order to "inform the jury that a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Initially, appellant contends that instructing the jury with CALJIC No. 3.00 always triggers an obligation to give CALJIC No. 3.01.[3] The authorities upon which appellant relies, however, hold only that both instructions are required when the prosecution advances an aiding and abetting theory. (See, e.g., *People v. Reyes* (1992) 2 Cal.App.4th 1598, 1601-1602; *People v. Patterson* (1989)

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[3] The trial court read the following instruction based upon CALJIC No. 3.00: "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."

209 Cal.App.3d 610, 614-616; *People v. Ponce* (1950) 96 Cal.App.2d 327, 331.)[4] Here, the prosecution did not seek appellant's conviction as an aider and abettor, but as a direct perpetrator of the robbery.[5]

Nevertheless, appellant contends that he could have been convicted of robbery *only* as an aider and abettor, because it was his accomplice who held the gun. He argues that by failing to instruct the jury on a theory of aiding and abetting, the trial court removed an element of the crime of robbery from jury consideration. We disagree.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) In addition to defining robbery, fear, immediate presence, taking, and against the will, the trial court instructed the jury on the elements of robbery in the following language of CALJIC No. 9.40: "1. A person had possession of property of some value however slight. [¶] 2. The property was taken from that person or from his or her immediate presence. [¶] 3. The property was taken against the will of that person. [¶] 4. The taking was accomplished by either force or fear. [¶] 5. The property was taken with the specific intent permanently to deprive that person of the property."

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[4] In the fourth authority cited by appellant, CALJIC No. 3.01 had been given. (See *People v. Campbell* (1994) 25 Cal.App.4th 402, 411.)

[5] Although appellant's argument is unclear, he appears to suggest that CALJIC No. 3.01 is required whenever it is alleged, as here, that a principal was armed with a firearm for purposes of enhancement under section 12022, subdivision (a)(1), and the court instructs with CALJIC No. 17.15, explaining that both aiders and abettors and direct perpetrators are principals in the commission of a crime. (See § 31.) We reject that argument for the same reason -- the prosecution did not rely on an aiding and abetting theory.

By using CALJIC No. 9.40, the trial court correctly stated the elements of robbery. (See *People v. Jones* (1996) 42 Cal.App.4th 1047, 1055.) Nevertheless, appellant contends that the absence of an aiding and abetting instruction resulted in withholding the specific-intent element of the crime from the jury. He describes the specific-intent element as that of having "shared his co-participant's specific intent to get and retain possession of the money and purse by use of force or fear." Appellant also describes the necessary specific intent not as his own intent to rob the victims, but as the intent to facilitate or encourage his accomplice's intent to use force or fear by means of a gun. Accepting appellant's description of specific intent would result in the creation of a new specific-intent element of the crime of robbery -- the specific intent to use force or to cause fear. However, appellant has proffered no authority which suggests that it is the *intended* use of force or fear that constitutes an element of the crime, rather than simply the *use* of force or fear to accomplish the crime. The specific intent required to commit a robbery is the intent to steal (see *People v. Ford* (1964) 60 Cal.2d 772, 792), not the intent to use force or fear to do so. Appellant's intent to steal was established beyond dispute by evidence that he demanded and received money from the victims.

Aider and abettor liability is vicarious, arising from the aider and abettor's knowledge of the purpose of the actual perpetrator and the intent to facilitate that purpose. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118.) "It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury. [Citation.]" (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, citing *People v. Beeman*, *supra*, 35 Cal.3d at p. 556.) Thus, liability is imposed even when the aider and abettor's actions fall short of acts constituting the elements of the crime. (*Ibid.*; see *People v. Beeman*, *supra*, at p. 559.) It follows that one who is an active participant in a robbery, whose actions constitute the elements of the crime, and who is shown to

harbor the specific intent to steal, is a direct perpetrator, and an aiding and abetting instruction is unnecessary in such circumstances. (*People v. Leach* (1985) 41 Cal.3d 92, 105; see *People v. Stankewitz* (1990) 51 Cal.3d 72, 106.)

Arguing that no evidence was adduced at trial to show that he threatened anyone or personally used force, appellant contends that if the participant who takes the property did not personally cause the fear by which the theft is accomplished, an aiding and abetting instruction must be given. Appellant suggests that he could not be found to have committed the force or fear element merely by taking advantage of the fear created by his accomplice's use of the gun, except as an aider and abettor who intended to facilitate the use of a gun for the purpose of controlling the victims. We have found no authority for such a rule, and appellant cites none. Moreover, CALJIC No. 3.01 would not have instructed the jury that it must find appellant intended to facilitate his accomplice's use of force or fear, because CALJIC No. 3.01 does not define aiding and abetting as intentionally aiding, promoting, encouraging or instigating any *single element* of a crime, but as intentionally aiding, promoting, encouraging or instigating the *commission of the crime*.

Force or fear is not synonymous with physical assault and has no technical meaning beyond the common understanding of jurors. (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.) "So long as the perpetrator uses the victim's fear to accomplish the retention of the property, it makes no difference whether the fear is generated by the perpetrator's specific words or actions designed to frighten, or by the circumstances surrounding the taking itself." (*People v. Flynn* (2000) 77 Cal.App.4th 766, 772.) "Fear may be inferred from the circumstances in which a crime is committed or property is taken. [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 690.) Evidence of assault, threats or use of a weapon is unnecessary. (*People v. Brew* (1991) 2 Cal.App.4th 99, 104; see also *People v.*

Flynn, at p. 771.) Although one meaning of "use" is "'to carry out a purpose or action by means of,'" another meaning is "to 'apply to advantage.' [Citation.]" (*People v. Donnell* (1975) 52 Cal.App.3d 762, 778.) We conclude that knowingly taking advantage of fear engendered by a gun displayed by an accomplice in order to steal is a use of fear.[6]

Appellant anticipates respondent's reliance upon *People v. Cook* (1998) 61 Cal.App.4th 1364 (*Cook I*), in which the appellate court held: "If the defendant performed an element of the offense, the jury need not be instructed on aiding and abetting, even if an accomplice performed other acts that completed the crime." (*Id.* at p. 1371.) Appellant points out that in habeas proceedings brought by the same defendant, the federal district court criticized that language, because it enunciated a "clearly unconstitutional" new rule that could result in conviction without proof of the required mens rea. (*Cook v. Lamarque* (E.D.Cal. 2002) 239 F.Supp.2d 985, 986 (*Cook II*).)[7] However, the criticized language in *Cook I* was unnecessary, as the federal court pointed out, because "[i]n returning a guilty

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[6] Moreover, appellant did more than take advantage of fear engendered by his armed accomplice. Immediately upon entering the store, he jumped over the counter, demanded money and repeated the demand. Luna testified that she gave him money "because I was scared and I was afraid he would hurt us." The remaining employees, Vasquez and Sandoval, both testified to the fear engendered by the man with a gun. Neither victim was asked whether appellant's conduct also frightened them, but where it appears conduct was reasonably calculated to produce fear, the victims' actual fear will be inferred. (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 698.) Similar conduct has been held to satisfy the element of fear. (See, e.g., *People v. Brew, supra,* 2 Cal.App.4th at p. 104.)

[7] Respondent did, in fact, rely upon *Cook I*, and despite appellant's citation to *Cook II* in his opening brief, respondent inexplicably failed to mention its subsequent history, including the fact that the language respondent relied upon was found to be unconstitutional.

verdict on the robbery charge, the jury necessarily found that Petitioner had the specific intent to deprive the victim of his property." (*Cook II*, *supra,* at pp. 993-994.) Thus, an aiding and abetting instruction was not required, and any error in failing to give such an instruction was harmless beyond a reasonable doubt. (*Ibid*.)

Here too, the jury was instructed that it could not convict appellant unless it found he had the specific intent permanently to deprive the victims of the property. By its guilty verdict on the robbery charge, the jury necessarily found that appellant harbored that specific intent. Thus, even assuming, arguendo, that an aiding and abetting instruction should have been given, failure to do so was harmless, because "no reasonable trier of fact, having actually found that defendant acted with the requisite knowledge, 'could at the same time have concluded that the defendant did not act for the purpose of facilitating or encouraging the crime.' [Citation.]" (*People v. Leach*, *supra*, 41 Cal.3d at p. 105.) As there was no reasonable possibility that the lack of an aiding and abetting instruction affected the verdict, its omission was necessarily harmless beyond a reasonable doubt. (*Id*. at p. 106; see also *People v. Stankewitz*, *supra*, 51 Cal.3d at p. 106.)

2. *Apprendi/Blakely Error*

The trial court sentenced appellant to the upper term, citing several factors in aggravation: there were multiple victims; appellant was on parole at the time of committing the offense; and the offense involved planning and sophistication, in that it was a coordinated robbery -- one robber held the gun while appellant jumped over the counter and stole the property. Appellant contends his sentence violates his federal constitutional right to due process and a jury trial, because in choosing to impose the upper term, the court relied on factors not found by a jury. (*Blakely v. Washington* (2004) 542 U.S. 296, 303 (*Blakely*); *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).)

"[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. [Citations.]" (*Cunningham v. California, supra,* 127 S.Ct. at p. 860.)[8] In *Cunningham*, "the high court held that California's determinate sentencing law violates a defendant's Sixth and Fourteenth Amendment right to a jury trial to the extent it permits a trial court to impose an upper term based on facts found by the court rather than by a jury beyond a reasonable doubt." (*People v. Calhoun* (2007) 40 Cal.4th 398, 406.)

Appellant contends that the trial court's reliance on multiple victims as an aggravating factor was improper, because such factor is not listed in California Rules of Court, rule 4.421 (former rule 421). At the same time, however, appellant recognizes that the factors listed in the rule are not meant to be exclusive. (Cal. Rules of Court, rule 4.408; see *People v. Berry* (1981) 117 Cal.App.3d 184, 191.) Further, following the United States Supreme Court's decision in *Cunningham*, the California Supreme Court held that where a jury has convicted the defendant of multiple counts involving different victims, as in this case, the *Apprendi*/*Blakely* rule is satisfied. (See *People v. Calhoun, supra*, 40 Cal.4th at pp. 406-408.)

Appellant also contends that because he was not afforded a jury trial on the question whether he was on parole at the time of the current offense, that fact was improperly used to impose the upper term.[9] Relying on *Shepard v. United States*

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[8] Because *Cunningham* was decided after respondent's brief was filed, we permitted respondent to file a supplemental brief, and appellant to file a reply to the supplemental brief.

[9] While appellant described the aggravating factor used by the trial court as "probation," we treat his argument as addressing the court's reference to parole.

(2005) 544 U.S. 13, appellant contends that *Apprendi*'s exception for prior convictions has been significantly narrowed, and applies only to the fact of the conviction.[10] Thus, he argues, it does not extend to considering whether he was on parole at the time of the current offense. Appellant ignores the fact -- pointed out in respondent's supplemental brief -- that his trial counsel admitted appellant was on parole at the time of the current offense. "It is, of course, well established that the defendant is bound by the stipulation or open admission of his counsel and cannot mislead the court . . . by seeming to take a position on issues and then disputing or repudiating the same on appeal. [Citations.]" (*People v. Pijal* (1973) 33 Cal.App.3d 682, 697.) Aggravating factors admitted by the defendant need not be tried to a jury. (*Blakely*, *supra*, 542 U.S. at p. 303; *Apprendi*, *supra*, 530 U.S. at p. 488.)

In imposing the upper term, the trial court also relied upon its finding that the offense involved planning and sophistication, because it was a coordinated robbery, in that one robber held the gun on the victims while the other took the money. No such finding was made by the jury; accordingly, that factor could not properly be considered in imposing the upper term. (See *Cunningham, supra,* 127 S.Ct. at p. 868.)

Respondent acknowledges that *Apprendi* error is reviewed under the standard applied to federal constitutional error in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).) (See *People v. Sengpadychith* (2001) 26 Cal.4th 316,

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[10] Appellant's contention overstates the holding in that case. The prior-conviction exception is sufficiently broad to encompass all matters ascertainable from the face of the prior judgment of conviction. (*People v. McGee* (2006) 38 Cal.4th 682, 707-709 (*McGee*); *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.)

326.)[11] Citing *People v. Osband* (1996) 13 Cal.4th 622 (*Osband*), respondent points out that a single factor in aggravation is sufficient to justify the imposition of the upper term, and suggests that it is unlikely the trial court would have imposed a lesser sentence without the additional factor of planning or sophistication. (See *Osband,* at p. 728.) We agree. Here, there was not merely a single proper factor in aggravation, but two -- multiple victims and appellant's parole status at the time of the crime. Further, the trial court found no factors in mitigation. We are persuaded beyond a reasonable doubt that under the circumstances presented here, the trial court would have imposed the same sentence without considering the factor of planning and sophistication. (See *U.S. v. Zepeda-Martinez*, *supra*, 470 F.3d at p. 913.)

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[11] The United States Supreme Court has suggested that in applying the harmless error test to *Apprendi* error, courts should be guided by the analysis in *Neder v. United States* (1999) 527 U.S. 1 (*Neder*). (*Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2548].) In the context of *Apprendi* error, one court has rephrased the test as follows: "Under *Recuenco* and *Neder*, an error is harmless if the court finds beyond a reasonable doubt that the result 'would have been the same absent the error.'" (*U.S. v. Zepeda-Martinez* (9th Cir. 2006) 470 F.3d 909, 913, quoting *Neder*, at p. 19.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

I concur:

EPSTEIN, P. J.

I concur in the judgment only:

SUZUKAWA, J.