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

THE PEOPLE,

H028483

Plaintiff and Respondent,

(Monterey County
Superior Court
No. SS042365A)

v.

LUIS ANTHONY RESTO,

Defendant and Appellant.

Defendant was convicted by jury trial of carrying a concealed firearm on his person (Pen. Code, § 12025, subd. (a)(2)), carrying a loaded unregistered firearm (Pen. Code, § 12031, subd. (a)(1)) and commercial burglary (Pen. Code, § 459). The court found true a prior serious felony (Pen. Code, § 1170.12) allegation, and it committed defendant to state prison for a six-year term. On appeal, defendant challenges the sufficiency of the evidence to support the burglary count, and he claims that the trial court violated his constitutional rights in imposing an upper term for the carrying a concealed firearm count. We reject his contentions and affirm the judgment.

I. Evidence At Trial

On August 30, 2004, at about 1:00 a.m., Genaro Estrada, the night crew manager of Food 4 Less, was working stocking the shelves of the store. There were six or seven other employees in the store. The store was not busy at that time, so all of the employees were working stocking the shelves. Estrada saw defendant approach the chips section. There was an “emergency door” next to the chips section. Defendant picked up some chips and walked toward the checkstand. As he did so, defendant “kept looking at” Estrada.

About two minutes later, Estrada saw defendant by the newspapers with a group of four to seven guys walking “right behind him.” Defendant walked toward the candy section with the group of guys following three or four steps behind him. Defendant stopped at the candy section, and he “was looking all around.” Defendant looked at Estrada, who was about ten steps away from defendant, and he also looked at the emergency door by the chips section. The group of guys who had been following defendant proceeded toward the beer section, which was out of Estrada’s sight, about 40 feet away.

Six or seven seconds later, the alarm on the emergency door near the beer section went off. Estrada ran toward that emergency door because he knew from experience that sometimes people would grab beer and run out the emergency door. Innocente Ybarra, the store’s security guard, and three other store employees, Danny Sanchez, Luis Herrera and Jose Casares, also ran to that emergency door. Ybarra saw two men leaving the store with a six-pack of beer. The store employees followed the men out the door and saw a light brown truck “pulling out” as the guys who had been behind defendant were “trying to get on the truck.” One of the guys dropped a bottle of tequila, and then the guys got into the truck, and the truck drove away. The five store employees walked around the store to the front door and reentered the store.

Between one and five minutes had passed since the alarm had gone off. Defendant was at the checkstand buying candy and chips. He paid with exact change. Estrada told Ybarra that defendant had been with the guys who had stolen the beer, and Ybarra detained defendant. Defendant was compliant. Ybarra asked defendant if he had been with the men who had taken the beer, and defendant admitted that he had been with them. Defendant also told Ybarra that he “was buying his items and that he had a receipt for it” and “why would he be with them if he was shopping.” Defendant denied stealing anything. Defendant sat for a while. Then he stood up, looked around, took a gun out from under his clothing and put the gun in a garbage bag. A few minutes later, Sanchez told Ybarra that he had seen defendant place a gun in a bag, and Ybarra handcuffed defendant.

About two minutes after he was handcuffed, defendant ran out the front door of the store. Estrada and the other four employees pursued defendant. They caught him about a block away, and they brought him back to the store. By that time, the police had arrived. A police officer arrested defendant and searched him. The officer found a police scanner in defendant’s back pocket and a cell phone. A wire was running from the scanner under defendant’s clothing up to an earpiece. The scanner was turned on and tuned to the police department’s “primary channel.” The gun that defendant had discarded was recovered, and it proved to be a loaded .22 caliber pistol. Defendant was not the registered owner of the pistol.

II. Procedural Background

Defendant was charged by information with carrying a concealed firearm on his person (Pen. Code, § 12025, subd. (a)(2)), carrying a loaded firearm (Pen. Code, § 12031, subd. (a)(1)) and commercial burglary (Pen. Code, § 459), and it was specially alleged that defendant was not the registered owner of the firearm (Pen. Code, § 12025, subd. (b)(6), 12031, subd. (a)(2)(F)). The information further alleged

that defendant had suffered a prior serious felony juvenile adjudication within the meaning of Penal Code section 1170.12. The prior serious felony allegation was bifurcated, and defendant waived his right to a jury trial on that allegation.

The jury deliberated for more than a day. It found defendant guilty of all three counts and found true the special firearm allegations. The court found the prior serious felony allegation true. Defendant was committed to state prison to serve concurrent doubled upper terms of six years. He filed a timely notice of appeal.

III. Discussion

A. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support the burglary conviction.

“The crime of burglary consists of an act—unlawful entry—accompanied by the ‘intent to commit grand or petit larceny or any felony.’ (§ 459.) One may be liable for burglary upon entry with the requisite intent to commit a felony or a theft (whether felony or misdemeanor), regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed.” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042.)

Here, the theory at trial was not that defendant intended to perpetrate a theft himself but that he aided and abetted his compatriots. Liability as an aider and abettor requires “proof that [the] aider and abettor act[ed] with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Where the underlying offense is a specific intent crime, as burglary is, the aider and abettor must “share” the perpetrator’s intent. (*Beeman*, at p. 560.) “[A]n aider and abettor will ‘share’ the perpetrator’s specific intent when he or she knows the full extent of the perpetrator’s criminal purpose and gives aid or

encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.” (*Beeman*, at p. 560.) Such intent “is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence.” (*People v. Holt* (1997) 15 Cal.4th 619, 669, internal quotation marks omitted.)

“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, emphasis in original.) “[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425; accord *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) “[W]e must review the entire record, and drawing all reasonable inferences in favor of [the judgment], . . . determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.] [¶] Reversal on this ground is unwarranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” (*People v. Manriquez* (2005) 37 Cal.4th 547, 576-577, internal quotation marks omitted.)

At 1:00 a.m., defendant entered a store carrying both a loaded pistol and a police scanner concealed under his clothing. The scanner was hooked up to a wire that ran up to an earpiece and was tuned to the local police department's “primary channel.” His possession of the gun and scanner was indicative of an intent to engage in criminal activity. Defendant repeatedly looked at the store employee nearest one of the emergency doors. He first grabbed a package of chips and made it appear as if he was headed for the checkstand. However, he subsequently reappeared at the head of a group of men walking across the store. Defendant's apparent surveillance activity and

misdirection suggested that he was about to engage in criminal activity within the store.

Defendant then positioned himself near the same store employee he had been watching, looked at the store employee again, looked at an emergency door and scanned the entire area. This conduct suggested that defendant was acting as a lookout. Meanwhile, the group of young men who had been following defendant proceeded to the back of the store where they stole alcohol and ran out a rear emergency door. Defendant admitted that he had been with the group of men who perpetrated the theft. The fact that defendant surveilled one emergency door that was near a store employee and then maintained a lookout while other members of his group perpetrated a theft and escaped through an emergency door reflected that defendant was well aware of the group's intent to steal, shared that intent and was acting to facilitate the theft.

The reasonable inferences that a rational trier of fact could draw from this evidence clearly include the hypothesis that defendant was the advance man for the group of men who entered the store and perpetrated the theft. All of his activity was consistent with knowledge of the group's intent to steal and of his intent to aid and encourage them in doing so. His possession of a gun and police scanner strongly corroborated his intent. Substantial evidence supports the burglary conviction.

B. Sentencing

Defendant claims that the trial court violated his federal constitutional rights in sentencing him to an upper term for the carrying a concealed firearm count.

The prosecution made an in limine motion requesting that the jury be asked to make findings on aggravating circumstances. Defendant objected to any aggravating circumstances being presented to the jury for findings. The court denied the prosecution's request.

At the sentencing hearing, the prosecution argued that the offenses were aggravated. Defendant's trial counsel argued that the prosecution was precluded from seeking aggravated terms because the court had rejected the prosecution's request to place aggravating circumstances before the jury. The court responded: "There are a number of issues surrounding sentencing and how *Blakely* versus *Washington* may apply. [¶] The Court will not be taking into consideration, out of abundance of caution, any factors in aggravation except for those that the Court feels are specifically excluded by the *Apprendi* decision, and [the] Court is talking about *Apprendi* versus *New Jersey*, 530 U.S. 466, and also mentioned in *Blakely* versus *Washington* at 124 Supreme Court 2531. And those deal with prior convictions. But any of the other aggravation factors will not be considered by the Court."

Defendant's trial counsel then argued that the court should not utilize defendant's prior felony both as an aggravating factor and to double his term because the prior had occurred when defendant was "barely 16" and he had been doing well on parole.

The court rejected defendant's argument. It imposed a doubled upper term of six years for the carrying a concealed firearm count. It found "one factor in aggravation . . . and that is that the defendant was on misdemeanor probation and CYA parole at the time that the crime was committed."¹

Defendant acknowledges that his challenge to the upper term sentence imposed for the carrying a concealed firearm count is foreclosed by both *People v. Black* (2005) 35 Cal.4th 1238 [imposition of upper term without jury finding on aggravating

¹ The court selected a concurrent doubled upper term of six years for the burglary count. The court stated no reason for imposing this upper term, and defendant does not challenge this term on any ground. A doubled midterm of four years was imposed for the carrying a loaded firearm count, but the court stayed this term under Penal Code section 654.

circumstances does not violate federal constitution] and *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [prior conviction allegations are sentencing factors for court findings, not jury findings]. He “raises this argument for federal court review, and in the hopes that the U.S. Supreme Court will overrule both cases.” Since *Black* and *Almandarez-Torres* have not been overruled by the U.S. Supreme Court and we are bound by them (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we must reject his challenge.

IV. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Rushing, P.J.

Elia, J.