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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN REYES, Defendant and Appellant.	B234833 (Los Angeles County Super. Ct. No. BA360669)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed.

John Scott Cramer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jonathan Reyes, appeals the judgment entered following his conviction for receiving stolen property (Pen. Code, § 496).[1] He was sentenced to state prison for a term of two years.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

Esaud Miranda testified that on January 16, 2009,[2] he had driven to a party near 82nd and Main in Los Angeles. As he was parking his 2000 Hyundai Sonata, a van drove past him, made a U-turn and came to a stop. Two men from the van walked toward Miranda, while a third man came up behind him. The men were wearing bandanas. One of them pulled out a gun and another said, "Give me what you got." This man yanked on Miranda's key chain, causing his keys to fall into the street. Miranda turned around and walked toward the party house, saying: "Take it. Take the car. Take whatever you guys want." Police officers happened to be at the party house, apparently in response to a noise complaint. Miranda spoke to them, but by the time they returned to the crime scene his Hyundai was gone.

The following day, police responded to a report that some people were stripping an automobile in the middle of a street. Defendant Reyes was found with two other men, standing between a van and Miranda's car. The Hyundai's license plates had been removed; the doors were open, the keys were in the ignition and the trunk was open. The license plates were inside the trunk. A computer check on the Hyundai confirmed the car had been stolen.

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

[2] All further calendar references are to the year 2009 unless otherwise specified.

Detective Javier Vargas interrogated Reyes, who initially denied any knowledge of the robbery. But after Vargas pretended the victim had already picked Reyes out of a photo array, Reyes admitted he had been driving the van that night. The van belonged to a friend of his, but Reyes had been borrowing it for six months. He admitted driving two companions to 82nd and Main that night, but claimed he had no idea what they were planning. After his companions exited the van, Reyes drove home alone. When he met up with his companions the next day, they were standing in the street next to a car. All of a sudden the police arrived and made arrests.

Miranda subsequently went with Detective Vargas to a police impound yard where he saw the perpetrators' van. He identified various items inside the van as having been taken from the Hyundai.[3]

Reyes did not testify or present any evidence.

CONTENTIONS

1. The trial court erred by failing to advise Reyes about the immigration consequences of going to trial rather than accepting a plea bargain offer.

2. Defense counsel rendered ineffective assistance by failing to advise Reyes about the immigration consequences of going to trial.

DISCUSSION

1. *Procedural background.*

Both of Reyes's claims stem from the fact that, after rejecting a plea bargain offer and being convicted at trial, he is now being deported by federal authorities.

On the first day of trial, there was a discussion about Reyes's decision to turn down a plea bargain offer under which he would have received three years probation after serving 240 days in county jail. Jury selection then began and

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[3] Miranda identified: "a spare tire, a tire jack, a scarf, some music CD's, and some bottles of car care products."

Reyes was ultimately convicted of receiving stolen property (§ 496).[4] The trial court sentenced him to two years in state prison.

Reyes now claims that, had the trial court and defense counsel done their jobs properly, he would have accepted the offered plea bargain and would not now be facing deportation. However, under federal law Reyes would still be facing deportation even if he had accepted the plea bargain offer. That is, although Reyes is currently subject to deportation under title 8 of the United States Code section 1227(a)(2)(A)(iii) because he was sentenced to one year or longer in prison on a theft conviction,[5] even if he had accepted the plea bargain offer he would still have been deportable, under title 8 of the United States Code section 1227(a)(2)(A)(i), for having been convicted of a crime of moral turpitude for which a sentence of one year or longer could have been imposed.[6]

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[4] Although Reyes was convicted on two counts of receiving stolen property, they were based on the same incident and the trial court dismissed the second count.

[5] Title 8 of the United States Code section 1227(a)(2)(A)(iii) provides: "Any alien who is convicted of an aggravated felony at any time after admission is deportable." Title 8 of the United States Code section 1101(a)(43)(G) defines "aggravated felony" as " 'a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year.' " This last phrase means that "a term of imprisonment of at least one year is imposed." (*United States v. Echavarria-Escobar* (9th Cir. 2001) 270 F.3d 1265, 1269.)

[6] Title 8 of the United States Code section 1227(a)(2)(A)(i) makes deportable "[a]ny alien who [¶] (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and [¶] (II) is convicted of a crime for which a sentence of one year or longer may be imposed."

2. *There was no trial court error*.

Reyes contends the trial court erred by failing to advise him about the possible immigration consequences of rejecting the plea bargain and going to trial. This claim is meritless.

Reyes complains: "This is a case where the immigration consequences were clear cut and stark. Yet the trial court failed to apprise appellant of the immigration consequences of his decision to go to trial during the context of a plea offering." Reyes argues he was entitled to a warning about the immigration consequences of *rejecting* the plea bargain offer which would have been analogous to the required section 1016.5 warning about the immigration consequences of *accepting* a plea offer.

"Penal Code section 1016.5 requires that, before accepting a plea of guilty or nolo contendere to any criminal offense, the trial court must advise the defendant that if he or she is not a United States citizen, conviction of the offense may result in deportation, exclusion from admission to the United States, or denial of naturalization. The statute allows the defendant to move to vacate the judgment if the trial court fails to give the required advisements. In *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 203-204 . . . , we recognized that a motion to vacate a judgment under section 1016.5 may be brought in the trial court after judgment has been imposed." (*People v. Totari* (2002) 28 Cal.4th 876, 879, fn. omitted.)

"In *Zamudio*, we recognized that a noncitizen defendant has a 'substantial right' to be given complete advisements under section 1016.5." (*People v. Totari, supra,* 28 Cal.4th at p. 883.) "To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.]" (*Id*. at p. 884.)

Section 1016.5, however, is designed to be given to defendants who intend to plead guilty or no contest. Reyes cites no case authority requiring such a warning for a defendant who has rejected a proffered plea bargain offer in favor of going to trial, nor have we found any such authority. Hence, we conclude the trial court did not err. In any event, as explained *post*, Reyes could have been deported whether or not he accepted the plea bargain offer.

3. *Reyes was not denied effective assistance of counsel.*

Reyes contends his attorney rendered ineffective assistance by not adequately advising him about the immigration consequences of rejecting the plea bargain offer. Reyes asserts that if he had been so advised "it is likely [he] would have accepted the plea offer and would not now be exposed to mandatory deportation." We disagree. The record demonstrates that, had Reyes been given a full immigration advisement, he would have realized his best hope of avoiding deportation was to stand trial.

a. *Legal principles.*

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness. [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 [146 L.Ed.2d 389].) "[T]he burden of proof that the defendant must meet in order to establish his entitlement to

relief on an ineffective-assistance claim is preponderance of the evidence." (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

b. *Discussion.*

As Reyes points out, *Castillo-Cruz v. Holder* (9th Cir. 2009) 581 F.3d 1154, 1161, held "that a conviction for receipt of stolen property under § 496 is not categorically a crime of moral turpitude because it does not require an intent to permanently deprive the owner of property." But Reyes fails to acknowledge the federal deportation analysis does not stop there. As the Attorney General points out, Reyes's violation of section 496 constituted a deportable crime of moral turpitude if he intended to permanently deprive Miranda of his property.

Although federal law does not define the term "crime involving moral turpitude," courts "have generally defined this term as comprising crimes that are 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.' [Citations.] Such crimes are of two types: those involving fraud and those involving grave acts of baseness or depravity. [Citation.]" (*Robles-Urrea v. Holder* (9th Cir. 2012) 678 F.3d 702, 708.) The fraud category includes theft offenses. (*Castillo-Cruz v. Holder, supra,* 581 F.3d at p. 1157; *Sanusi v. Gonzales* (6th Cir. 2007) 474 F.3d 341, 343, fn. 2.)

Under the initial "categorical test," an appellate court "make[s] a categorical comparison of the elements of the state statute of conviction to the generic definition of a theft offense in order to determine whether the full range of conduct proscribed by the statute of conviction is broader than the generic definition." (*Alvarez-Reynaga v. Holder* (9th Cir. 2010) 596 F.3d 534, 536.) The Ninth Circuit concluded section 496 did not meet this test: "Under Californian law, a conviction for grand theft or petty theft under Cal. Penal Code § 484 requires, in common with other crimes of moral turpitude, 'the specific intent to deprive the victim of his property permanently.' [Citations.] Receipt of stolen property under Cal. Penal Code § 496(a) has no such requirement, but rather permits conviction for an intent

to deprive an individual of his property temporarily." (*Castillo-Cruz v. Holder*, *supra*, 581 F.3d at p. 1160.)

But in situations where the categorical test fails, " 'the modified categorical approach asks what facts the conviction "necessarily rested" on in light of the [prosecution] theory of the case . . . , and whether these facts satisfy the elements of the generic offense.' " (*Robles-Urrea v. Holder*, *supra*, 678 F.3d at p. 712.) The modified categorical approach calls for "a determination whether the facts on which [the defendant's] conviction necessarily rested, as established by the judicially noticeable documents in the record of conviction, make his conviction one involving moral turpitude." (*Ibid*.)

Applying the modified categorical approach to this case, it is clear the jury could not have convicted Reyes without having found he acted with an intent to permanently deprive Miranda of his property. The two counts of receiving stolen property related to the theft of Miranda's car (count 2) and the theft of the items taken from his car (count 1). The jury was required to find, as an element of receiving stolen property, that Reyes knew the property had been stolen. The jury was also instructed that in this case the "stolen property" had to have resulted from either a robbery or a theft, both of which required the jury to find Reyes had acted with the specific intent to permanently deprive the victim of his property. The prosecution's theory of the case was that Reyes had been the third man involved in the carjacking and, therefore, on the following day he must have known the property being taken from the Hyundai and placed into the van had been stolen.

Hence, the record shows Reyes was deportable whether he accepted the plea bargain offer or not, and at least by going to trial there existed the possibility of being acquitted. Reyes has not demonstrated he suffered ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.