Filed 6/28/12 P. v. Jones CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DWAYNE JONES, Defendant and Appellant.	B227567 (Los Angeles County Super. Ct. No. YA077077)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

E. Thomas Dunn, Jr., 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, Supervising Deputy Attorney General, Kim Aarons, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals his conviction of one count of residential burglary (Pen. Code, § 459), with true findings he suffered two prior serious or violent felony convictions (Pen. Code, § 667, subds. (a)-(i); § 1170.12, subds. (a)-(d)). On appeal, he contends that insufficient evidence supports his conviction for burglary and that the trial court erred in admitting evidence of an unlawful search. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 15, 2010, around noon, Torrance Police officer Robert Waldrop responded to a burglary alarm from a residence that belonged to Abad Cabrera at 5404 Konya Avenue in Torrance. The house at 5404 Konya shares an approximately eight foot high property dividing wall with a house to the south at 5403 Michelle. It is a twelve foot drop from the Konya Avenue house to the backyard of the adjacent house. Officer Waldrop, who was in uniform, parked on Henrietta, south of Michelle.

When he arrived at the scene, Officer Waldrop looked for Officer Levell, an officer from another unit who had previously responded to the scene, but Officer Waldrop could not find him. At that point, Officer Waldrop saw defendant, who appeared disheveled and was talking on his cell phone, exit the backyard of the house on Michelle through the west gate. Defendant walked away from Officer Waldrop, and headed northbound on Henrietta Street. Defendant appeared to be having a "regular phone conversation," and Officer Waldrop followed him; when Officer Waldrop was five feet to 10 yards behind defendant he heard "bits and pieces" of defendant's conversation. Officer Waldrop got closer to defendant and heard him say in a more distressed tone, "They're here. Five-0 is here. I need a ride." In Officer's Waldrop's experience, "Five-0" is a reference to police. Defendant looked back, saw Officer Waldrop, and started running. Officer Waldrop was able to grab defendant and detain him.

Officer Waldrop had defendant spread his feet, and placed defendant's hands on the back of defendant's head to facilitate a patdown search. Defendant was perspiring, his breathing was irregular, and his heart was pounding rapidly. Defendant told Officer Waldrop that he had just left a friend's house on Del Amo, and he was on the phone with

a friend trying to get a ride. Officer Waldrop requested a second unit, and tried to locate Officer Levell. Officer Waldrop saw Officer Levell on Michelle, and heard Officer Levell's radio call that there was a neighbor who reported a possible second suspect in the area described as a six-foot tall male black.

After placing defendant in handcuffs, Officer Waldrop conducted a patdown search of defendant. As Officer Waldrop ran his hand down defendant's left shin, defendant moaned in pain. In response to Officer Waldrop's questioning, defendant responded that his shin hurt. Officer Waldrop pulled up defendant's left pant leg and saw scrapes and contusions on defendant's leg. Defendant's skin was peeling and there was fresh blood. In Officer Waldrop's experience, such injuries can result from going over a large cinderblock wall. Defendant told Officer Waldrop he did not know how he injured his leg, and said he was in the area because he was trying to catch a bus to go to Del Amo Mall. Del Amo Mall is about two miles from the crime scene.

Officer Waldrop checked the residence at 5404 Konya, and found the rear window on the south side of the house had been smashed, and observed inside the house a dresser that had been ransacked. Officer Waldrop placed defendant under arrest; a search of defendant's pockets yielded cotton knit gloves, pepper spray, defendant's cell phone, $37, and a wallet. In Officer's Waldrop's experience, burglars often carry gloves so as not to leave fingerprints at the scene; use cell phones as way to communicate with accomplices via a direct-connect feature; carry pepper spray to silence dogs or distract persons found in the home being burglarized; and carry entry tools. After he took the phone from defendant, Officer Waldrop observed defendant's phone lighting up with an alert that said "R-I-D-E."

The radio transcripts show that Officer Waldrop arrived in the area about 12:06 p.m. Defendant received a call from a person named "Geezy" at approximately 12:08 p.m. that lasted 0:00 minutes.

Abad Cabrera, the owner of the home at 5404 Konya, informed police that $1000 in cash and some jewelry was missing from the house. Elsa Goodman, the owner of the

house at 5403 Michelle, did not give anyone permission to be in her backyard that day. On January 23, 2010, Maria Rangel was cleaning the Cabrera house and found a towel in the patio by the side of the house wrapped around a screwdriver, a crowbar, and some black gloves.

Defendant's prints were not found in the Cabrera home. There were no usable prints on the screwdriver, crowbar, or gloves found by the side of the house.

The prosecution introduced defendant's preliminary hearing testimony, which was read to the jury. Defendant testified that he worked for Project Angel Food, which delivered food to elderly people. He works from 8:00 a.m. to 4:00 p.m. on most weekdays. He did not work on January 15, 2010 because he needed to go to the doctor for treatment of the abrasion on his left leg. Defendant was injured while moving a table at his home. Defendant had been to Del Amo mall once before by car, and wanted to go there on January 15, 2010 because he was looking for toys and games on sale. He took the bus, and when he got off, he believed he was near the mall. Defendant mistakenly took his girlfriend's pepper spray that morning instead of his own spray that he uses for erectile dysfunction, and asserted the cotton gloves in his possession at the time of his arrest were for his work because he had to enter a cooler to retrieve food. Defendant denied climbing the wall of the house on Michelle, being in the backyard of the house, or jumping off the wall between the houses. Defendant admitted he was convicted of two counts of robbery in 1996, and suffered a bank robbery conviction in 2004.

Paula De Jean, defendant's supervisor at Project Angel Food, testified that defendant worked as a driver delivering food. Defendant took sick days on Thursday, January 14, 2010 and Friday, January 15, 2010. According to Project Angel Food payroll records, the last day defendant worked before the burglary of the Cabrera home was December 27, 2009. Project Angel Food terminated defendant effective January 15, 2010.

Defendant lived a considerable distance from the Del Amo Mall.

The prosecution's theory of the case was that defendant aided and abetted an unknown person in the burglary of the Cabrera home. The prosecution relied on the circumstantial evidence of defendant's possession of gloves and pepper spray; his proximity to the burglarized home; his egress from the property adjacent to the burglarized home; defendant's cellphone call to advise his accomplice that the police were on the scene; defendant's attempted flight from Officer Waldrop; and defendant's injuries consistent with an attempt to scale a wall. The prosecution argued the presence of an accomplice was demonstrated by the gloves, crowbar, and screwdriver found at the Cabrera home. "So when you add [this evidence] together . . . the defendant is right next to the burglary. Exiting the property that he doesn't have permission [to be on]. With gloves. With pepper spray. A long way from home. . . . The inference is that [defendant] is guilty."

The jury convicted defendant of one count of burglary, and found true the prior conviction allegations. The trial court sentenced defendant to a term of 35 years to life consisting of 25 years to life on the burglary count, plus two five-year enhancements for the two prior conviction allegations.

DISCUSSION

I. SUFFICIENT EVIDENCE SUPPORTS DEFENDANT'S BURGLARY CONVICTION

Defendant argues insufficient evidence supports his burglary conviction, either as a principal or as an aider and abetter because there was no evidence defendant entered the house at 5404 Konya, and as an accomplice, there was no evidence he was present at the crime scene, was in the company of the principal, or fled from the scene. Respondent argues that there was evidence defendant was directly involved in the burglary based upon his possession of gloves (used to conceal fingerprints) and pepper spray (defense against dogs or unanticipated residents); furthermore, there was evidence he was involved as an accomplice based upon the neighbor's sighting of a second suspect, additional

burglary tools recovered from the residence, and defendant's conversation on the cellphone.

Section 459 provides that, "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." Thus, "the substantive crime of burglary is defined by its elements as: (1) entry into a structure, (2) with the intent to commit theft or any felony." (*People v. Anderson* (2009) 47 Cal.4th 92, 101.) The crime is complete when the defendant enters one of the statutorily specified premises with the intent to steal something or commit any felony; a burglary can be committed without an actual taking of property. (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 535–536.)

"'An accomplice is . . . one who is liable to prosecution for the identical offense charged against the defendant.'" (*People v. Boyer* (2006) 38 Cal.4th 412, 467.) Section 31 provides that "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed." Accomplice liability requires a showing the defendant aided the perpetrator with knowledge of the perpetrator's purpose and with the intent or purpose to aid or assist in committing the principal's crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) "[T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) Moreover, "the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*Id.* at p. 1117.)

If a defendant's liability for an offense is predicated upon the theory that he or she aided and abetted the perpetrator, the defendant's intent to encourage or facilitate the actions of the perpetrator "must be formed *prior to or during* 'commission' of that offense." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) Aiding and abetting a specific intent crime such as burglary requires the aider and abetter to share the specific intent of the principal. (*People v. Beeman*, *supra*, 35 Cal.3d at p. 560.)

A conviction of burglary may be based upon circumstantial evidence. (*People v. D.M.G.* (1981) 120 Cal.App.3d 218, 227.) "'Burglary being one of those crimes which are usually committed in secret, the proof of the corpus deliciti generally must rest on circumstantial evidence alone.'" (*People v. Jordan* (1962) 204 Cal.App.2d 782, 786.) Although mere presence at a crime scene and failure to prevent the crime, even with knowledge of the perpetrator's criminal purpose, do not constitute aiding and abetting, the trier of fact may consider such circumstances in determining aiding and abetting liability. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529–530.) An unexplained presence at the scene of a crime implies complicity. (*People v. Wilson* (1928) 93 Cal.App. 632, 636.) Other circumstances to be considered are companionship, and conduct before and after the offense, including flight, which can indicate guilt. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094; *People v. London* (1988) 206 Cal.App.3d 896, 903.) "It has been consistently held that one who was present for the purpose of diverting suspicion, or to serve as a lookout, or to give warning of approach of anyone seeking to interfere," is liable as an aider and abettor, and thus a principal in the crime committed. (*People v. Silva* (1956) 143 Cal.App.2d 162, 169.) Whether a person is an accomplice is a question of fact for the jury, unless there is no dispute as to the facts or the inferences to be drawn from them. (*People v. Avila* (2006) 38 Cal.4th 491, 565.)

Here, sufficient evidence supports defendant's conviction for burglary. First, defendant was in the backyard of the adjacent house after having scaled a cinderblock fence, he was perspiring, arguably indication of exertion or nervousness, had burglary implements on him, and was seeking a means of escape because the police ("Five-0")

were present. Second, accomplice liability requires a showing that defendant aided the unknown burglar of the Cabrera residence with knowledge of the perpetrator's purpose and with the intent or purpose to aid or assist in committing the underlying burglary. (*People v. Beeman, supra*, 35 Cal.3d at p. 560.) Evidence of this unknown burglar and defendant's intent to assist in committing the underlying burglary consisted of the burglary tools discovered at the Cabrera residence, defendant's possession of additional burglary tools, defendant's presence in the backyard of the adjacent house, and Officer Levell's report of the neighbor's sighting of a second person, indicating that two persons had broken into the home.

II. OFFICER WALDROP'S OBSERVATION OF DEFENDANT'S LEG WOUND WAS NOT THE FRUIT OF AN UNLAWFUL SEARCH

Defendant argues that Officer Waldrop's search of his pant leg revealing the scrape marks should have been suppressed as the fruits of an unlawful search because he was not under arrest at the time and the patdown was not supported by probable cause or reasonable basis for believing defendant was armed and dangerous. Respondent argues defendant waived the issue because defendant's motion to suppress argued that defendant's statements at the time of his detention should be suppressed as obtained in violation of his *Miranda*[1] rights based on unlawful custody.[2] (See *People v. Williams* (1999) 20 Cal.4th 119, 130–131 [party may not offer on appeal theory of suppression not offered in the trial court].) Defendant contends the issue was subsumed within his motion to suppress, and the issue of Officer Waldrop's observation of his leg was specifically raised at the suppression hearing; further, if the issue was not properly before the court, counsel was ineffective for failing to raise it.

We find the issue forfeited because a suppression of statements under *Miranda* does not subsume an argument that the pant leg search was an unlawful search. A

---

[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

[2] Defendant's suppression motion is not part of the record.

judgment may not be reversed based on the erroneous admission of evidence unless a timely and specific objection was raised in the lower court. (Evid. Code, § 353, subd. (a); see also *People v. Williams*, *supra*, 20 Cal.4th at p. 130 [party may not offer on appeal theory of suppression not offered in the trial court].)

Nevertheless, in order to avert a meritless claim of ineffective assistance of counsel, we note that even if the issue were not forfeited, no error occurred. Any warrantless search is unreasonable unless it falls within one of the recognized exceptions to the warrant requirement. (*Katz v. United States* (1967) 389 U.S. 347, 357 [88 S.Ct. 507, 19 L.Ed.2d 576].) The burden of proving that a search falls within one of these exceptions rests with the People. (*People v. Williams*, *supra*, 20 Cal.4th at p. 130.)

"It is settled that circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation. [Citations.] Although each case must be decided on its own facts, certain standards for judging the lawfulness of the officer's conduct have emerged from our decisions. [Citations.] [¶] . . . [¶] [I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (*In re Tony C.* (1978) 21 Cal.3d 888, 892–893, fn. omitted.) During such stop, the officer may perform a patsearch for weapons if he or she believes the suspect is armed and dangerous to the officers or others.

(*Terry v. Ohio* (1968) 392 U.S. 1, 24 [88 S.Ct. 1868, 20 L.Ed.2d 889]; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1395–1396.)

"A police officer's expertise can attach criminal import to otherwise innocent facts." (*People v. Limon* (1993) 17 Cal.App.4th 524, 532.) Further, where burglary is the suspected crime, it is reasonable for police to believe the suspected burglar may be armed. (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1059–1060.) Here, Officer Waldrop was immediately suspicious of defendant based upon his emergence from the house on Michelle in a disheveled appearance. Defendant was sweating, talking on his cell phone seeking a means escape by calling someone, stating he needed a ride because "Five-0" was nearby, and ran away when Officer Waldrop approached him. Officer Waldrop was aware a burglary had occurred nearby, the house on Michelle had a high stone wall, and defendant moaned in pain when his leg was touched. These observations constituted objective evidence that activity relating to a crime had taken place and defendant was involved in it, justifying Officer Waldrop's detention of defendant and patdown search of his pant leg.

DISPOSITION

The judgment is affirmed.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.