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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NEZIAH IGNATIUS NESBETH, et al., Defendants and Appellants.	B236375 (Los Angeles County Super. Ct. No. TA118603)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Harold J. Levy & Associates, Harold J. Levy for Defendant and Appellant Neziah Ignatius Nesbeth.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Marc A. Kohm and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Neziah Ignatius Nesbeth, and his co-defendant, Rodwell H. Smith,[1] were convicted of transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)[2]). Smith was also convicted of possession of marijuana for sale (§ 11359). On appeal, Nesbeth contends that the trial court punished him for exercising his right to trial by sentencing him to a two year term in state prison, erred in instructing the jury pursuant to CALCRIM 2361, and in denying his Penal Code section 1118.1 motion for judgment of acquittal. We affirm Nesbeth's judgment of conviction.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

Los Angeles Police Department Officers Bryan Dameworth and Jesus Carrillo were in a patrol car when a vehicle suddenly turned and changed lanes if front of them, causing Officer Dameworth, who was driving, to brake. The officers initiated a traffic stop. Smith, the driver of the vehicle, exited it and Officer Dameworth directed him to go to the sidewalk.

Officer Carrillo testified that he approached the front passenger side of the vehicle, and the window was open. Officer Carrillo smelled a "strong pungent odor" of fresh, not burned, marijuana coming from the vehicle.

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[1] Appointed counsel for Smith filed an opening brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436. We consider Smith's matter in a separate opinion.

[2] All statutory citations are to the Health and Safety Code unless otherwise noted.

Officer Carrillo asked Nesbeth, who was in the front passenger seat of the vehicle, if he had been smoking marijuana, and Nesbeth responded, "Yes, sir, we both had been smoking marijuana."[3]

Officer Dameworth testified that Officer Carrillo motioned to him that he smelled an odor of something in the vehicle. Officer Carrillo walked over to talk to Smith, and Office Dameworth walked to the passenger side of the vehicle. Officer Dameworth smelled the odor of marijuana when he was about two or three feet from the vehicle. Officer Carrillo testified that Smith had an expired medical marijuana card.

Officer Dameworth testified that he opened the passenger door to the vehicle, smelled "a strong odor" of marijuana, and observed a blue trash bag in the center of the vehicle between the second row passenger seats. The blue trash bag contained four unwrapped bricks of marijuana totaling 16.8 pounds. Officer Dameworth testified that he did not find any marijuana smoking paraphernalia or rolling papers in the vehicle or on the persons of Smith or Nesbeth. The officers testified that neither Smith nor Nesbeth showed any symptoms of being under the influence of marijuana.

Based on a hypothetical question closely tracking the facts introduced at the trial, Los Angeles Police Department Officer Darren Stauffer, the prosecution's expert witness, opined that individuals in the vehicle possessed and transported the marijuana for purpose of sale. Officer Stauffer opined, based on his experience, that people who transported drugs sometimes do it alone and sometimes in groups. The street value of marijuana ranged from $1,000 to $10,000 a pound, depending on the quality.

2. Defendant's Evidence

Nesbeth testified that he asked Smith for a ride to Victorville. Nesbeth smelled something "funny" in the vehicle, but he did not ask Smith what the smell was. Nesbeth

[3] The trial court gave the jury a limiting instruction that the jury may consider Officer Carrillo's testimony concerning this statement by Nesbeth only as to Nesbeth and not Smith.

did not see any bag in the vehicle, and he denied that he told the police that he had been smoking marijuana.

B. Procedural Background

The District Attorney of Los Angeles County filed an information jointly charging Smith and Nesbeth with possession of marijuana for sale in violation of section 11359 (count 1), and sale/offer to sell/transportation of marijuana in violation of section 11360, subdivision (a) (count 2). Following a trial, the jury found Smith guilty on both counts. The trial court declared a mistrial on count 1 as to Nesbeth because the jury was unable to reach a verdict, and the jury found defendant Nesbeth guilty on count 2. The trial court denied Nesbeth's motion for judgment of acquittal made pursuant to Penal Code section 1118.1.

The trial court sentenced Smith to 184 days in county jail and three years of formal probation, and imposed fines. Smith was credited with 184 days in actual custody credits. The trial court denied Nesbeth probation and sentenced him to a state prison term of two years and imposed fines. Nesbeth was credited with 16 days in custody consisting of 8 actual custody credits and 8 conduct credits.

DISCUSSION

A. Exercise of Right to Trial

Nesbeth contends that, in sentencing him, the trial court punished him for exercising his right to trial. We disagree.

1. Standard of Review

We review the trial court's sentencing choices for an abuse of discretion, and do not interfere with the court's exercise of its discretion when it has considered all facts bearing on the offense and the defendant. (*People v. Vargas* (1975) 53 Cal.App.3d 516, 533; *People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.) To merit relief on appeal

from an alleged abuse of discretion, it must clearly appear that the resulting injury is sufficiently grave to manifest a miscarriage of justice. (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573-574.)

2. Applicable Law

Our California Supreme Court in *People v. Collins* (2001) 26 Cal.4th 297, stated, "The Sixth Amendment, made applicable to the states in this context by the Fourteenth Amendment of the federal Constitution, confers upon a defendant in a criminal prosecution the right to a trial by jury. [Citations.] . . . Similarly, article I, section 16 of the California Constitution confers upon a defendant in a criminal prosecution the right to a trial by jury. [Citations.]" (*Id*. at p. 304.) "It is well settled that to punish a person for exercising a constitutional right is 'a due process violation of the most basic sort.' [Citation.] [¶] . . . [T]he refusal of an accused to negotiate a plea with the prosecution must not influence the sentence imposed by the court after trial." (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279.) The court in *Lewallen* also stated, "We emphasize, however, that a trial court's discretion in imposing sentence is in no way limited by the terms of any negotiated pleas or sentences offered the defendant by the prosecution. The imposition of sentence within the legislatively prescribed limits is exclusively a judicial function. [Citation.] . . . Legitimate facts may come to the court's attention either through the personal observations of the judge during trial [citation], or through the presentence report by the probation department, to induce the court to impose a sentence in excess of any recommended by the prosecution." (*Id.* at p. 281, footnote omitted; see *In re Edy D*. (2004) 120 Cal.App.4th 1199, 1201.) Moreover, our Supreme Court has stated, "The mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights." (*People v. Szeto* (1981) 29 Cal.3d 20, 35.)

3. Background Facts

Smith desired to accept a plea bargain offered prior to trial by the prosecution, but it was a "package deal" made also to Nesbeth. Smith was prevented from agreeing to the offered plea bargain because Nesbeth desired to proceed to trial. Smith went to trial but did not testify or call any witnesses.

Upon conviction, the trial court sentenced Smith to, inter alia, three years of formal probation. The following exchange occurred during the hearing on Nesbeth's sentencing: "[Nesbeth's counsel:] "I am submitting that [Nesbeth] should be given time served and released from the court today. [Trial court:] Okay. People? [Prosecutor:] Your Honor, our recommendation for Mr. Nesbeth was 45 days Cal-Trans and 45 days of community service with 3 years of formal probation. [Trial court:] And that was before the trial? [Prosecutor:] Before the trial it was 30 days Cal-Trans and 30 days of community service. [Trial court:] Right. And he didn't take that. [Prosecutor:] Correct. [Trial court:] And he went to trial. And he got convicted of transporting almost 17 pounds of marijuana. And it's a felony. And the sentencing range for that is 2 year, 3 years and 4 years." The trial court then sentenced Nesbeth, stating, "I'm going to deny probation. This isn't a matter of transporting a small amount of marijuana. You're talking 16 plus pounds. And because of that large quantity of marijuana, I think that's an aggravating factor that certainly would justify the court in denying probation. [¶] Having said that there is the middle term of 3 years, which would be appropriate unless I think that it should be the high term because of the amount of marijuana. And I can use it to deny probation and also to find it as an aggravating factor to impose the higher term. I'm not going to do that because of what's happened in this case overall. I won't give him the midterm. I'll sentence him to the low term of 2 years in the state prison."

Nesbeth's counsel stated, "In terms of just general equity, given that the co-defendant was convicted of possession for sale, and my client was only convicted of transportation, and the co-defendant received 90 days time served, it—and my client has no record whatsoever, and there was nothing complicated about the arrest or anything else, I'm a little bit at a loss why a person who was convicted of possession would

receive a greater sentence than a person who was convicted of . . . transportation and possession for sale?" The trial court responded, "Well, Mr. Smith early on wanted to admit his guilt. That's a factor. It's also a factor that he's—I'm giving [Nesbeth] the low term rather than the midterm or the high term."

4. Analysis

Nesbeth contends that the trial court's statements during sentencing indicated it was punishing Nesbeth for his decision to have a jury trial. The trial court said that Nesbeth rejected the plea offer, was convicted of transporting marijuana, and the crime was subject to a specific sentencing range. "A trial court's judgment is presumed to be correct and to be based on legitimate sentencing objectives. Isolated or ambiguous remarks by the trial court do not overcome that presumption. The party attacking the judgment must clearly and affirmatively demonstrate that the trial court relied on improper considerations." (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 835.) The trial court's statements could reasonably be inferred to mean that the plea offer was no longer valid and the trial court was not bound to sentence Nesbeth under the terms of the rejected plea offer. (*In re Lewallen*, *supra*, 23 Cal.3d at p. 281 [a trial court's discretion in imposing sentence is not limited by the terms of any negotiated plea, and sentencing is a judicial function if it is within the legislatively prescribed limits].)

The trial court did not abuse its discretion in denying Nesbeth probation. It did so because Nesbeth was convicted of transporting a large quantity—over 16 pounds—of marijuana in violation of section 11360, subdivision (a). This is a factor that may be considered by the trial court in determining whether to deny probation. (Cal. Rules of Court, rule 4.414(a)(1) ["[t]he nature, seriousness, and circumstances of the crime as compared to other instances of the same crime" is a criteria affecting the decision to deny probation].) A defendant convicted of violating section 11360, subdivision (a) "shall be punished by imprisonment . . . for a period of two, three or four years" (§ 11360, subd. (a)), and Nesbeth was sentenced to the low term of 2 years.

Nesbeth contends that the trial court punished him for exercising his right to trial because he was sentenced to two years in state prison, but Smith received three years of formal probation. The trial court explained to Nesbeth's counsel that Smith received more lenient sentence because, unlike Nesbeth, Smith wanted to admit guilt prior to trial. Such a willingness to acknowledge wrongdoing at an early stage of the criminal proceedings is appropriately considered as a circumstance in mitigation for sentencing purposes. (Cal. Rules of Court, rule 4.423(b)(3); see rule 4.414(b)(7) [a criteria affecting the decision to grant or deny probation is "[w]hether the defendant is remorseful"]; rule 4.408(b) [enumeration of the criteria in the Rules of Court does not prohibit application of additional criteria reasonably related to the sentencing decision].) As to the discrepancy in the sentence imposed on Nesbeth as opposed to Smith, it is also reasonable to infer that the trial court determined that Nesbeth gave false testimony under oath during the trial, which the trial court may properly consider in determining Nesbeth's sentence.

In *People v. Foster* (1988) 201 Cal.App.3d 20, the codefendants in robbery and false imprisonment crimes were sentenced to different terms because one defendant pled guilty and testified for the prosecution under an agreement, while the other was found guilty of the charges after a jury trial. (*Id*. at pp. 23, 26.) The defendant with the lengthier sentence (15 years, 4 months) appealed, arguing he was denied equal protection and due process and should not be sentenced to more than the four-year term his codefendant received in prison. (*Id*. at pp. 26-27.) The court disagreed, explaining that "[a] sentencing court considers not only the circumstances of the crime, but circumstances individual to each defendant. [Citations.] The court and prosecution could properly consider [the codefendant's] cooperation. So long as [the defendant's] sentence was justified by [the defendant's] crimes, individual culpability, and record, the sentence received by an accomplice is not relevant." (*Id*. at p. 27.) The trial court did not punish Nesbeth for exercising his right to trial.

B. CALCRIM 2361

Nesbeth contends that the trial court erred when it instructed the jury pursuant to CALCRIM 2361 because the phrase "right to control" set forth therein was confusing, and the trial court did not, sua sponte, further instruct the jury as to the meaning of that phrase. We disagree.

As to count 2, transportation of marijuana in violation of section 11360, subdivision (a), the trial court instructed the jury pursuant to CALCRIM No. 2361,[4]

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[4] CALCRIM No. 2361 provides, "The defendant is charged [in Count _____] with (giving away/transporting) more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)]. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant [unlawfully] (gave away/transported) a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; [¶] 4. The controlled substance was marijuana; [¶] AND [¶] 5. The marijuana possessed by the defendant weighed more than 28.5 grams. [¶] [*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]] [¶] [A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.] [¶] [The People do not need to prove that the defendant knew which specific controlled substance (he/she) (gave away/transported).] [¶] [A person does not have to actually hold or touch something to (give it away/transport it). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.] [¶] <Defense: Compassionate Use> [¶] [Possession or transportation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this

stating in relevant part, "A person does not have to actually hold or touch something to transport it. It is enough if the person has control over it or the right to control it either personally or through another person."

The prosecutor's theory that Nesbeth was guilty of transporting of marijuana in violation of section 11360, subdivision (a) was that Nesbeth was aiding and abetting in the crime. The parties to a crime are principals and accessories. (Pen. Code, § 30.) "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 . . . are principals in any crime so committed." (Pen. Code, § 31.)

An aider and abettor of the crime of transporting of marijuana is not required to have possession of or a right to control the marijuana. The trial court instructed the jury on aiding and abetting, pursuant to CALCRIM No. 401,[5] stating in relevant part, "the

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burden, you must find the defendant not guilty of this crime. [A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]"

[5] CALCRIM No. 401 provides, "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] [If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.] [¶] [A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things: [¶] 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime. [¶] AND [¶] 2. He or she must do everything reasonably

defendant not need to actually have been present when the crime was committed to be guilty as an aider and abettor." A defendant aids and abets the transportation of the substance even when another "has sole dominion and control" over the controlled substance. (*People v. Busch* (2010) 187 Cal.App.4th 150, 161.) There is not a reasonable likelihood that the jury would have misapplied the language "right to control" set forth in CALCRIM No. 2361.

Nesbeth contends that there is not substantial evidence that Nesbeth had a right to control the contraband. Because the prosecutor's theory that Nesbeth was guilty of transporting of marijuana was because Nesbeth was aiding and abetting in the crime, we do not reach this contention of substantial evidence of control.

C. Motion for Judgment of Acquittal

Nesbeth contends that the trial court erred in denying his Penal Code section 1118.1 motion for judgment of acquittal because substantial evidence does not support the finding of aiding and abetting in the crime of transporting marijuana. We disagree.

1. Standard of Review

Our review is for substantial evidence. "On a motion for judgment of acquittal under section 1118.1, the trial court applies the same standard as an appellate court reviewing the sufficiency of the evidence. The court must consider whether there is any substantial evidence of the existence of each element of the offense charged, sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. [Citation.] We independently review the trial court's ruling." (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.)

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within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]"

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation] . . . . '[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]'" (*People v. Zamudio, supra,* 43 Cal.4th at pp. 357-358.)

"In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

2. Analysis

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164; *People v. Beeman* (1984) 35 Cal.3d 547, 561.) "'Whether defendant aided and abetted the crime is a question of fact, and on appeal all

conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.' [Citation.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

The jury could have reasonably inferred that Nesbeth knew of the presence of marijuana and Smith was transporting it. Officer Carrillo smelled a "strong pungent odor" of marijuana coming from the vehicle. Officer Dameworth smelled the odor of marijuana when he was about two or three feet from the vehicle, and when he opened the passenger door to the vehicle he smelled "a strong odor" of marijuana. Nesbeth told Officer Carrillo that both he and Smith had been smoking marijuana. And the prosecution's expert witness testified that people who transported drugs sometimes do it alone and sometimes in groups.

There was substantial evidence that Nesbeth intended to commit, facilitate, or encourage transportation of marijuana, and by act or advice, aided, promoted, or encouraged the commission of that crime. Nesbeth was present in the vehicle. Although mere presence at the scene of a crime is not sufficient by itself to establish liability as an aider and abettor of the crime (*In re Michael T.* (1978) 84 Cal.App.3d 907, 911; *People v. Richardson* (2008) 43 Cal.4th 959, 1024), it is among the factors which may be considered in making that determination. (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407; *People v. Campbell*, *supra*, 25 Cal.App.4th at p. 409.)

Other factors which may be considered in making the determination of aiding and abetting include companionship, and conduct before and after the offense. (*People v. Medina*, *supra*, 46 Cal.4th at p. 924; *People v. Miranda*, *supra*, 192 Cal.App.4th at p. 407; *People v. Campbell*, *supra*, 25 Cal.App.4th at p. 409.) There is evidence that the marijuana weighed almost 17 pounds, and depending on the quality it had a street value ranging from $1,000 to $10,000 a pound. It could be reasonably inferred that Nesbeth would not be trusted to be in the vehicle unless he were participating in the crime. The jury could also reasonably infer that Nesbeth's statement to Officer Carrillo that both he and Smith had been smoking marijuana was an attempt to prevent the officers from finding the marijuana by attempting to convince the officers that the smell of marijuana

was due the defendants smoking it, and not because they were transporting large quantities of it.

There was substantial evidence supporting the jury's finding that Nesbeth was guilty of aiding and abetting in the crime of transporting marijuana. The trial court did not err in denying Nesbeth's motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.