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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUEL RODRIGUEZ, Defendant and Appellant.	B244083 (Los Angeles County Super. Ct. No. KA097457)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed as modified.

Alex Green, 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, Scott A. Taryle and Kimberley J. Baker-Guillemet, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Manuel Rodriguez appeals from his judgment of conviction for residential burglary. He argues the court erred in instructing the jury on an aiding and abetting theory and claims he is entitled to additional presentence credits for time served on a probation violation.

We find no instructional error. We agree with appellant that he is entitled to additional presentence custody credits and direct modification of the abstract to reflect the correct amount of credits.

FACTUAL AND PROCEDURAL SUMMARY

Donly Garsia and Joel Castaneda had sold drugs prior to March 31, 2012. That night, at about 3:00 a.m., Ms. Garsia heard a noise at the back of the house which sounded like someone pulling on a chain that secured a bicycle. She woke up Mr. Castaneda. He went into the living room and opened the interior wooden door, leaving the outer metal door closed. He yelled to find out who was there. Through a window, Ms. Garsia saw appellant and two other men standing at the front of the house. Mr. Castaneda testified that appellant demanded "rent," which he understood to be payment because they had sold drugs in the territory of the El Monte Flores gang. When Mr. Castaneda refused to come outside, appellant said that if he did not, appellant would leave the "wrong way." Ms. Garsia testified that she heard appellant and one of the others say: "'We want you to give us some money because we are from El Monte Flores"' a local gang. She understood that according to the gang members, "it's the law that the person that sells drugs has to pay them a fee."

Mr. Castaneda replied that he did not have to pay the gang anything or that they had no money. The three men demanded that he open the door and come outside, but he refused. He saw appellant walk around the side of the house. Mr. Castaneda went to the bathroom. He found appellant with his body half-way through the window into the bathroom. Ms. Garsia saw that appellant had climbed half-way into a window in a bathroom at the back of the house and that Mr. Castaneda was trying to hold him back.

When Mr. Castaneda put a hand up and told appellant to stop, appellant moved back and fell. Ms. Garsia telephoned police and reported that appellant was entering the house.

After falling from the window, appellant returned to the front door where the other two men were still asking for money. Appellant joined them, until the police arrived, and the men ran off. A responding officer found appellant crouched against a wall of the house.

Before appellant came into the bathroom window, there had been intact security bars latched over the window. Mr. Castaneda testified that appellant had to pull the bars off in order to partially enter the window. An investigating officer saw that the bars had been attached to the house by screws and that there were holes in the stucco where they had been attached.

Appellant was arrested. He was charged with one count of first degree burglary (Pen. Code, § 459; all statutory references are to the Penal Code unless otherwise indicated) and two counts of making criminal threats (§ 422, subdivision (a)). The terrorist threats counts later were dismissed in the furtherance of justice on motion by the prosecution.

Appellant testified that he was drunk the night of the burglary and that he accompanied the other two men to the Castaneda/Garsia residence. The men told him that they wanted to get some money from the residents to buy beer, so he went with them. When they got to the house, they knocked on the door, but the man inside (Castaneda) did not want to come outside. Appellant asked him for money, although he denied wanting it. He denied telling Castaneda that he was a member of El Monte Flores because he is not a gang member. When asked what happened next, appellant said he could not remember. He denied attempting to enter the residence through a window. He testified that when Mr. Castaneda and Ms. Garsia said they did not have any money, he backed off and went to the side of the house, while the other two men continued to talk with the occupants at the front door.

Appellant was convicted of residential burglary and sentenced to the middle term of four years. He was given 47 days of custody credit and 7 days of conduct credit. This is a timely appeal from the conviction.

DISCUSSION

I

Appellant claims the trial court committed prejudicial error by instructing the jury on an aiding and abetting theory of guilt.

In a colloquy over jury instructions during the prosecution case, the prosecutor observed that no instruction on aiding and abetting was required since the victims testified that appellant partially entered their home and demanded money. The court said the instruction would be required if the prosecution was going to rely on a demand for money made by one of the other perpetrators. The prosecutor replied: "All right. Hadn't planned on it. Thank you, though."

After appellant testified that he accompanied the other two men to the house and demanded money, but denied attempting to enter, the court again raised the aiding and abetting instruction. It stated that it would give the full aiding and abetting instruction because it was supported by appellant's testimony. Defense counsel objected, arguing that there was no other individual charged with any crime on that day, and that it had not been alleged that anyone else had committed a crime that date. The court said: "There were two other people there whose conduct may have been involved upon which his responsibility may be premised on." The prosecutor pointed out that the other perpetrator with a tattoo of three dots near his eyes was never caught. He explained that if that perpetrator had been caught, the prosecution might have pursued an aiding and abetting theory against appellant. He said: "I don't intend to argue aiding and abetting; but, since there was another person making a demand for money, I could see where the court could find aiding and abetting." Defense counsel objected that merely demanding money is not a crime, to which the prosecution cited testimony that appellant climbed in the bathroom window.

The court said: "The instruction appears appropriate because one person demanded money and then your client demanded money and the jury could determine whether your client's demand for money indicated some encouragement or aiding to facilitate the obtaining of money." The court instructed with CALCRIM Nos. 400, 401, and 1702. CALCRIM Nos. 400 and 401 informed the jury that appellant could be convicted as an aider and abettor if it found that the prosecution had proved that: 1) a perpetrator committed the crime; 2) appellant knew that the perpetrator intended to commit the crime; 3) appellant intended to aid and abet the perpetrator in committing the crime before or during its commission; and 4) appellant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. CALCRIM No. 1702 informed the jury that to be found guilty of burglary as an aider and abettor, appellant "must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate or encourage commission of the burglary before the perpetrator finally left the structure." The instructions also defined burglary.

The prosecutor did not rely on an aiding and abetting theory during his initial closing argument. In his closing, defense counsel addressed the theory that appellant was a direct principal. Alternatively, he argued that one of the other perpetrators had entered the bathroom window and he addressed appellant's potential guilt as an aider and abettor. Counsel argued that appellant had testified that he knew the men were going to ask for money when they got to the house, but did not know they were going to go through a window or make gang threats. He argued the appellant only asked for money, which is not a crime. The only crime, defense counsel argued, was committed by the other man who entered the window with an intent to commit a crime. He contended that appellant did nothing to aid the perpetrators in the commission of burglary.

In rebuttal, the prosecutor argued that the jury could infer that appellant was aware of the intent of the other two men, whom he knew to be gang members, when he accompanied them to the victims' house at 3:00 in the morning and demanded money. The prosecutor said: "We know somebody was in the window, no matter what. [Defense counsel] is agreeing to that. Why would they pin it on just this defendant. We know

somebody tried to get in." The prosecutor responded to the argument of defense counsel that it would have been easier for a person to gain access to the bathroom window from the roof than from the ground, by pointing out that the victims both testified that they saw appellant in the window while hearing footsteps on the roof. He did not expressly argue that appellant should be found guilty as an aider and abettor.

"Even without a request, a trial court is obliged to instruct on '"general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 265), or to put more concisely, on '"general legal principles raised by the evidence and necessary for the jury's understanding of the case'" [citation]." (*People v. Delgado* (2013) 56 Cal.4th 480, 488 (*Delgado*).) "In particular, instructions delineating an aiding and abetting theory of liability must be given when such derivative culpability 'form[s] a part of the prosecution's theory of criminal liability and substantial evidence supports the theory.' [Citation.]" (*Ibid.*)

"A person may be liable for a criminal act as an aider and abettor. Section 31 defines 'principals' in a crime to include persons who 'aid and abet in its commission, or, . . . have advised and encouraged its commission.' (§ 31.) This court has interpreted section 31 to require that an aider and abettor must act with 'knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and . . . conduct by the aider and abettor that in fact assists the achievement of the crime. [Citation.]' (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)" (*People v. Lopez* (2013) 56 Cal.4th 1028, 1069.) It is established that 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.)" (*Delgado, supra,* 56 Cal.4th at p. 486.)

In *People v. McCoy* (2001) 25 Cal.4th 1111, 1120, the Supreme Court explained that the line between actual perpetrator and aider and abettor is often blurred because

where one or more persons commit a crime together, both may act in part as actual perpetrator and in part as aider and abettor. (*Id*. at p. 1120.) It emphasized that "[t]he aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role." (*Ibid.*)

We review defendant's claims of instructional error de novo, determining whether the court fully and fairly instructed the jury on the applicable law. (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.) We consider the instructions as a whole. (*Ibid.*)

With these principles in mind, we turn to the contentions of the parties. Appellant argues aiding and abetting instructions should not have been given because the prosecution did not rely on that theory. Appellant also argues that the instructions were not supported by substantial evidence because if he was not the person who entered the window, all he did was ask the victims for money before anyone tried to enter the residence. He cites his own testimony that he did not know that one of the other perpetrators was going to ask for money by threats or force.

While the prosecutor's focus was on proving appellant guilty as a principal in the burglary based on the evidence that he demanded money and entered the bathroom, the prosecutor did not disclaim the aiding and abetting theory in argument. We conclude there was substantial evidence to support that theory. Even if the jury did not credit the testimony that it was appellant who partially entered the bathroom window, appellant admitted that he went to the house at 3:00 a.m. with men whom he knew to be gang members, went to the front door with them, demanded money from the victims, heard them demand money as rent because the victims had dealt drugs in their gang territory and then stood by until he was found by police crouching by the wall of the house. Mr. Castaneda testified that appellant had said that "if [Castaneda] didn't come out the right way then he would come in the wrong way." This was substantial evidence satisfying the elements supporting guilt on an aiding and abetting theory. There was no error in instructing the jury on that theory.

II

Appellant argues that he is entitled to additional presentence custody credit under section 2900.5 for time he served due to his probation violation because that incarceration stemmed from the same conduct that led to his current conviction and prison incarceration. Respondent agrees with the factual part of this claim, but disagrees with the claim about impermissible double credit.

Section 2900.5, subdivision (b) states: "For purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed."

A. Facts

Appellant pled guilty to misdemeanor evading arrest in violation of Vehicle Code section 2800.1, subdivision (a) on February 1, 2012 (case No. 1RI02447). He was sentenced to three years of probation and ordered to serve two days in county jail, less credit for two days. He was arrested in the present case on March 31, 2012, while on probation for the evading crime. On April 3, 2012, because of the present offense, appellant's probation was revoked in the evading case and the matter was set for a probation violation hearing. Appellant was remanded into custody at that time on the probation violation. He was found in violation of his probation at the end of the preliminary hearing in the present case, on May 2, 2012.

On May 16, 2012, appellant was sentenced to nine months in county jail for the probation violation in case No. 1RI02447 "to run consecutive to any other sentence". The same day, appellant was arraigned in the instant case, pled not guilty, and was remanded into custody.

The trial court sentenced appellant to a four-year prison term on the present burglary conviction on August 31, 2012. After verifying that appellant was arrested on the present charge on March 31, 2012, the court said: "However, on May 16, he was sentenced to nine months in the county jail on his probationary matter so . . . up to

today's date he has been under sentence and is not entitled to any credits. So his total credits are 47 actual days plus 7 days of good time work time. Total of 54 days."

B. Analysis

Appellant argues that he is entitled to custody credit for the period he was in custody as a result of his probation violation because the conduct which violated probation is the same conduct for which he was convicted of burglary in the present case. We agree.

Appellant received presentence custody credit in the present case for the 47 actual days of custody for the period between his arrest on March 31 through his sentence on the probation violation on May 16, 2012, plus seven days of good time work time. He now seeks credit for the period from May 16 through August 31, 2012 when he was sentenced on the present burglary conviction.

Under section 2900.5, subdivision (b), a criminal defendant may not be awarded double credit of custody credits against separate consecutive sentences imposed for multiple offenses. The Supreme Court interpreted this statute, concluding: "There is no reason in law or logic to extend the protection intended to be afforded one merely *charged* with a crime to one already incarcerated and serving his sentence for a first offense who is then charged with a *second* crime. As to the latter individual the deprivation of liberty for which he seeks credit cannot be attributed to the second offense. Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." (*In re Rojas* (1979) 23 Cal.3d 152, 156.)

Respondent cites *People v. Bruner* (1995) 9 Cal.4th 1178, 1191–1192 (*Bruner*) for the proposition that if we granted appellant's request, appellant would receive double credit because during that time he was serving his nine months of custody on the probation violation in case No. 1RI02447. Reviewing earlier decisions, *Bruner* held that a defendant may not be credited with jail or prison time attributable to a parole or probation violation that was based *only in part* on the same continuing episode. Appellant relies on *People v. Johnson* (2007) 150 Cal.App.4th 1467, which distinguished *Bruner*, and held that the defendant was entitled to presentence custody credit,

notwithstanding that custody was based on violation of probation, where the probation violation was based *solely* on the crime of which he was subsequently convicted. (*Id*. at p. 1485.) The same reasoning applies here, where the probation violation was based only on the present burglary offense. Appellant is entitled to 153 days of actual credit (from his arrest on March 31, 2012 to his sentencing in the present case on August 31, 2012) plus 22 days of conduct credit.

DISPOSITION

The trial court is directed to modify the judgment and award defendant a total of 153 days of actual credit plus 22 days of conduct credit and to prepare an amended abstract of judgment in accordance with this disposition and to deliver it to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.