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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DIZHA OMINIQUE SANDERS, Defendant and Appellant.	B270930 (Los Angeles County Super. Ct. No. MA066948)

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Hollingsworth, Judge. Affirmed in part and reversed in part with directions.

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Paul S. Thies, and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Dizha Ominique Sanders appeals from a judgment of conviction entered after a jury found her guilty of felony attempted driving or taking of a vehicle without consent in violation of Vehicle Code section 10851, subdivision (a) (§ 10851; Pen. Code, § 664; count 1), and misdemeanor petty theft of a car stereo (Pen. Code §§ 484, subd. (a), 490.2; count 2). Sanders contends that Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (Pen. Code, § 1170.18), applied to her conviction for the attempted unlawful driving or taking of a vehicle, and that the conviction should have been reduced to a misdemeanor. Sanders also contends the evidence is insufficient to support her conviction for aiding and abetting the commission of the crimes; the trial court erred in admitting evidence of the uncharged thefts of two other stereos taken from cars on the same street; she received ineffective assistance of counsel due to her attorney's failure to impeach a key prosecution witness with a pending felony charge;[1] and the trial court erred in requiring her to pay attorneys' fees without first determining her ability to pay.

We reverse Sanders's felony conviction on count 1 for the attempted unlawful driving or taking of a vehicle in light of the Supreme Court's decision in *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), in which the court concluded that Proposition 47 applies to the theft form of a section 10851 offense. We vacate Sanders's sentence in its entirety, including the order to pay attorneys' fees, and remand for a retrial on count 1 or resentencing. On remand

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1 Sanders filed a petition for a writ of habeas corpus, also raising ineffective assistance of counsel. We have denied the petition by a separate order.

the People may elect to accept a reduction of Sanders's felony conviction for the attempted unlawful driving or taking of a vehicle to a misdemeanor or retry the charge as a felony. In all other respects we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Sanders was charged in an information with felony attempted driving or taking of a vehicle without consent (§ 10851, subd. (a); Pen. Code, § 664; count 1) and misdemeanor petty theft (Pen. Code, §§ 484, subd. (a), 490.2; count 2). In count 1, the information alleged that on September 13, 2015 Sanders attempted to drive or take an all terrain vehicle (ATV) from Juan Torres. In count 2, the information alleged that Sanders on the same date committed a theft of a stereo system from Charles Bowie. Sanders pleaded not guilty to both charges.

B. *The Evidence at Trial*

1. *The People's Case*

At about 4:30 a.m. on September 13, 2015 Torres heard the sound of metal scraping metal outside his house in Lancaster. He had parked a trailer containing two large ATV's in his driveway. He looked out his window and saw C.J.W. (C.J.) and Shane Wallace (Shane) attempting to push one of the ATV's off the trailer.[2] One of the young men had pushed the front wheels

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[2] We refer to Shane, his mother Misty Johnson, and other members of the Johnson family by their first names to avoid confusion. At the time C.J. was about 16 years old; Shane was

of the ATV off the trailer; the other had pulled the ATV from the front of the trailer. Torres saw a Chevy Malibu parked across the street, with Sanders sitting in the driver's seat.

Torres went outside and yelled at C.J. and Shane, asking what they were doing and why they were taking his motorcycle.[3] The two men ran to the Chevy Malibu and tried to get inside, but they were unable to do so. They banged on the car's trunk three times and yelled, "Go, go, go." Sanders drove away, and the two men fled on foot.

Torres got into his car and followed C.J. and Shane. Torres called 911, and was on the phone with an operator, as he pursued the two men in his car. The two men were "jumping" from house to house. At some point the men split up, and Torres continued to pursue one of them. The man went to a house, then came out, and Torres was able to take his picture. The man next entered a house at the corner of 16th Street. Torres drove back to find the other man, and saw him jump over the wall of a house. Torres continued to follow the second man as he went from house to house.

As Torres was driving on 16th Street he saw the Chevy Malibu in his rear-view mirror, flashing its headlights. The Chevy Malibu parked near the house the first man had entered, and Sanders got out. As Sanders walked toward the house, she gestured and yelled at Torres, saying something like, "what did

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20. They were not tried with Sanders; neither testified at Sanders's trial.

[3] Torres referred to the ATV's as large motorcycles. However, he described them as being similar to dirt bikes used in the desert, with four wheels.

[he] want?" She then went into the house. Torres gave the 911 operator the license plate number of the Chevy Malibu.

Los Angeles County Sheriff's Department deputies Michael Courtial, Gilberto Borruel, and Brian Mayfield responded to the scene. Torres flagged them down when they arrived. Torres talked to Borruel in Spanish. Torres pointed out the house he believed C.J. and Shane had entered. He also told Borruel that he had seen Sanders enter the same house. The deputies knocked on the door, but no one answered.

Torres pointed out the Chevy Malibu to the deputies. Courtial walked over to the car and noted that the hood was warm, indicating it had been driven recently. He looked through the car window and saw two car stereos in the back seat on the driver's side and one car stereo on the passenger side front seat floorboard. One stereo had a wood frame trim that appeared to belong to a different vehicle. The other two had exposed wires similar to those on a stereo that had been taken out of a box from the store. However, there were no boxes in the car. The Chevy Malibu had its own car stereo in the dashboard and, according to Courtial, none of the three stereos would have fit in the car's dashboard. Courtial also observed Sanders's California identification card on the driver's seat cushion.

Sanders then came out of the house and asked the deputies what was going on. Borruel asked her who was in the house. Borruel used a loudspeaker to announce that the deputies were with the sheriff's department, and asked the individuals in the house by name to come out. Borruel did this two times, but no one came out. The owner of the house, Misty, showed up, and she gave the deputies permission to enter the house. The deputies entered, and found C.J., Shane, and Kaine Johnson crouched on

the floor in the bathroom. There were also two children in the house. In a field identification, Torres identified C.J. and Shane as the men who tried to take his ATV and Sanders as the woman who drove the Chevy Malibu.

Torres told the deputies there was a white car parked on the street near his house that had its passenger door open. Courtial drove back to the location of Torres's residence, and saw a white Volvo parked on the street. Courtial looked inside, and observed that the car stereo and part of the dashboard paneling for the trim pieces had been removed, with the wires exposed. Courtial also observed a P.T. Cruiser in the driveway of the house in front of which the Volvo was parked. The glove compartment was open, and papers from the compartment were scattered on the floorboard and the seats of the vehicle.

Both cars were owned by Sharon Love. Love had parked the P.T. Cruiser in her driveway the night before. When she left the car, the papers were in the glove compartment; she had not locked the car. Love had also seen the Volvo parked on the street the prior night. Since then, the stereo from inside the car had been removed, as well as a stereo that had been in the trunk. However, neither Love nor her daughter, who principally drove the Volvo, could identify any of the stereos found in the Chevy Malibu as coming from Love's cars.

Courtial walked to the house next door, which had a white Chevy parked in the driveway, with its passenger door open. Courtial looked inside, and saw that the car stereo was missing, with the wires exposed. Bowie, who owned the car, testified that at approximately 5:00 a.m. on the morning of September 13, 2015 his niece woke him up, and told him that his car had been broken into. Bowie saw that both the passenger and driver side doors

were open. When Bowie had last seen the car the day before, both doors were closed and the stereo was intact. Bowie identified one of the stereos found in the Chevy Malibu as the one from his car. Courtial later returned to Bowie's car, and found inside a matching remote control for one of the stereos recovered from the Chevy Malibu.

2. *The Defense Case*

Misty testified that between 1:45 and 2:00 a.m. on the morning of September 13, 2015 her daughter Kalia went into labor. Misty was home, along with her other children, including her son Kaine and her daughters Carine and Camille. Sanders was a friend of Kalia; C.J. was a friend of Kaine. When Kalia went into labor, C.J. drove Misty, Kalia, Kaine, and Sanders to the hospital in his car. The hospital was less than 10 minutes away. C.J. dropped off Misty and Kalia at the hospital, then drove away with Kaine and Sanders. Misty stayed at the hospital until Kalia's baby was born, then returned home around 9:00 a.m. that morning. That evening Sanders was babysitting Misty's younger children and grandchildren. Misty had also asked her son Shane, who was living at the house, to come home when they left to go to the hospital.

Misty talked to Sanders from the hospital to let her know what was happening with Kalia. Misty assumed that Sanders was at her home with the children, but she did not know. At about 5:00 a.m. Misty received a call from the sheriff's department, telling her that someone ran into her house. She gave the deputies permission to enter the house.

Kaine testified that after C.J. dropped Misty and Kalia at the hospital, they stopped at a gas station, then returned to

Kaine's house between 2:00 and 2:30 a.m. C.J. left. Kaine and Sanders, who had agreed to babysit, stayed home and watched television. Sanders did not leave the house after they returned from the hospital. C.J. and Shane later returned to the house, and "went straight to the bathroom." Kaine thought this was unusual. Kaine heard on the loudspeaker a person calling out names, and saw Sanders go to the front door. Kaine then went into the bathroom.

Sanders testified on her own behalf. The morning of September 13, 2015 she was at Misty's house babysitting the children with Kaine. When Kalia went into labor, C.J. drove Kalia, Misty, and Sanders in his Chevy Malibu to the hospital. C.J. dropped off Misty and Kalia, then they stopped by the store, and returned to the house. Sanders stayed at the house all morning, watching television with Kaine and receiving periodic updates about Kalia from Misty by telephone. Later that morning Shane walked into the house, followed by C.J., who looked scared. Shane and C.J. went to the back of the house.

Sanders heard the sheriff's deputies on the loudspeaker, and she went outside. The officers showed Sanders her identification card, and she said it was hers. They asked if there was anyone else in the house; she responded, "yes." They did not ask for the names of the individuals in the house. The deputies "just went in." The deputies got everyone out of the house, and Sanders was placed under arrest. Sanders denied stealing the ATV or car stereos, and denied driving the Chevy Malibu. She also testified she was inside the house all morning after returning from the hospital.

C. *Jury Instructions and Closing Argument on Attempted Unlawful Driving or Taking of a Vehicle*

The court instructed the jury with CALJIC No. 14.36, which provided that to prove Sanders guilty of the unlawful driving or taking of a vehicle in violation of section 10851, the People must prove that "1. A person took or drove a vehicle belonging to another person; [¶] 2. The other person had not consented to the taking or driving of his vehicle; and [¶] 3. When the person took or drove the vehicle, he or she had the specific intent to deprive the owner either permanently or temporarily of his title to or possession of the vehicle." The trial court also instructed the jury on principles of an attempted crime and aiding and abetting.

In her closing argument following the court's instructions, the prosecutor referred to the elements of a "taking of a vehicle," the ATV. She then reviewed the evidence showing that C.J. and Shane attempted to lift up and pull the ATV off the trailer.

Defense counsel in his closing argument did not argue that C.J. and Shane had not committed the crimes. Instead, he argued that Sanders was not the driver of the Chevy Malibu and was in Misty's house all morning.

D. *The Jury Verdict and Sentencing*

The jury found Sanders guilty on count 1 of felony attempted driving or taking of a vehicle without consent and on count 2 of misdemeanor petty theft. Sanders moved to reduce her conviction for attempted driving or taking of a vehicle without consent to a misdemeanor pursuant to Proposition 47, pointing out that there was no evidence presented as to the value of the ATV. The court denied the motion on the basis that the law was

unsettled as to whether Proposition 47 applied to a conviction under section 10851.

The trial court suspended imposition of sentence on count 1, and placed Sanders on 36 months' formal probation on the condition she serve 28 days in county jail, with credit for time served, and perform 30 days of community labor. The court stayed the sentence on count 2 under Penal Code section 654.

DISCUSSION

A. *We Reverse Sanders's Conviction for the Attempted Unlawful Driving or Taking of a Vehicle Because the Record Does Not Show Whether Sanders Was Convicted Under a Legally Valid Nontheft Theory*

At the time of sentencing, there was a split of authority among the appellate courts as to whether Proposition 47 applied to a conviction under section 10851. The trial court placed Sanders on felony probation without deciding whether Sanders's conviction under section 10851 was eligible for treatment as a misdemeanor under Proposition 47, expressing its hope that the Supreme Court would provide guidance in the near future.

The Supreme Court has now resolved this issue, holding in *Page* that "[b]y its terms, Proposition 47's new petty theft provision, [Penal Code] section 490.2, covers the theft form of the . . . section 10851 offense. . . . [S]ection 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950. An automobile is personal property. 'As a result, after the passage of Proposition 47, an offender who

obtains a car valued at [no more] than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.' [Citation.]" (*Page*, *supra*, 3 Cal.5th at p. 1183.)

In reaching this conclusion, the court relied on its earlier holding in *People v. Garza* (2005) 35 Cal.4th 866, in which the court distinguished between convictions under section 10851 for theft and those for driving the vehicle away. The court in *Page* described the distinction as follows, "'Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under section 10851[, subdivision] (a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction . . . . On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete . . . . Therefore, a conviction under section 10851[, subdivision] (a) for posttheft driving is not a theft conviction . . . .'" (*Page*, *supra*, 3 Cal.5th at p. 1183, citing *Garza*, *supra*, at p. 871.)

Accordingly, if Sanders's conviction for attempted driving or taking of a vehicle under section 10851 was based on her attempted "'taking a vehicle with the intent to permanently deprive the owner of possession,'" and the value of the ATV was less than $950, the crime was petty theft, punishable as a misdemeanor. (*People v. Page*, *supra*, 3 Cal.5th at pp. 1183, 1187.)

In light of *Page*, Sanders in her supplemental brief urges us to remand to the trial court to hold an evidentiary hearing on the value of the ATV. The People argue in their supplemental letter

brief that we should instead affirm the conviction without prejudice to Sanders filing a petition for resentencing under Proposition 47. Both positions are incorrect. As we explained in *People v. Gutierrez* (2018) 20 Cal.App.5th 847 (*Gutierrez*) on similar facts, "[t]he parties have mistakenly conflated the retrospective and prospective applications of Proposition 47. . . . Penal Code section 1170.18 allows individuals who had already been convicted of felonies at the time of Proposition 47's enactment to petition for resentencing if the felony had been reclassified as a misdemeanor. When such a petition has been filed, the defendant bears the burden of proving he or she is eligible for retrospective relief. [Citation.] However, [the defendant] had not even committed the crime charged at the time Proposition 47 went into effect. Thus, relief under Penal Code section 1170.18 is unavailable to him. The issue in this case is not whether [the defendant] should be resentenced under Penal Code section 1170.18, but whether he was properly convicted of a felony theft violation of . . . section 10851. He was not." (*Id*. at p. 855.)

At the time of the unlawful driving or taking of Torres's ATV on September 13, 2015, Proposition 47 was in effect (passed by the voters in November 2014), and Sanders was therefore entitled to the benefit of the new law. As we concluded in *Gutierrez*, "at the time of [the defendant's] arrest in 2015, theft of a vehicle worth $950 or less was 'punishable only as a misdemeanor.' [Citation.] Thus, to obtain a felony conviction for vehicle theft, the People were required to prove as an element of the crime that the [stolen vehicle] . . . was worth more than $950." (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 855.) Because in this case there was no evidence of the value of the ATV, Sanders's

felony conviction, if based on an attempted vehicle theft, cannot stand. (See *id*. at p. 856.)

We cannot tell from the record whether Sanders was convicted based on an attempted vehicle theft, which requires an attempt to take with "the intent to permanently deprive the owner of its possession," or an attempted unlawful driving of the vehicle without the owner's consent. (*Page*, *supra*, 3 Cal.5th at p. 1182.) As in *Gutierrez*, the jury instructions did not define the elements of the two different crimes included within section 10851. (See *Gutierrez*, *supra*, 20 Cal.App.5th at p. 856.) Rather, the trial court instructed the jury with CALJIC No. 14.36, which stated that to prove a violation of section 10851, the People needed to prove that "1. A person took or drove a vehicle belonging to another person; [¶] 2. The other person had not consented to the taking or driving of his vehicle; and [¶] 3. When the person took or drove the vehicle, he or she had the specific intent to deprive the owner either permanently or temporarily of his title to or possession of the vehicle."[4]

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[4] Although Sanders did not object to the trial court's use of CALJIC No. 14.36, we conclude she has not forfeited this issue on appeal because the error potentially affects her substantive rights. (Pen. Code, § 1259 ["The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *Gutierrez, supra*, 20 Cal.App.5th at p. 856, fn. 8 ["when an instruction allegedly affects the substantial rights of the defendant, it is reviewable even in the absence of an objection"]; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [a defendant's failure to object to a jury instruction with an incorrect statement of the law does not forfeit the issue on appeal].)

As we concluded in *Gutierrez*, "The court's instructions here allowed the jury to convict [the defendant] of a felony violation of section 10851 for stealing the [vehicle], even though no value was proved—a legally incorrect theory—or for a nontheft taking or driving offense—a legally correct one. 'When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.' (*People v. Chiu* (2014) 59 Cal.4th 155, 167 . . . .)" (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.)[5]

Because the record does not show whether Sanders was convicted under a legally valid nontheft theory or a legally invalid theory of vehicle theft of a vehicle valued under $950, "we reverse the felony conviction for unlawful driving or taking a vehicle and remand the matter to allow the People either to accept a reduction of the conviction to a misdemeanor or to retry the offense as a felony with appropriate instructions." (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.) "Following the guidance of *Chiu*, the appropriate remedy for the error here is to allow a retrial on the felony charge if the People can in good faith bring such a case." (*Id.* at p. 858.)

Because the People may elect to accept a reduction of Sanders's conviction for the attempted unlawful driving or taking of a vehicle to a misdemeanor, we address Sanders's other contentions as to both counts.

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[5] The trial court in *Gutierrez* instructed the jury with CALCRIM No. 1820, which has substantially the same elements as CALJIC No. 14.36. (See *Gutierrez*, *supra*, 20 Cal.App.5th at p. 851.)

B. *Sufficiency of the Evidence of Aiding and Abetting*

1. *Standard of Review*

In determining whether there is sufficient evidence to support a conviction, we "'"must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."' [Citation.]" (*People v. Casares* (2016) 62 Cal.4th 808, 823.) Further, "'it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences and determines whether the People have established guilt beyond a reasonable doubt.' [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" (*Id*. at pp. 823-824; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87 [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"'].)

Where the defendant is charged with a specific intent crime, "'[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' [Citation.]" (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 87.) The same standard of appellate review applies when the People rely primarily on circumstantial evidence. (*People v. Casares*, *supra*, 62 Cal.4th at p. 823; *Manibusan*, *supra*, at p. 87.)

2. *The Law of Aiding and Abetting*

"'[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.' [Citations.]" (*People v. Johnson* (2016) 62 Cal.4th 600, 630.) "Although [a] defendant's "'mere presence alone at the scene of the crime is not sufficient to make [him or her] a participant,"' his [or her] presence in the car "'may be [a] circumstance[] that can be considered by the jury with the other evidence in passing on his [or her] guilt or innocence."' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 [substantial evidence supported the defendant's conviction for aiding and abetting attempted murder based on evidence that the defendant was in the shooter's car, which passed the victim's car, waited in a parking lot, then pulled out to pursue the victim's car]; accord, *In re White* (2018) 21 Cal.App.5th 18, 26 [affirming conviction for aiding and abetting attempted kidnapping to commit rape and related charges where the defendant stared at the victim for an "unusual" amount of time before the attack, appeared to act as lookout, did not intervene during the attack, and drove the attacker away afterwards]; cf. *People v. Lara* (2017) 9 Cal.App.5th 296, 322 [evidence was insufficient to show that two of the defendants aided and abetted a murder although they were present at the scene, friends with the likely shooter, fled the scene, and lied about their presence, but their intent to encourage the shooting was speculative].) "'Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime,

companionship, and conduct before and after the offense.' [Citation.]" (*Nguyen*, *supra*, at p. 1054; accord, *Lara*, *supra*, at p. 322.)

The holding in *People v. Land* (1994) 30 Cal.App.4th 220, 224, cited by Sanders, is not to the contrary. In *Land*, the defendant challenged his conviction for receiving stolen property on the ground that there was insufficient evidence that he aided and abetted the crime. The defendant's friend had stolen a car, picked up the defendant, told the defendant it was stolen, then proceeded to commit multiple crimes with the car, including robbery, assault, and attempted murder. Although the court noted that the defendant's mere presence in the stolen car was not sufficient evidence of possession or control over the car, the court upheld the conviction, concluding that the defendant's close relationship to the driver, use of the car for a "common criminal mission," and the additional stops they made in the vehicle before abandoning it, supported the jury's finding that the defendant constructively possessed the vehicle. (*Id*. at pp. 224, 228.)

3. *The Evidence Is Sufficient To Support Sanders's Conviction as an Aider and Abettor*

Sanders argues that her mere presence at the scene of the crimes is insufficient to establish her knowledge of C.J.'s and Shane's unlawful purpose or her intent to facilitate the commission of the crimes. Sanders points out that no one saw her drive C.J. and Shane to the scene of the crimes, hypothesizing, "One could easily infer that the perpetrators asked [her] for a ride somewhere, and she agreed to give them a ride, but did not know what the perpetrators were doing." She

adds that it was dark outside and there was no evidence that she saw C.J. and Shane put the car stereos in the Chevy Malibu.

Although there is no direct evidence of Sanders's knowledge or intent, "'[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' [Citation.]" (*People v. Nguyen*, *supra*, 61 Cal.4th at p. 1055.) Sanders has presented one theory of her presence at the scene—that she merely gave C.J. and Shane a ride in the Chevy Malibu without knowledge of what they were planning. However, there was substantial evidence to the contrary. At 4:30 a.m. Sanders was parked in C.J.'s Chevy Malibu across from Torres's house. At the same time, C.J. and Shane attempted to steal Torres's ATV. By this time there was a car stereo on the floorboard of the front passenger side of the Chevy Malibu, and two stereos on or next to the back seat on the driver's side. The stereo in the front of the car had wood trim from another car; the two in the back had exposed wires.[6] When Torres confronted C.J. and Shane, they

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[6] Sanders contends the stereos found in the back of the car were "hidden underneath a sweater and in a bag." However, Courtial testified that when he looked inside the Chevy Malibu he observed three stereos—one on the front floorboard and two "in" the driver's side back seat. When he was reviewing photographs of the stereos, Courtial testified that one stereo was "sitting on top of a red sweater." A second stereo was inside the vehicle with wires exposed. A third stereo was sitting on the floorboard of the back driver's side of the car. One of the stereos was "in a canvas bag sitting on top of [the car's] roof." It is unclear whether one of the stereos was inside or on top of the canvas bag when Courtial first observed the stereos. In any event, at least two stereos were in plain view.

attempted to get into the Chevy Malibu, but were unable to do so. They banged on the trunk of the car three times, said "[g]o, go, go," and Sanders drove away. C.J. and Shane then ran from house to house to evade Torres, who pursued them in his car. C.J. and Shane ran to Misty's house, while Sanders drove to the same house. All three ended up inside the house. When Sanders arrived, she flashed her headlights before parking and entering the house.

These facts provided substantial evidence that Sanders served as the getaway driver for C.J. and Shane with the intent to aid in the commission of the thefts of the ATV and car stereo. (See *People v. Casares*, *supra*, 62 Cal.4th at p. 823.) While the jury could have reached a contrary finding that Sanders was not aware of C.J.'s and Shane's unlawful purpose and did not intend to facilitate commission of the thefts, ""'[i]f 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.'" [Citations.]" (*Id.* at pp. 823-824.)

C. *Admission of the Uncharged Crimes Evidence*

1. *Proceedings Below*

The People introduced evidence that the car stereos in Love's two cars were stolen on the morning of September 13, 2015, pursuant to Evidence Code section 1101, subdivision (b),[7] to

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[7] Evidence Code section 1101, subdivision (b), provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or

show Sanders's knowledge of C.J.'s and Shane's unlawful purpose and her intent to aid their plan to steal Bowie's car stereo. The prosecutor also argued that the evidence was being introduced to show a common plan or scheme. The prosecutor pointed out that the three houses (Torres's, Love's, and Bowie's) were adjacent to each other on the street where Sanders was parked, and the attempted theft of the ATV and thefts of the car stereos all occurred the same morning. Sanders objected to admission of the evidence on the grounds that the evidence was not relevant and was more prejudicial than probative given that neither Love nor her daughter could identify any of the stereos found in the Chevy Malibu as having been taken from Love's cars. (Evid. Code, § 352).

The trial court overruled the objection, finding "that based on the proximity of the defendant, . . . her proximity to the vehicle, her driving of the vehicle, the time of night and the fact that these were all done at the same time or near the same time and in the same location, [there is] sufficient evidence to show common plan, scheme and knowledge under [Evidence Code] section 1101[, subdivision](b)." The court also found that the probative value was not "substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice."

2. *Applicable Law and Standard of Review*

Evidence Code section 1101, subdivision (b), "authorizes the admission of 'a crime, civil wrong, *or other act*' to prove something

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accident . . .) other than his or her disposition to commit such an act."

other than the defendant's character. . . . The conduct admitted under Evidence Code section 1101[, subdivision] (b) need not have been prosecuted as a crime, nor is a conviction required. [Citation.]" (*People v. Leon* (2015) 61 Cal.4th 569, 597 (*Leon*); accord, *People v. Ewoldt* (1994) 7 Cal.4th 380, 393 [§ 1101, subd. (b) "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition"].)

"'In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.'"' [Citation.]" (*Leon*, *supra*, 61 Cal.4th at p. 598, citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) Greater similarity between the charged and uncharged offenses is required to prove the existence of a common design or plan. (*Leon*, *supra*, at p. 598; *Ewoldt*, *supra*, at p. 402.) To show a common design or plan, "'evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts.' [Citation.]" (*Leon*, *supra*, at p. 598; accord, *Ewoldt*, *supra*, at pp. 393-394 ["'The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done'"].)

Additionally, "the uncharged act must be relevant to prove a fact at issue (Evid. Code, § 210), and its admission must not be unduly prejudicial, confusing, or time consuming (Evid. Code, § 352)." (*Leon*, *supra*, 61 Cal.4th at pp. 597-598.) Evidence of uncharged crimes has no probative value where there is no

evidence linking the defendant to the uncharged conduct. (*People v. Williams* (2017) 7 Cal.App.5th 644, 677 (*Williams*) [trial court erred by admitting evidence of three similar uncharged robberies committed around the same time as the charged crime given the lack of any link between the defendant and the uncharged crimes, but the error was harmless]; cf. *Leon*, *supra*, at p. 599 [trial court did not abuse its discretion in allowing evidence of prior uncharged robberies where the evidence showed the defendant committed the charged crimes according to the same plan and with the same weapon as the prior robberies].)

Although "[t]he threshold *admissibility* of uncharged crimes evidence does not require proof that the defendant was the perpetrator in both sets of offenses," the jury may only consider the evidence of uncharged conduct if "'the evidence is sufficient to sustain a finding that the defendant committed both sets of crimes.'" (*Leon*, *supra*, 61 Cal.4th at p. 599.) If the jurors find the evidence that the defendant committed the uncharged crimes was "lacking, they could not rely on it in determining [the] defendant's guilt of the charged offenses." (*Ibid*.)

Further, "evidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute"; in that case, the prejudicial effect of the evidence of the uncharged crimes substantially outweighs the probative value. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 715 [evidence of a prior car theft and a burglary of a purse from a car that were linked to the defendant were not admissible to show the defendant's later intent to steal a purse from a house because if the evidence showed that the defendant took the purse from the house, his intent to take it could not reasonably be disputed]; cf. *People v. Rocha* (2013) 221 Cal.App.4th 1385, 1396 [admission of

evidence of prior burglary of garage admissible to show the defendant entered the victim's garage with larcenous intent where there was "a bona fide dispute as to the mental element of the charged offense"].)

"'We review the trial court's decision whether to admit evidence, including evidence of the commission of other crimes, for [an] abuse of discretion.' [Citation.]" (*Leon*, *supra*, 61 Cal.4th at p. 597; accord, *People v. Harris* (2013) 57 Cal.4th 804, 841.)

3. *The Trial Court Erred in Admitting Evidence of the Uncharged Crimes, but the Error Was Harmless*

The central issue at trial was whether Sanders was the driver of the Chevy Malibu on the morning the crimes were committed. Sanders's counsel argued that Sanders was not guilty of aiding and abetting C.J. and Shane in their commission of the crimes because she was at home that night, and was not parked on the street where the crimes were committed. He did not argue that C.J. and Shane did not commit the crimes.

Although the trial court found that the Torres, Bowie, and Love thefts all happened around the same time in the same location, because there was nothing to tie C.J., Shane, or Sanders to the theft of Love's stereos, the jury "could not rely on [the evidence of the uncharged crimes] in determining [Sanders's] guilt of the charged offenses." (*Leon*, *supra*, 61 Cal.4th at p. 599; accord, *Williams*, *supra*, 7 Cal.App.5th at p. 678 [the uncharged crimes evidence had "little probative value, as it did not link [the defendant] with the uncharged crimes"].) Further, evidence of the uncharged thefts was not admissible to show a common design or plan to prove that C.J. and Shane stole Bowie's stereo because this fact was not in dispute. (See *People v. Lopez*, *supra*,

198 Cal.App.4th at p. 715 ["evidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute"].) Accordingly, admission of evidence of the theft of Love's car stereos was an abuse of discretion. (*Leon*, *supra*, at p. 597.)

However, the erroneous admission of evidence of prior crimes requires reversal of a conviction only where, under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, it is reasonably probable the defendant would have received a more favorable result had the evidence been excluded. (*People v. Thomas* (2011) 52 Cal.4th 336, 366, fn. 20 [concluding admission of prior uncharged crimes was harmless error]; accord, *Williams*, *supra*, 7 Cal.App.5th at p. 678 ["we see no reasonable probability that the jury would not have convicted [the defendant] if the evidence had been excluded"].)

Here, as in *Williams*, the potential for prejudice was minimal precisely because of the absence of a link between Sanders and the theft of Love's stereos. (*Williams*, *supra*, 7 Cal.App.5th at p. 678 [concluding "the evidence had little potential for prejudice" given the absence of a link between the defendant and the uncharged crimes].) Moreover, the undisputed evidence supported a finding that C.J. and Shane attempted to take the ATV and stole Bowie's car stereo, which was found the morning of the theft in C.J.'s Chevy Malibu, with the matching remote control still in Bowie's car. Sanders's counsel did not argue to the contrary. The evidence that Sanders aided and abetted C.J. and Shane in their commission of the crimes was likewise strong, including that C.J. and Shane committed the attempted theft of the ATV while Sanders was parked across the street in C.J.'s Chevy Malibu, Bowie's stereo and two other

suspicious stereos with exposed wires or trim from another car were in the Chevy Malibu, C.J. and Shane attempted to get into the Chevy Malibu after their attempted theft of the ATV, banging on the car three times and saying "[g]o, go, go" before Sanders drove off, and Sanders drove to the same house to which C.J. and Shane fled on foot, flashing her lights when she arrived. It is therefore not reasonably probable that, absent evidence that Love's stereos were taken from her cars, Sanders would have been acquitted of aiding and abetting the attempted theft of Torres's ATV and theft of Bowie's stereo. (See *People v. Thomas*, *supra*, 52 Cal.4th at p. 355-366; *Williams*, *supra*, at p. 678.)

D. *Sanders's Claim of Ineffective Assistance of Counsel for Failure To Impeach Bowie with His Pending Felony Charge*

1. *Proceedings Below*

Prior to trial, the prosecutor objected to impeachment of Bowie with his older prior convictions and a pending felony charge for being a felon in possession of a firearm. The trial court asked defense counsel if he was planning to ask Bowie questions about the open case. Counsel responded, "Of course not." The court stated, "I'm just making sure because, if you were, I would have to get his lawyer." The court added that as to any prior convictions alleged in Bowie's open case, if he were questioned about the priors in the current case "he may have a Fifth Amendment issue."[8]

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[8] The Fifth Amendment privilege against self-incrimination applies to witnesses. (*People v. Williams* (2008) 43 Cal.4th 584, 613 ["It is a fundamental principle of our law that witnesses may not be compelled to incriminate themselves, and the scope of a

The court ruled it would allow Bowie to be impeached with his most recent convictions, including a 2004 felony conviction for carrying a concealed weapon in a car and 2005 and 2009 felony convictions for being a felon in possession of a firearm. The court excluded evidence of Bowie's prior convictions dating back to 1990 and his pending felony charge. During Bowie's cross-examination, the trial court told the jury the parties stipulated that in 2004 Bowie was convicted of carrying a concealed firearm, and that in 2005 and 2009, he was convicted of being a felon in possession of a firearm.

2. *Applicable Law*

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to show that (1) his or her """counsel's representation fell below an objective standard of reasonableness under prevailing professional norms""" and that (2) he or she """suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]"" [Citations.]" (*People v. Johnson*, *supra*, 62 Cal.4th at p. 653; accord, *People v. Mickel* (2016) 2 Cal.5th 181, 198; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-692 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

"""[I]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or

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witness's privilege is liberally construed"]; accord, *Ohio v. Reiner* (2001) 532 U.S. 17, 21 [121 S.Ct. 1252, 1254, 149 L.Ed.2d 158] [Fifth Amendment "privilege's protection extends . . . to witnesses who have 'reasonable cause to apprehend danger from a direct answer'"].)

unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. [Citation.]"' [Citations.]" (*People v. Johnson, supra*, 62 Cal.4th at p. 653; *People v. Carrasco* (2014) 59 Cal.4th 924, 982.) "Moreover, we begin with the presumption that counsel's actions fall within the broad range of reasonableness, and afford 'great deference to counsel's tactical decisions.' [Citation.] Accordingly, we have characterized defendant's burden as 'difficult to carry on direct appeal,' as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ""no rational tactical purpose"" for an action or omission. [Citation.]" (*People v. Mickel*, *supra*, 2 Cal.5th at p. 198.)

Sanders argues her counsel was ineffective for failing to impeach Bowie with his pending felony charge for being a felon in possession of a firearm to show that his testimony was motivated by an expectation of leniency or immunity. "It is long-standing law that a prosecution witness can be impeached by the mere fact of pending charges. [Citation.] Such a situation is a 'circumstance to show that he . . . may, by testifying, be seeking favor or leniency. [Citations.]' [Citation.]" (*People v. Martinez* (2002) 103 Cal.App.4th 1071, 1080; accord, *People v. Dyer* (1988) 45 Cal.3d 26, 49 [it is a "well established principle that the defense is entitled to elicit evidence that a witness is motivated by an expectation of leniency or immunity"]; *People v. Coyer* (1983) 142 Cal.App.3d 839, 842 ["During trial, defense counsel 'is permitted to inquire whether charges are pending against a witness as a circumstance tending to show that the witness may be seeking leniency through testifying'"].)

However, as the Supreme Court held in *Dyer*, "[i]n the absence of proof of some agreement which might furnish a bias or motive to testify against defendant, the fact that each witness had been charged with the commission of unrelated offenses was irrelevant. Any error in failing to admit such testimony was, therefore, clearly harmless." (*People v. Dyer*, *supra*, 45 Cal.3d at p. 50.) In *Dyer*, the court concluded the trial court's exclusion of evidence of criminal charges against two witnesses was harmless because the charges had been dismissed or reduced before the witnesses testified, and there was no evidence that the dismissal or reduction was part of an agreement that they would testify against the defendant. (*Id*. at pp. 45-46.)

Sanders relies on *People v. Allen* (1978) 77 Cal.App.3d 924, in which the court concluded that the trial court committed prejudicial error by excluding evidence that a minor who testified he committed a robbery with the defendant had two other pending robbery charges to show that he had a motive to fabricate the defendant's involvement in exchange for leniency on all three robberies. (*Id*. at pp. 932-933.) However, the court explained, "The minor must have had the expectation, the belief, the state of mind, that he was to receive prosecution immunity, or a lighter juvenile disposition in connection with the other two robbery charges as well as the current robbery charge . . . for the motive evidence to be meaningful. This state of mind was necessary to show a motive for untruthfulness or undue prosecution pressure." (*Id*. at pp. 931-932.) Here, there was no evidence that Bowie had a reason to expect favorable treatment with respect to the pending charge in exchange for his testimony in this case.

Similarly, in *People v. Brady* (2010) 50 Cal.4th 547, the Supreme Court held that the trial court did not violate the defendant's constitutional rights by refusing to allow his counsel to cross-examine a central prosecution witness about his prior conviction and his probationary status in order to argue that he testified against the defendant to curry favor with the district attorney's office. (*Id*. at p. 560.) The court explained, "[c]ross-examination may expose facts from which jurors can appropriately draw inferences about the reliability of a witness, including the possibility of bias. . . . Defendant made no showing that [the witness] actually had been offered leniency or threatened with retaliation by the prosecution. . . . As such, [the] defendant has failed to demonstrate that the prohibited cross-examination would have left the jury with a significantly different impression of [the witness's] credibility. [Citation.]" (*Ibid*.)

3. *Sanders Has Not Met Her Burden To Show Ineffective Assistance of Counsel*

Even assuming that evidence of Bowie's pending charge for being a felon in possession of a firearm was admissible for impeachment purposes, Sanders has the burden to show that her """"counsel's representation fell below an objective standard of reasonableness under prevailing professional norms."""" (*People v. Johnson*, *supra*, 62 Cal.4th at p. 653.) Although Sanders argues that there can be no "satisfactory explanation" (italics omitted) for her attorney's decision not to impeach Bowie with

the pending charge, the record is silent as to why Bowie's trial counsel did not use the pending charge for impeachment.[9]

Moreover, even if Sanders could meet the first prong of the test for ineffective assistance of counsel, she cannot meet her burden to show that she "suffered prejudice to a reasonable probability." (*People v. Johnson*, *supra*, 62 Cal.4th at p. 653.) There was no evidence in the record that Bowie was ever offered any leniency or immunity with respect to the pending charge in exchange for his testimony. Thus, the probative value of the pending charge was minimal. (See *People v. Brady*, *supra*, 50 Cal.4th at p. 560; *People v. Dyer*, *supra*, 45 Cal.3d at p. 50.)

Further, because Bowie was impeached with three prior convictions, he was not cloaked with "a false aura of veracity" by the exclusion of evidence of his past criminal conduct. (*People v. Beagle* (1972) 6 Cal.3d 441, 453; see also *People v. Clark* (2011) 52 Cal.4th 856, 931-932 [evidence of misconduct not resulting in a conviction "generally is less probative of immoral character or dishonesty and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude"].)

Moreover, Bowie's testimony was limited. He testified that his car had its stereo intact the night before the theft and that one of the stereos in the Chevy Malibu was the one taken from his car. But there was corroborating testimony from Courtial that the stereo in Bowie's car was missing and the remote control found in Bowie's car matched one of the stereos found in the

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[9] In her habeas petition, Sanders contends that trial counsel told her appellate counsel that he was not aware he could impeach a witness with a pending conviction. However, trial counsel refused to sign a declaration stating that this was the reason why he did not impeach Bowie.

Chevy Malibu. In addition, defense counsel never argued to the jury that C.J. and Shane had not stolen Bowie's stereo, instead arguing that Sanders was not the driver of the Chevy Malibu.

Sanders has therefore not met her burden to show that she suffered prejudice to a reasonable probability from the failure of her counsel to impeach Bowie with the pending felony charge.

E. *The Trial Court's Order for Sanders To Pay Attorneys' Fees*

As part of the sentencing hearing, the trial court inquired of defense counsel whether he was privately retained. He responded that he was appointed by the court from the "bar panel." The court proceeded to order Sanders "to pay attorney[s'] fees in this matter in an amount [to be] determined by the financial evaluator." Sanders contends that because the trial court did not make a finding as to her ability to pay, the matter must be remanded for a noticed hearing on her ability to pay.

Penal Code section 987.8, subdivision (b), provides that when a defendant is provided legal assistance through an appointed counsel, "upon conclusion of the criminal proceedings in the trial court . . . , the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." It is undisputed that the trial court did not make a determination of Sanders's ability to pay, and that under Penal Code section 987, subdivision (b), it should have provided "notice and a hearing" before ordering Sanders to pay attorneys' fees. However, the People contend Sanders forfeited this argument by her failure to object to the attorneys' fees order in the trial court, citing *People v. Aguilar* (2015) 60 Cal.4th 862, 867-868.

Because we vacate the entire sentence and remand for further proceedings, there has been no "conclusion of the criminal proceedings in the trial court." (Pen. Code, § 978.8, subd. (b).) We therefore also vacate the order requiring Sanders to pay attorneys' fees. The trial court should provide Sanders with notice and an opportunity to raise her ability to pay if, at the conclusion of any future sentencing hearing, the trial court intends to impose attorneys' fees. We therefore do not reach the question whether Sanders forfeited her objection to the order that she pay attorneys' fees by failing to object at the sentencing hearing.[10]

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[10] Although the Supreme Court in *Aguilar* held that a defendant forfeits his or her challenge to an attorneys' fees order by failing to object in the trial court, the court noted that it was not deciding "the question whether a challenge to an order for payment of the cost of the services of appointed counsel is forfeited when the failure to raise the challenge at sentencing may be attributable to a conflict of interest on trial counsel's part." (*People v. Aguilar*, *supra*, 60 Cal.4th at p. 868, fn. 4, citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1216-1217.) In *Viray*, the court concluded that the defendant had not forfeited her right to challenge an order that she pay attorneys' fees where her appointed attorney specifically requested payment of the fees, and thus created a conflict with his own client. (*Viray*, *supra*, at pp. 1215-1216.) We do not reach the question whether the order for Sanders to pay attorneys' fees for an appointed private counsel presented the type of conflict addressed by the court in *Viray*.

DISPOSITION

The judgment of conviction is reversed as to count 1. Sanders's sentence is vacated in its entirety, including the order that she pay attorneys' fees, and the matter is remanded for further proceedings consistent with this opinion. On remand the People may either accept a reduction of the conviction on count 1 to a misdemeanor with the court to resentence Sanders in accordance with that election or retry Sanders for a felony violation of section 10851. The judgment is affirmed as to Sanders's conviction on count 2.

FEUER, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.