Filed 3/7/12 P. v. Aguilar CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROMAN N. AGUILAR, Defendant and Appellant.	B228239 (Los Angeles County Super. Ct. No. BA 367785)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed in part; reversed in part.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Jaime L. Fuster and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted appellant Roman N. Aguilar of vandalism over $400 (count 1) and grand theft of personal property exceeding $400 (count 2) and found true an allegation that in committing both offenses he took, damaged and destroyed property of a value exceeding $65,000.

The trial court suspended imposition of a sentence and granted appellant 36 months of formal probation, with a condition of probation that appellant serve 364 days in county jail. The court ordered appellant to pay restitution to the victim in the stipulated sum of $135,860.16 (Pen. Code, § 1202.4, subd. (f)), a restitution fine of $200 (Pen. Code, § 1202.4, former subd. (b)), a probation revocation restitution fine of $200 (Pen. Code, § 1202.44), court security assessments of $60 (Pen. Code, § 1465.8, subd. (a)(1))[1] and criminal conviction assessments of $60 (Gov. Code, § 70373). Appellant received 268 days of conduct credit, consisting of 134 days of actual custody and 134 days of good time/work time.

Appellant asserts the trial court erred by failing to give a unanimity instruction sua sponte, by improperly instructing the jury to aggregate the value of items taken and damaged for the enhancement, and by improperly imposing court security and criminal conviction assessments as conditions of probation. We agree with appellant that the trial court improperly instructed the jury with respect to the enhancement but find the error harmless. Respondent concedes that the court improperly imposed the assessments as conditions of probation.

FACTS

The victim, Tae Jin Kim, purchased at an auction a house on South Burlington Avenue, taking out a loan for the purchase. Kim was not able to view the inside of the house before its purchase. Afterwards, on August 18, 2009, Kim visited the property and found it occupied by appellant. Appellant told Kim he was a renter and wished to stay in the house. Kim walked through the house and found the interior in generally decent condition. Over the month of August, Kim tried to negotiate an agreement with appellant

---

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

that would allow appellant to remain as a renter in the home. However, appellant told Kim various conflicting stories, and Kim eventually concluded appellant was not interested in renting the house.

Kim met with appellant and gave him two months to move out. When appellant failed to do so, Kim filed an unlawful detainer action to evict appellant. Appellant at first opposed the unlawful detainer action, then entered into a stipulated judgment in which he agreed to vacate the premises by December 22, 2009. During this time, appellant paid no rent to Kim, who continued making mortgage payments on the house.

On December 21, 2009, Kim called appellant to confirm he would move out by the date set by the court. Appellant told Kim he was in the middle of moving out, and they agreed to meet at the house on the following day, December 22, so that appellant could turn over his key to Kim. On December 22, Kim arrived at the house as arranged but appellant was not there. Kim went into the house and discovered the interior was completely destroyed.

There was extensive damage, including both vandalism and missing fixtures. Kim found that the railing of the staircase had been spray-painted black.[2] Also, sheet rock and drywall were ripped from the walls, all the masonry and decorative stonework around the fireplace had been removed, the hardwood flooring was ripped out, kitchen cabinets were ripped out, bathroom tiles and carpets were taken up and removed, light fixtures were ripped out and removed and plants outside the house were uprooted. All the kitchen appliances were gone. In addition to an ornate front door, three or four interior doors were missing, and the crown molding surrounding the doors and windows were also gone. The back door was left open and several windows were broken.

An expert estimated the damage to the house to be $135,860.16. He testified it would probably have taken four people one week to complete all the damage. Kim, who

---

[2] Cans of black spray paint were left in the room next to the staircase, and it was stipulated at trial that appellant's fingerprint was found on one of the spray cans.

also qualified as an expert in construction and renovation, stated he believed the damage to be significantly more than $135,000.

On January 21, 2010, appellant met with Detective Mario Mota of the Los Angeles Police Department. During that meeting, appellant admitted to Detective Mota that he took the fireplace tile, cabinets, carpeting, light fixtures, bathroom tiles and front door on December 20, 21 and 22. He said he removed the carpeting from his children's rooms and other general areas because he had installed it, and he took the front door because it was an antique that he had brought from Northern California. Appellant admitted to Detective Mota that he painted the staircase black. He told the detective he did so because he was upset at losing his house. The house had belonged to his mother-in-law, and he had taken out a loan to pay off her other children.

Appellant returned some of the property to the Rampart police station on January 26, 2010. The returned items included the front door, some lighting fixtures and three to four pieces of carpeting. Appellant told Detective Mota he did not bring back the antique tile because he was in the process of selling it on eBay.

At trial, appellant testified that the house was a Victorian craftsman over 100 years old. He had begun to restore the house in 2004, and he had about 75 percent of it restored before running out of money. He lost the house to foreclosure in June 2009. He denied vandalizing the property, and he specifically denied admitting to Detective Mota that he damaged the house because he was angry**.**

Appellant testified he believed the items he took belonged to him because he bought them. The stipulated judgment stated that he would "vacate the subject premises on or by December 22nd, 2009, *removing all personal property* and persons covered by this provision." (Italics added.) It was his understanding the italicized language in the stipulated judgment allowed him to "[t]ake whatever is mine." Appellant also claimed he had Kim's permission to take the front door. He testified he vacated the house on December 20, 2009, and the house was vandalized after he moved out.

DISCUSSION

1. Unanimity Instruction

Appellant contends that the trial court erred in not giving the jury a unanimity instruction sua sponte. Specifically, appellant argues that the jury may not have agreed on which criminal acts supported the vandalism count and which supported the theft count. We disagree.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . [Citation.] Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; see also Cal. Const., art. I, § 16.) "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citations.] A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 423.)

However, no unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 275.) This exception applies when the criminal acts were so closely connected in time, or were "successive, compounding, part of a single objective," and "arguably barred from multiple punishment by . . . section 654." (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296.)

In the present case, the information did not elect which acts constituted vandalism and which acts constituted larceny. However, in closing argument the prosecutor did make such an election. The prosecutor told the jury that it was important to separate the two counts. He explained, "There is vandalism and there's theft. The theft refers to what was taken from the property. Vandalism refers to the condition of what was left behind." He further stated: "Now, exactly which items does [vandalism] refer to here? Well, a lot of the damage that was done in this house you could consider vandalism. I want to draw

your attention to a few items in particular that are especially significant when considering the vandalism in this case. First there's the drywall damage. . . . [A]reas of sheetrock and drywall . . . were simply torn, ripped off, holes punched in them." The prosecutor further cited the damage to the drywall caused by ripping out the ceiling fixtures and the spray-painted staircase. The prosecutor noted that the expert had testified the cost of repair to the drywall was more than $29,000 and more than $600 for the stairway, well in excess of the $400 of vandalism damage charged in the information.

The grand theft count, the prosecutor informed the jury, included the light fixtures and carpet that appellant admittedly took, and the tiles that he told Detective Mota he took but disputed at trial. The prosecutor additionally indicated the charge included the front door, other missing doors, kitchen cabinets, plants from outside the home and the missing floorboards. The estimated value of the missing doors, he reminded the jury, was more than $1,600, the kitchen cabinets were valued at more than $3,500, and the value of the light fixtures was more than $700, the total of which was more than the $400 amount alleged in the grand theft charge.

The prosecutor thus specified which acts constituted vandalism and which acts constituted theft. The jury was properly instructed that vandalism involves malicious damage or destruction of property of another and larceny involves the taking of property of another. The elements of each count were clearly defined, and there was no danger that some jurors believed appellant was guilty only of vandalism and others only of larceny. (*People v. Russo, supra*, 25 Cal.4th at pp. 1134-1135.)

Moreover, there was evidence the criminal acts were closely connected in time and part of a single objective -- to express the anger appellant felt at having to vacate the premises.

No unanimity instruction therefore was required.

2. Enhancement

Appellant argues that the section 12022.6, subdivision (a)(1) enhancements should be stricken because the jury was improperly instructed that it could aggregate the value of

the items taken and damaged as alleged in counts 1 and 2 to determine the truth of the enhancement.

Section 12022.6, subdivision (a) states: "When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows: [¶] (1) If the loss exceeds sixty-five thousand dollars ($65,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year."

The information in this case alleged as to counts 1 and 2 that appellant took, damaged and destroyed property of a value exceeding $65,000 within the meaning of section 12022.6, subdivision (a)(1) in the commission of the vandalism and grand theft offenses. As to the amount of loss pursuant to section 12022.6, subdivision (a)(1), the jury was instructed that if it found appellant guilty of the crimes charged in Counts 1 and 2, it should then decide whether the People had proved the additional allegation that the value of the property taken and/or damaged or destroyed was more than $65,000. The jury found the enhancement true as to both counts 1 and 2.

"As our Supreme Court recognized in *People v. Tassell* (1984) 36 Cal.3d 77, 90, there are 'two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense.' The latter attach to particular counts, while the former, those related to the nature of the offender, do not attach to any particular counts but rather are added as the final step in computing the total sentence. Section 12022.6 is an enhancement which relates to the nature of the offense and therefore must attach to a particular count. [Citation.]" (*People v. Bowman* (1989) 210 Cal.App.3d 443, 446-447; see § 1170.1, subd. (a).) In response to *Bowman*, the Legislature enacted subdivision (b) to section 12022.6.[3] (See *People v. Green* (2011) 197

---

[3] Section 12022.6, subdivision (b) provides in part: "In any accusatory pleading involving multiple charges of taking, damage, or destruction, the additional terms

Cal.App.4th 1485, 1492-1493.) In order for the losses from separate crimes to be combined for section 12022.6 purposes, the information must charge, and the jury must find, that the crimes resulted from "a common scheme or plan."[4] (See *People v. Green, supra*, at p. 1491, fn. 7.)

In the present case, the trial court instructed the jury along the lines of CALCRIM No. 3220, stating: "If you find the defendant guilty of the crimes charged in Counts 1 and 2, you must then decide whether the People have proved the additional allegation that the value of the property taken and[/]or damaged or destroyed was more than $65,000.00. [¶] To prove this allegation, the People must prove that: [¶] 1. In the commission of the crime, the defendant took, or damaged, or destroyed real or personal property; [¶] 2. When the defendant acted, he intended to take, or damage, or destroy the property; [¶] AND [¶] 3. The loss caused by the defendant's taking, or damaging, or destroying the property was greater than $65,000.00. . . ."

The trial court, which apparently drafted the jury instructions, omitted additional bracketed language contained in CALCRIM No. 3220 that instructed the jury that if it found appellant guilty of more than one crime, it could add together the losses suffered to determine whether the total losses amounted to more than the stated amount ($65,000) only if (1) the People proved that appellant intended to and did take, damage or destroy property in each crime, AND (2) the "losses arose from a common scheme or plan." (CALCRIM No. 3220.) Thus, the jury was instructed it could aggregate the value of the property taken, damaged or destroyed without also finding that the losses arose from a

---

provided in this section may be imposed if the aggregate losses to the victims from all felonies exceed the amounts specified in this section *and arise from a common scheme or plan*." (Italics added.)

4 Section 12022.6, subdivision (c) provides that "[t]he additional terms provided in this section shall not be imposed unless the facts of the taking, damage, or destruction in excess of the amounts provided in this section *are charged in the accusatory pleading and admitted or found to be true by the trier of fact*." (Italics added.)

common scheme or plan. Neither party voiced an objection to the court's proposed jury instruction.

The instruction given the jury allowing it to aggregate the losses in counts 1 and 2 without also making a finding that the losses arose from a common scheme or plan was a legally incorrect statement of the law. (§ 12022.6, subds. (b) & (c).) Respondent apparently concedes this instruction was in error, noting the jury should have been instructed either that it could not aggregate the value of the items taken or damaged as alleged in each count in reaching a true finding, or that it had to find a common plan or scheme between the counts in order to consider the losses together. However, respondent argues appellant forfeited this claim because he failed to object to the court's instructions. We do not agree.

When the trial court gives a legally incorrect instruction that allegedly affects the substantial rights of a defendant, it is reviewable even if no objection was raised in the trial court. (§ 1259; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [no forfeiture when "trial court gives an instruction that is an incorrect statement of the law"]; *People v. Prieto* (2003) 30 Cal.4th 226, 247 [instructional errors reviewable on appeal to extent they affect defendant's substantial rights even absent objection].)

Having found the trial court erred in giving a legally incorrect instruction to the jury and appellant did not forfeit the point by failing to object in the trial court, the issue remains whether such error was harmless. We conclude it was. The key inquiry here is whether the jury would have reached a different verdict if it had been properly instructed. Even under the more stringent *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24), we find no doubt, let alone a reasonable doubt, that appellant took, damaged or destroyed property based upon a common scheme or plan to get revenge for the foreclosure upon his home. On the record presented, it is crystal clear that the jury would have reached the same result even if properly instructed.

3. Court Security and Criminal Conviction Assessments

Respondent concedes that appellant is correct in arguing the assessments imposed under Penal Code section 1465.8, subdivision (a)(1) and Government Code section 70373

may not be imposed as conditions of probation. Respondent, however, argues they should be imposed as separate orders.

The court security assessment under Penal Code section 1465.8 is designed to "ensure and maintain adequate funding for court security." (§ 1465.8, former subd. (a)(1).) Government Code section 70373 shares a similar purpose with Penal Code section 1465.8 to ensure and maintain adequate funding for court facilities. (Gov. Code, § 70373.) These assessments finance the criminal justice system by funding the courts and are not rehabilitative or restitutionary in nature. Thus, they may not be made conditions of probation. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1402-1403.)

However, the assessments may be imposed separately from appellant's probation conditions. (*People v. Pacheco, supra*, 187 Cal.App.4th at pp. 1402-1403.) Accordingly, the judgment should be modified to delete the court security and court facilities funding assessments, and a separate order should be entered for such assessments.

DISPOSITION

The judgment is modified to strike the court security assessments of $60 and the criminal conviction assessments of $60. The matter is remanded to the trial court with directions to enter a separate order providing for such assessments. In all other respects, the judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.