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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW WAYNE RAYMOND, Defendant and Appellant.	E037922 (Super.Ct.No. RIF116893) OPINION
THE PEOPLE, Plaintiff and Respondent, v. DARELL LEE BUTLER, Defendant and Appellant.	E039781 (Super.Ct.No. RIF116893)

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant Matthew Wayne Raymond.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Darell Lee Butler.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil Gonzalez, Supervising Deputy Attorney General, and Theodore M. Cropley, Deputy Attorney General, for Plaintiff and Respondent.

Defendants and appellants Matthew Wayne Raymond and Darrell Lee Butler appeal their convictions of grand theft. They contend the court erred in certain evidentiary rulings and in giving jury instructions. We affirm.

FACTS

On May 10, 2004, Steven Statter was sitting in a parked automobile in the parking lot of an apartment building. Defendants approached the vehicle and Statter lowered the window. Defendant Butler told Statter that he wanted to buy drugs. Statter said he did not have any drugs. Defendant Butler reached in, grabbed $1,720 in cash from Statter's shirt pocket, ripping the pocket. Defendant Raymond was standing right behind Butler.

Defendants were charged with robbery. (Pen. Code, § 211.)[1] The information alleged that each defendant had personally used a deadly or dangerous weapon.

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

(§ 12022, subd. (b)(1).) The information alleged that defendant Raymond had a prison term prior. (§ 667.5, subd. (b).) Defendant Butler was alleged to have suffered seven prison term priors (§ 667.5, subd. (b)), a strike prior (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), and a prior serious felony conviction (§ 667, subd. (a)).

The jury found each defendant guilty of the lesser included offense of grand theft. The jury found the weapon allegations not true.

Defendant Raymond admitted his prior prison term allegation. Defendant Butler admitted his seven prior prison terms and a serious or violent felony conviction. Defendant Raymond was sentenced to three years in state prison (two years for grand theft, plus one year for the prior prison term) and defendant Butler was sentenced to 12 years (six years – double the aggravated term – for the grand theft, plus one year each for six prior prison terms). The court struck one of defendant Butler's seven prior prison term allegations.

DISCUSSION

1.

THE EXCLUSION OF AN INCONSISTENT STATEMENT AS TO AN UNAVAILABLE WITNESS WAS HARMLESS

Both defendants contend that the trial court erred in denying their request to present inconsistent statements of a witness, Jim Jones, who was unavailable at trial.

A. Factual Background

Victim Statter had planned to meet Jim Jones and Javier Anguiano at the apartment complex. When he arrived, he saw Jones and Anguiano talking to defendants

in the parking lot. Not wishing to talk to defendants, Statter parked his vehicle on the far side of the parking lot. Defendants then approached the vehicle where Statter had parked. Defendant Butler grabbed the money and both defendants fled.

Statter, with Anguiano and Jones, went to defendant Raymond's residence to confront him about the theft. The police were already there.

In his police interview, defendant Butler admitted that he was in the parking lot, talking with defendant Raymond, Anguiano, and Jones, at the time that Statter drove up. He admitted taking the money.

On the date of the theft, police also interviewed Jones. Jones told Officer Hutzler that he saw the confrontation between defendants and Statter. Nearly a year later, in February 2005, Jones apparently told a prosecution investigator that he did not actually see the incident. He said that he and Anguiano were inside an apartment at the time of the theft.

Anguiano testified at trial that he saw the incident. Jones did not testify. Defendants wanted to introduce Jones's statements to the investigator in 2005, i.e., that he and Anguiano were inside an apartment and not in the parking lot when the theft occurred. Apparently, defendant wanted to use the statement to undermine Anguiano's credibility that Anguiano had seen the theft; presumably, Anguiano would not have seen it if he were inside an apartment with Jones.

B. Any Error Was Harmless

The People concede that defendants should have been allowed to introduce this evidence. Whether or not the court erred, however, the exclusion of the evidence was harmless by any standard of prejudice.

Statter testified that defendants accosted him and that defendant Butler took his money. Statter testified that immediately thereafter, defendants ran away, got into a car, and sped out of the parking lot. Police found defendants at defendant Raymond's residence. Defendant Raymond was hiding in an enclosed area near the pool. The money was found in defendant Raymond's garage. Defendant Raymond and defendant Butler each admitted to police that they had taken the money. Defendants each also told police that Jones and Anguiano were with them, conversing, in the parking lot just before they went to accost Statter.

Evidence that Jones had made conflicting statements cut both ways: He told police that he *had* witnessed the theft. His later statement (that he had not) was inconsistent only to the extent that he had already told police that he saw defendants commit the crime. The only other point of contact with the issues in the case was whether Jones's statement, that he and Anguiano had been inside at the time of the theft, cast doubt on Anguiano's testimony that he had in fact seen the theft take place. But defendants themselves told police that they were in the parking lot with both Jones and Anguiano immediately before accosting Statter, defendants themselves each had confessed to committing the crime, Statter's testimony identified both defendants as the

thieves, and the money was found at defendant Raymond's residence. Whether Jones and Anguiano also saw the incident was insignificant in light of the remaining evidence.

Under either the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) or *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705]) standard of prejudice, any error in failing to admit the proffered evidence was harmless.

2.

No Instructional Error

A. The Contention

Defendant Raymond raises the contention that the trial court's instruction on aiding and abetting, CALJIC No. 3.01, was incorrect. He argues that the instructions improperly permitted the jury to find him guilty without sufficient evidence that he aided *and* abetted defendant Butler.

CALJIC No. 3.01, as given by the court, provides:

"A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] Mere presence at the scene of a 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."

Section 31 defines the principals to a crime, including aiders and abettors: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

Defendant Raymond makes a purported distinction between "aiding," which he defines as assisting or supplementing the efforts of another, and "abetting," which he defines as inciting or encouraging. (Citing *People v. Elliott* (1993) 14 Cal.App.4th 1633, 1641-1642 (*Elliott*).) He argues that section 31 requires proof that he aided *and* abetted the crime, i.e., that he both assisted *and* that he encouraged or incited his codefendant in the commission of the crime. CALJIC No. 3.01, he argues, impermissibly allowed a finding of guilt as an aider and abettor if he aided, promoted, encouraged, *or* instigated the commission of the crime, rather than requiring both that he aided the commission of the crime *and* that he promoted, encouraged, or instigated the crime.

B. Defendant Waived His Right to Claim Error in the Instructions

Defendant Raymond did not object to the instruction below. In fact, defendant requested the instruction. If he believed the instruction needed amplification or clarification, the burden was on him to request such instructions. (*People v. Dennis*

(1998) 17 Cal.4th 468, 514.) "Failure to do so waives the claim of instructional error on appeal." (*People v. Fraser* (2006) 138 Cal.App.4th 1430, 1452.)

Defendant urges that the instruction, by assertedly not requiring a finding that he both aided *and* abetted the crime, resulted in the failure to instruct on a necessary element of the crime, thus affecting his "'substantial rights'" to due process of law. (See § 1259; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 6.) We do not consider that defendant's "substantial rights" were affected by instructional error, inasmuch as his interpretation of "aid and abet" is faulty, as is shown by our analysis below.

C. The Instruction Was Proper

Defendant's contention has already been rejected on the merits in other cases:

"Like the defendant in *Campbell*[2] Booth relies heavily on [*Elliott*] where the court observed that a defendant who only encouraged felons to run away and hide after the commission of the crime but had not actually harbored, concealed, or aided them did not fit within the definition of an *accessory after the fact* as set forth in Penal Code section 32. [Citation.] However, such reliance is misplaced. *Campbell* clearly points out that, while *Elliott* drew from case law discussing aiding and abetting, it 'did not purport to construe section 31 or the phrase "aid and abet." Moreover, although *Elliott* and the cases cited therein recognize a distinction between the terms "aid" and "abet," they do not suggest that the phrase "aid and abet" in section 32 [*sic*] requires separate findings

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[2] *People v. Campbell* (1994) 25 Cal.App.4th 402 (*Campbell*).

that one assisted and encouraged the perpetrator of a crime.' (*Campbell*, *supra*, 25 Cal.App.4th at p. 412.)

"*Campbell* explains that the reason our courts have been careful to draw the distinction between 'aiding' and 'abetting' is not because there is a two-pronged test, but to emphasize that one cannot be convicted of being an accomplice by conduct alone, but must also share the principal's purpose or goal to commit the crime, i.e., there must be a union between act and intent. For that reason, the term 'abet,' which requires a guilty state of mind, has been recognized as an indispensable element of accomplice liability. (*Campbell*, *supra*, 25 Cal.App.4th at p. 414.)

"While accomplice liability cannot be predicated on conduct absent the required mental state, one *can* be guilty as an accomplice (if he shares the goal of the perpetrator) without having actually assisted the commission of the offense, e.g., by 'instigating,' or 'advising' the perpetrator to commit it or by having been 'present for the purpose of its commission.' (See *Campbell*, *supra*, 25 Cal.App.4th at p. 411, and cases cited.)

"Like the court in *Campbell*, we note that the instruction attacked here as insufficient was modeled after the one proposed by the California Supreme Court in *People v. Beeman* (1984) 35 Cal.3d 547, 561 [199 Cal.Rptr. 60, 674 P.2d 1318]. Review in *Campbell* was denied on August 17, 1994. (25 Cal.App.4th at p. 414.)

"We adopt the reasoning of *Campbell* to conclude that CALJIC No. 3.01 adequately instructs the jury on the concept of aiding and abetting. . . ." (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1255-1256.)

We find *Booth* and *Campbell* persuasive. *Elliott* is inapposite. The instruction given was proper.

3.

DEFENDANT BUTLER'S SENTENCE WAS PROPER

A. *Cunningham v. California*

In *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 547 U.S. ___ [127 S.Ct. 856] (*Cunningham*), the United States Supreme Court held that the California Determinate Sentencing Law (DSL) violated an accused's right to a jury trial, to the extent that the DSL permits a judge, rather than the jury, to find facts to support imposing the aggravated term. "[T]he Federal Constitution's jury-trial guarant[y] 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." (*Cunningham*, *supra*, 547 U.S. at p. ___ [127 S.Ct. at p. 860].)

Under the DSL, the aggravated sentence is not the "statutory maximum," because California courts are required to impose the middle term unless the court (sitting without the jury) finds facts, based upon a preponderance of the evidence, either in mitigation or aggravation of the offense. (§ 1170, subd. (b).) The middle term is: the "statutory maximum" pursuant to *Cunningham* and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; because it is the maximum sentence which can be imposed in the absence of additional factual findings. (*Cunningham*, *supra*, 547 U.S. at p. ___ [127 S.Ct. at p. 860].)

B. The Trial Court Properly Selected the Aggravated Term

Here, the jury found defendant guilty of a lesser included offense—grand theft. The jury found not true the allegation that defendant was armed with a deadly weapon. Defendant expressly waived his right to a jury trial on his prior conviction allegations. Defendant thereafter admitted seven felony convictions which had resulted in separate prison terms, and he admitted an allegation that he had suffered a prior serious or violent felony conviction for residential burglary, a strike prior.

At sentencing, the court acknowledged *Blakely, supra*, and opined that it had discretion to impose the aggravated term. Defendant had numerous prior convictions. In almost every instance, as defendant had admitted on the record, he had failed after each release on parole to remain free of prison custody for a period of five years. The court found that defendant's prior performance on parole was thus unsatisfactory. The court characterized defendant's convictions as both numerous, which was patent, and of "increasing seriousness." In chronological order, defendant's convictions were for: possession of a dangerous weapon, 6/23/00; spousal abuse, 5/4/98; petty theft with a prior, 10/7/94; possession of a controlled substance, 12/18/91; vehicle theft, 5/22/89; possession of a controlled substance, 6/17/86; and residential burglary, 2/23/84; which do show something of a pattern of increasing seriousness (greater violence). Defendant also expressly admitted that his residential burglary conviction constituted a prior strike conviction. Here, all of the factors which the trial court considered in aggravation of the sentence were matters encompassed within defendant's admissions on the record.

Accordingly, the trial court's selection of the aggravated term, and sentencing as a second striker under the Three Strikes Law, did not violate *Blakely* or *Cunningham*.

DISPOSITION

The judgment as to each defendant is affirmed.

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/s/ McKINSTER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ RICHLI
J.