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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.

GASPAR AVENDANO, JR.,

Defendant and Appellant.

B261490

(Los Angeles County
Super. Ct. No. YA090951)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Steven R. Van Sicklen, Judge. Affirmed as modified.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and
Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gaspar Avendano, Jr., contends he should have been convicted of only three counts of receiving stolen property, rather than four counts, because two of the convictions were based on the same conduct. The Attorney General properly concedes that Avendano is correct and, accordingly, we shall strike one of those convictions.

The judgment is affirmed as modified.

BACKGROUND

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

1. Prosecution evidence.

On May 19, 2014, at about 4:30 a.m., Avendano was contacted by a police officer responding to a call that someone was loitering near a closed restaurant. Avendano had in his possession some cash and a set of keys, but no backpack, tools or wallet. Avendano was released after he was searched. The restaurant was a five or 10-minute walk from the Manhattan Village Senior Villas and the Belamar Hotel.

Earlier that same morning, Michael Parr, a resident of the Manhattan Village Senior Villas, awoke at about 4:15 a.m. to find his cell phone and a snakeskin wallet missing from his apartment. He noticed the sliding glass door leading to his patio was open. Using a Google application to locate his cell phone, Parr discovered it was in the courtyard of the Belamar Hotel, two or three blocks from his apartment complex. Parr called the police.

At about 7:15 a.m., Officer Benjamin Cavallone of the Manhattan Beach Police Department responded to the Belamar Hotel, where he met Parr who explained he had traced his missing cell phone to this location. Cavallone found Avendano sleeping on a bench. Parr's phone was underneath the bench. Parr's wallet and a black pouch were within arm's reach of Avendano. Inside the pouch were checks imprinted with the name "the Manhattan [Village] Senior Villas" and some credit cards. Avendano had several sets of keys in his pants pocket.

Around 4:45 a.m. that morning, Fred Pastor, who worked as the maintenance man for the Manhattan Village Senior Villas apartment complex, arrived at the manager's office. Pastor and the manager shared the office, but they had separate desks. The office door was unlocked and both desks were in disarray. Police officers subsequently showed Pastor various items they had found in Avendano's possession. Some of these items had been taken from the office, including the checks, Pastor's rolodex, the manager's folder, a cash box with money inside, and keys for some of the units in the complex.

That same day, Gwendolyn Binegar, another resident of the apartment complex, was unable to locate her car key, car lock remote, and house keys which had been hanging on her kitchen refrigerator. These items were found in Avendano's pants pocket. When the police opened Binegar's car, it was filled with debris that did not belong to her.

2. Verdict and Judgment.

Avendano did not present any evidence. The information charged him with three counts of burglary and four counts of receiving stolen property (Pen. Code, §§ 459, 496, subd. (a)). The jury could not reach verdicts on the burglary counts, but convicted Avendano on the receiving stolen property counts. The trial court sentenced him to four years in county jail, one year for each of the four convictions. Avendano filed a timely notice of appeal.

CONTENTION

Avendano contends his two convictions for receiving stolen property that related to items taken from the Manhattan Village Senior Villas management office constituted only a single offense.

DISCUSSION

As the Attorney General concedes, Avendano was improperly convicted on two counts of receiving stolen property relating to the items taken from the manager's office.

Count 4 alleged Avendano received stolen items taken from Pastor's desk in the office, while count 5 alleged he received stolen items taken from the manager's desk.

"A conviction for receiving stolen property cannot withstand appellate scrutiny unless substantial evidence was presented to the trier of fact that (1) the property was

received, concealed, or withheld by the accused; (2) such property had been obtained by theft or extortion; and (3) the accused knew that the property had been so obtained. [Citation.]” (*People v. Kunkin* (1973) 9 Cal.3d 245, 249.) “Where a defendant receives multiple articles of stolen property at the same time, this amounts to but one offense of receiving stolen property. [Citations.] As the California Supreme Court explained in [*People v. Smith* (1945) 26 Cal.2d 854, 858-859], this circumstance is comparable to the crime of larceny, ‘which authorities hold that the theft of several articles at one and the same time constitutes but one offense although such articles belong to several different owners.’ [Citation.]” (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 461-462.)

As the Attorney General acknowledges, “it appears that counts 4 and 5 are convictions for the same conduct. The stolen items underlying both of those counts appear to belong to the management office of Manhattan Village Senior Villas. There is nothing in the record to suggest that those items were received during different times and in different transactions.”

We agree with the Attorney General’s concession and her request that we strike Avendano’s conviction for count 5 and reduce Avendano’s jail sentence by one year.

DISPOSITION

The judgment is affirmed as modified. The conviction on count 5 for receiving stolen property is stricken and Avendano's jail sentence shall be reduced from four years to three years. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

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EDMON, P. J.

We concur:

KITCHING, J.

ALDRICH, J.