Filed 8/16/18 P. v. Rivas CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUDY RIVAS et al., Defendant and Appellant.	B284503 (Los Angeles County Super. Ct. No. YA094268)

APPEAL from judgments of the Superior Court of Los Angeles County. Scott T. Millington, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant Rudy Rivas.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Alex Chavez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Mark A. Kohm and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

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A hospital worker pilfered expensive medical equipment from the hospital, passed it along to his friend, and the friend resold the equipment. A jury convicted the worker and his friend of conspiracy to commit grand theft; the worker of grand theft; and his friend of receiving stolen property. On appeal, the worker and his friend attack their convictions on a number of grounds. None of them warrants reversal. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Between March 2015 and March 2016, defendant Alex Chavez (Chavez) worked as a sterile processing technician at the Torrance Memorial Medical Center (the hospital) in Torrance, California. At that time, the hospital had approximately 20 such technicians. Those technicians' jobs were to retrieve medical equipment that had just been used in surgeries, transport it to the sterilization facilities in the hospital's basement, sterilize the equipment, and then place it back into inventory for further use.

During Chavez's tenure at the hospital, several items of surgical equipment went missing. Among the missing items were: (1) four Stryker System 7 drills; (2) four RemB drill systems; (3) a Synthes fragment set; (4) an Ortho spine cord drill; (5) nasal endoscopy instruments; (6) two Storz flexible urology cameras; (7) a Stryker camera; (8) two flexible uteroscopes; and (9) a bipolar instrument. In total, this equipment cost well over $300,000.

Chavez exchanged over 300 text messages with defendant Rudy Rivas (Rivas). In many of the messages sent and received while Chavez was working at the hospital, Chavez and Rivas discussed the very same types of surgical equipment as the items

missing from the hospital, including "Stryker" drill sets, RemB instruments, Synthes frame sets, and flexible scopes. They also exchanged photographs of surgical equipment. In at least one text message, Chavez asked Rivas what items he "needed"; in another, he asked Rivas if he was "working on getting the merchandise sold."

By tracing its unique serial number, police were able to determine that one of the Stryker System 7 drills purchased by the hospital before Chavez started working there had been sold by Rivas to a third party vendor. Rivas sold the drill for $6,000 the day after he texted Chavez to tell him that he had "got an offer for 6 gran[d] for the System 7."

II. Procedural Background

The People charged Chavez and Rivas (collectively, defendants) with (1) conspiracy to commit grand theft (Pen. Code, § 182, subd. (a));[1] (2) grand theft (§ 487, subd. (a)); and (3) receiving stolen property (§ 496, subd. (a)).

The matter proceeded to a jury trial. Among other things, the trial court instructed the jury that grand theft and receiving stolen property are *alternate* offenses (such that a defendant cannot be convicted of both). The jury convicted both defendants of conspiracy to commit grant theft; also convicted Chavez of grand theft; and also convicted Rivas of receiving stolen property.

The trial court sentenced each defendant to five years of formal probation, including one year of jail time.

Each defendant filed a timely notice of appeal.

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

DISCUSSION

I. Evidentiary Issues

A. Miranda *violation*

Chavez argues that the trial court erred in ruling that a statement he made during an interrogation by the Torrance police was admissible under *Miranda v. Arizona* (1966) 384 U.S. 436. Because the People never introduced Chavez's statement into evidence, however, any *Miranda* violation is by definition harmless beyond a reasonable doubt. (E.g., *People v. Bradford* (1997) 14 Cal.4th 1005, 1039 [*Miranda* requires exclusion of unwarned statements from the People's case-in-chief].) Chavez insists that his confession *was* admitted into evidence because it was marked as a court exhibit 1 at a pretrial hearing, and the jury received "exhibits 1 through 30" at trial. But this assertion ignores that the admission of the *People's* exhibit 1 at trial is different from the admission of the *court's* exhibit 1 at a hearing, and there is no evidence that Chavez's statement was ever before the jury.

B. *Misdemeanor conduct of two prosecution witnesses*

Defendants argue that the trial court erred in excluding the prior misdemeanor conduct of two of the People's witnesses, Corey Miller (Miller) and Frank Gonzalez (Gonzalez).

1. *Pertinent facts*

In its case-in-chief, the People called Miller and Gonzalez as witnesses. Miller worked as a sterilization technician shift leader at the hospital, and testified about the surgical equipment that went missing from the hospital. He was convicted of misdemeanor "hit and run" in 2010 (Veh. Code, § 20002, subd. (a)). Gonzalez purchased surgical equipment for the hospital, and testified about the equipment he had purchased in November

2014, as well as the equipment he purchased to replace the missing items. Gonzalez was convicted of misdemeanor petty theft (§ 484, subd. (a)) in 1996, and misdemeanor disobeying a court order in 2000 (§ 166, subd. (a)(4)).[2] The trial court granted the People's motion to exclude these prior convictions, concluding that they were (1) too remote in time, and (2) pertained to witnesses who were testifying about such matters as the hospital's inventory policies and procedures (rather than as percipient witnesses to the charged crimes).

2. *Analysis*

Under Evidence Code section 352, a trial court has "broad" discretion to admit evidence regarding prior misconduct of a witness, for purposes of impeachment, if that misconduct "involves moral turpitude." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296; *People v. Harris* (2005) 37 Cal.4th 310, 337; *People v. Carter* (2014) 227 Cal.App.4th 322, 329 (*Carter*).) This may include conduct that constitutes a misdemeanor. (*Ibid.*) Although Evidence Code section 352 generally requires courts to consider whether the "probative value" of evidence is "substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice" (Evid. Code, § 352), courts applying this section in determining whether to admit a witness's misconduct are to examine: (1) the extent to which the conduct reflects upon the witness's honesty and veracity; (2) whether the conduct is near or remote in time; and (3) whether the conduct constitutes a felony or a misdemeanor, recognizing that "[i]n general, a misdemeanor—or any other

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2 He also sustained a 2013 conviction for driving under the influence (Veh. Code, § 23152), but defendants do not argue for admission of this conduct on appeal.

conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony." (*Wheeler*, at p. 296; *People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*).)[3]

The trial court did not abuse its discretion in excluding Miller's and Gonzalez's prior misconduct. Even if we assume that Miller's hit and run conduct and Gonzalez's petty theft each involves moral turpitude (and hence reflects upon their honesty and veracity) (*People v. Mireles* (2018) 21 Cal.App.5th 237, 246 [petty theft and hit and run "arguably" involve moral turpitude]; cf. *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1408 [disobeying court order may not involve moral turpitude]), the trial court acted within its discretion in finding that the convictions were too remote in time to shed much light on their current veracity: Miller sustained his hit and run conviction seven years before testifying, and Gonzalez's petty theft conviction occurred more than 20 years before he testified. (*Mireles*, at p. 246 [20-year-old conviction is remote]; *People v. Gonzales* (1967) 66 Cal.2d 482, 500 [seven-year-old misconduct can be remote].)

Defendants raise two further arguments. First, they assert that admission of Miller's and Gonzalez's prior misconduct had additional probative value because that misconduct suggests that *they* may have stolen the surgical equipment. Defendants never argued this theory below and, even if they had, the trial court would have been correct to reject it as a basis for admitting their

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3 When the witness to be impeached is a defendant, courts are also to consider (4) the degree of similarity between the misconduct and the conduct charged in the instant case, and (5) the effect, if any, that admission of the misconduct will have on the defendant's decision to testify. (*Clark*, *supra*, 52 Cal.4th at p. 931.) These factors are not relevant here because neither Miller nor Gonzalez is a defendant.

prior convictions. Evidence that a third party committed the charged crime is admissible only if, as a threshold matter, "the evidence could raise a reasonable doubt as to [the] defendant's guilt" (*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368), and it is well settled that it is not enough to show that the third party had a "motive or opportunity to commit the crime" (*People v. Hall* (1986) 41 Cal.3d 826, 833). At most, defendants have shown that Miller and Gonzalez had the opportunity to steal the medical equipment; they have not shown any motive, and fall far short of the necessary showing of "direct or circumstantial evidence linking [Miller or Gonzalez] to the actual perpetration of the crime." (*Ibid.*) Second, defendants contend that the trial court's ruling violated their constitutional rights. As a general matter, however, a ruling that complies with the rules of evidence (as the trial court's ruling did here) does not violate a criminal defendant's constitutional rights. (*People v. Casares* (2016) 62 Cal.4th 808, 830.)

C. *Hunting photo*

Defendants argue that the trial court erred, under Evidence Code section 352, in admitting a photograph showing the two of them together.

1. *Pertinent facts*

One of the photographs recovered from Rivas's cell phone depicted Chavez and Rivas on a hunting trip; they were both wearing camouflage clothing, and the photo showed the prey they killed (a baby bear), as well as one of them holding a firearm. The People sought to admit the photo to show defendants' close friendship. The trial court ruled that the photo was "highly probative" in this conspiracy case to "show[] a relationship . . . between the two defendants." The court did not find "the

camouflage, the gun, a bear" to be prejudicial because hunting is "legal." The court nevertheless suggested that the People redact the gun and bear from the photo by darkening the photo in those spots, and the People did so before introducing it into evidence.

2. *Analysis*

As noted above, a trial court has the discretion under Evidence Code section 352 to exclude otherwise relevant evidence if its probative value is "substantially outweighed" by a "substantial danger of undue prejudice." (Evid. Code, § 352.) We review the trial court's ruling solely for an abuse of this discretion. (*Carter*, *supra*, 227 Cal.App.4th at p. 329.)

The trial court did not abuse its discretion in admitting the photo. The court acted within its discretion in finding that the photo was probative of the closeness of defendants' relationship, in finding that a photo depicting the two engaging in a legal form of outdoor recreation was not unduly prejudicial (particularly in a case involving no violence or guns), and in reducing any prejudice further by ordering the redaction of the firearm and dead prey.

Defendants make two arguments in response. First, they cite cases holding that evidence of a defendant's possession of other weapons is generally more prejudicial than probative. (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393; *People v. Henderson* (1976) 58 Cal.App.3d 349, 360.) These cases are unhelpful because the redacted photo no longer depicted any firearm. Defendants counter that the redaction was effectively useless because the photo still depicts them in camouflage, and camouflage "evoke[s]" firearms. Were we to adopt defendant's argument, a picture of two people at a Renaissance faire would be subject to exclusion for "evoking" medieval weaponry. We decline to adopt such "logic." Second, defendants contend that the photo

was unnecessary because they offered to stipulate that the defendants "had been on a field trip in the outdoors," but this ignores the conventional wisdom that a picture is worth a thousand words (*People v. Duff* (2014) 58 Cal.4th 527, 557), and the general principle that the People are not required to accept a stipulation to a watered-down form of otherwise admissible evidence (*People v. Valdez* (2012) 55 Cal.4th 82, 130).

II. Unanimity Instruction

Defendants argue that the trial court erred in not, on its own, instructing the jury that it had to unanimously agree on which pieces of surgical equipment defendants stole from the hospital. This is an instructional issue we review de novo. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 919.)

A. *Pertinent law*

A jury verdict must be unanimous. (Cal. Const., art. I, § 16.) Consequently, and as a general rule, "when the evidence suggests more than one discrete crime, . . . the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*); *People v. Quiroz* (2013) 215 Cal.App.4th 65, 73 ["Where the evidence suggests that the defendant might have committed more than one crime, the court must instruct the jury that it must agree on *which* of the acts—and, hence, which of the *crimes*—the defendant committed."].) Notwithstanding this general rule, a court need not give an instruction telling the jury that it must unanimously agree on which acts constitute the crime when: (1) the prosecutor "make[s] an election by 'tying each specific count to specific criminal acts . . . ' typically in opening statement and/or closing argument" (*People v. Brown* (2017) 11 Cal.App.5th 332, 341; *Russo*, at p. 1132); or (2) "'the acts alleged are so closely

connected as to form part of one transaction'" (*People v. Harris* (1994) 9 Cal.4th 407, 431, fn. 14 (*Harris*)). The erroneous failure to give a unanimity instruction is harmless if the reviewing court "can conclude beyond a reasonable doubt that all jurors must have unanimously agreed on the act(s) constituting the offense." (*People v. Norman* (2007) 157 Cal.App.4th 460, 466 (*Norman*).)

B. *Analysis*

Whether the trial court erred in not giving a unanimity instruction in this case is a close question. Although the prosecutor at no point completely disavowed the evidence that defendants stole several items of surgical equipment, the prosecutor told the jury in opening statements that the Stryker System 7 was the "main focus," emphasized the evidence regarding the serial number-traced Stryker System 7 drill during closing argument, and on that basis urged the jury to find that defendants "actually did at least commit *that one theft* at Torrance Memorial." (Italics added.) It is unclear whether this constitutes an election. By the same token, the thefts of the various pieces of equipment follow the same modus operandi, but they occurred on distinct dates involving different equipment, making it unclear whether they were "'are so closely connected as to form part of one transaction'" (*Harris*, *supra*, 9 Cal.4th at p. 431, fn. 14).

However, any error in the trial court's omission of a unanimity instruction is harmless because we "can conclude beyond a reasonable doubt that all jurors must have unanimously agreed on the act(s) constituting the offense." (*Norman*, *supra*, 157 Cal.App.4th at p. 466.) The evidence regarding the Stryker System 7 drill with the serial number was overwhelming—it was purchased by the hospital and sold by Rivas to the third party the

day *after* Rivas told Chavez about the upcoming sale and its exact price. What is more, even if the prosecutor's argument did not rise to the level of an election, the prosecutor nevertheless actively encouraged the jury to focus on this precise piece of equipment as the "one theft" the jury knew for sure defendants committed. On this record, we can conclude that the absence of a unanimity instruction was harmless beyond a reasonable doubt.

Defendants further argue that the trial court did not require the jury to unanimously agree on the particular overt act underlying the conspiracy count. This argument lacks merit because a unanimity instruction is not required for a conspiracy's overt acts. (*Russo*, *supra*, 25 Cal.4th at pp. 1135-1136.)

III. Juror Misconduct

Defendants argue that the trial court erred in allowing a juror who dozed off for a minute or two to remain on the jury. We review claims of juror misconduct for an abuse of discretion. (*People v. Bonilla* (2007) 41 Cal.4th 313, 350; *People v. Fuiava* (2012) 53 Cal.4th 622, 711-712 (*Fuiava*).)

A. *Pertinent facts*

During the prosecutor's redirect examination of Miller regarding the precise dates upon which specific items of surgical equipment went missing, the court observed that Juror No. 2's eyes were closed. The court interrupted the testimony to ask, "Do we have everybody's attention?"

The next morning, the court spoke with Juror No. 2 alone in the presence of counsel and the parties. In response to questions from the court, Juror No. 2 admitted that she had been "sleeping during the last part" when the prosecutor "was speaking . . . about the equipment that he was explaining"—that is, during Miller's redirect testimony. Juror No. 2 further

indicated that she was asleep either for "a minute or two" or "less than a minute," and "missed" the testimony during that brief period. The court invited defendants' counsel and the prosecutor to ask any follow-up questions; none of them did.

After excusing the juror, the court asked the parties for their positions on whether to excuse Juror No. 2. Chavez said he wanted her to stay on because she missed only "a minute or two" or testimony that was not "material." Rivas said "it would appear [Juror No. 2] needs to be dismissed" "out of an abundance of caution," but asked for more time to consider the issue. A few days later, Rivas changed his position and said Juror No. 2 "can stay." The trial court asked if Rivas would waive the issue, but Rivas refused. The trial court ultimately ruled that Juror No. 2 would remain because "she was not dozing off too long" and because "no one sought to excuse her."

B. *Analysis*

1. *Forfeiture*

Both Chavez and Rivas forfeited their right to complain about the trial court's refusal to excuse Juror No. 2 from the jury because they both affirmatively told the court that they did not want her to be excused. This constitutes a forfeiture. (*People v. Holloway* (2004) 33 Cal.4th 96, 124 ["defendant forfeited this issue by failing to seek the juror's excusal or otherwise object to the court's course of action"]; *People v. Williams* (2013) 58 Cal.4th 197, 289 (*Williams*) [defendant forfeited where he "neither objected to [the juror's] continued service nor requested a mistrial on the ground of juror misconduct"].)

Citing *People v. Garcia* (2012) 204 Cal.App.4th 542, 551-552 and *People v. Traugott* (2010) 184 Cal.App.4th 492, 500-501, defendants assert that nothing short of a personal waiver from

them will suffice. However, those cases dealt with verdicts rendered by fewer than 12 jurors—not, as we have here, juror misconduct to which there was no objection.

We will nevertheless reach the merits.

2. *Merits*

A trial court may remove a sitting juror from a case for "good cause." (§ 1089; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 (*Espinoza*).) Good cause exists when a juror is "actually asleep during material portions of the trial." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411 [applying this standard with respect to new trial motion]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1349 [same]; *Williams*, *supra*, 58 Cal.4th at p. 290 [same]; *People v. Roselle* (1912) 20 Cal.App. 420, 423-424 [applying this standard with respect to whether to excuse juror during trial]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 731 [same].) In this case, Juror No. 2 admitted to being asleep for, at most, "a minute or two" during the redirect testimony of a witness testifying about the hospital's inventory procedures. This was not material testimony, as one of the defense counsel frankly acknowledged.

Defendants make two further arguments in response. First, they assert that any error was not harmless because no one saw Chavez steal the equipment. This assertion is irrelevant because it does not address the pertinent question—namely, were the portions of the testimony the juror missed *material*? This assertion is also incorrect in its assessment of the strength of the evidence against the defendants insofar as it ignores that the text messages and serial number trace establish defendants' guilt overwhelmingly and without regard to an eyewitness to the actual taking of the Stryker System 7 equipment. Second, defendants contend that the trial court did not conduct a

sufficient inquiry into Juror No. 2's inattentiveness. To be sure, "[o]nce a trial court is put on notice that good cause to discharge a juror may exist," the court is required "'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." (*Espinoza*, *supra*, 3 Cal.4th at p. 821.) But a court has "broad discretion" when it comes the "the manner in which it conduct[s] its inquiry." (*Fuiava*, *supra*, 53 Cal.4th at pp. 711-712; *Clark*, *supra*, 52 Cal.4th at p. 971.) Here, upon seeing Juror No. 2 asleep, the trial court called in the juror and questioned her about whether she was asleep, when she was asleep, and for how long she was asleep. The court also invited follow-up questions from counsel, and solicited their input. The court's inquiry was well within its discretion.

IV. Duplicative Convictions

As a general rule, a person cannot stand convicted of the crimes of theft and receiving stolen property for the same item of property. (§ 496, subd. (a) ["no person may be convicted both [of receiving stolen property] and of the theft of the same property"]; *People v. Allen* (1999) 21 Cal.4th 846, 853; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 (*Jaramillo*).)

Citing this rule, Rivas argues that he cannot be convicted *both* of conspiracy to commit theft and receiving stolen property; in a similar vein, Chavez argues that he cannot be convicted *both* of conspiracy to commit theft *and* theft. These arguments only work, however, if conspiracy to commit theft and theft are the same offense. But it is well settled that they are distinct offenses. (*People v. Morante* (1999) 20 Cal.4th 403, 416 ["Criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy"]; *People v. Travis* (1959) 171 Cal.App.2d 842, 844

["conspiracy to commit grand theft and grand theft are separate and distinct crimes"].) Consequently, a person (like Chavez) may be convicted of both conspiracy to commit theft and theft (*Travis*, at p. 844), and a person (like Rivas) may be convicted of both conspiracy to commit theft and receiving stolen property (*Jaramillo*, *supra*, 16 Cal.3d at p. 759, fn. 8 ["when a conspiracy between the thief and the receiver is established, the thief may be convicted for both conspiracy and receiving"]). Defendants cite to cases involving lesser included offenses, but no case they cite supports the argument they urge us to adopt in this case.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ