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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALI AVANTI EZZANIKOTUN, Defendant and Appellant.	B236474 (Los Angeles County Super. Ct. No. BA380284)

APPEAL from a judgment of the Superior Court of Los Angeles County, Clifford L. Klein, Judge. Affirmed as modified.

Helen S. Irza, 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 and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ali Avanti Ezzanikotun was convicted by a jury of grand theft auto (Pen. Code, § 487, subd. (d)(1))[1] and was found to have suffered a prior conviction within the meaning of the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). He received a midterm sentence of two years, which was doubled to four years under the Three Strikes law.

On appeal, defendant challenges: (1) the denial of his request to discharge his appointed counsel and substitute retained counsel; (2) the sufficiency of the evidence to establish the intent element of the grand theft auto offense; and (3) the calculation of presentence custody credits. We reject the first two contentions but conclude the judgment must be corrected with regard to custody credits.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves the theft of a tow truck. The owners of the tow truck, Francisco and Ingrid Gudiel, witnessed the crime and identified defendant both before and during trial. Their eyewitness identifications are not at issue on appeal. The sole disputed issue regarding the grand theft auto conviction is the element of intent. Defendant contends that because the evidence failed to show that he intended to keep the tow truck either permanently or for an extended period of time, the prosecution failed to prove its case.

The tow truck was stolen from the Gudiels' auto repair store parking lot at about 9:00 a.m. on January 19, 2011. Earlier that morning, Mr. Gudiel had gone inside the store after leaving the tow truck in the parking lot with the motor running. Mrs. Gudiel was standing next to the tow truck when a Black male (whom the Gudiels later identified as defendant) climbed inside the driver's side of the truck. Mrs. Gudiel began yelling and defendant turned to look at her as he locked the passenger door. Mr. Gudiel heard his wife yelling and saw on the surveillance monitors that the truck was moving. Mr. Gudiel ran outside yelling and was chasing the truck until he saw defendant display what he

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[1] All further statutory references are to the Penal Code.

believed was a gun, which caused him to fear for his life. After the truck drove north on Crenshaw and turned left on Stocker, Mr. Gudiel went inside the store to call 911. Mrs. Gudiel tried to follow the truck in her car but came back when she could not find it. The police arrived about 30 minutes later.

At 9:16 a.m. that morning, Inglewood Police Officer Frederick Osorio responded to a call at a Target store on Century Boulevard where he saw a tow truck parked in the red zone in front of the store entrance. As Osorio spoke with a Target security guard, defendant came out of the store with a bloody knife in his hand. Defendant saw Osorio and immediately ran through the parking lot. Osorio and other officers pursued defendant for half a mile before apprehending him. Later that day, the Gudiels were taken to defendant's hospital room where they identified him as the perpetrator.

Following his arrest on January 19, 2011, defendant was originally charged with carjacking (§ 215, subd. (a)) and the personal use of a firearm (§§ 12022.53, subd. (b), 1203.06, subd. (a)(1)). After his preliminary hearing, defendant was arraigned on the original information on April 1, 2011.

Trial was set for May 23, 2011, as day 52 of 60.[2] On May 20, the trial was continued to May 25 as day 54 of 60. On May 25, the trial was continued for good cause to June 15 as day 0 of 10. On June 15, as a result of defendant's excused nonappearance, the trial was continued to June 20 as day 5 of 10. On June 20, the court granted defendant's motion to continue the trial to July 18 as day 0 of 10.

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[2] Under section 1382, subdivision (a), a defendant's speedy trial right requires "that, in a felony case, the court shall dismiss the action when a defendant is not brought to trial within 60 days of his or her arraignment on an indictment or information, unless (1) the defendant enters a general waiver of the 60-day trial requirement, (2) the defendant requests or consents (expressly or impliedly) to the setting of a trial date beyond the 60-day period (in which case the defendant shall be brought to trial on the date set for trial or within 10 days thereafter), or (3) 'good cause' is shown." (*People v. Sutton* (2010) 48 Cal.4th 533, 545.)

On July 18, defendant requested that the court replace his appointed counsel (Romina Aghai) with another appointed counsel. After conducting a *Marsden* hearing,[3] the court (Judge Ronald Rose) denied his request. The trial was continued to July 21 as day 3 of 10.

On July 21, another deputy public defender filled in for Ms. Aghai, who was engaged in another courtroom. After noting that Ms. Aghai would be available for trial on day 8 of 10 (July 26, 2011), Judge Rose inquired about the possibility of a settlement. The prosecutor offered to reduce the original carjacking charge to a simple robbery charge with a 14-year prison sentence. Defendant refused the 14-year offer and announced that he wished to replace Ms. Aghai with privately retained counsel. Judge Rose responded, "Well, you have until next week to have your attorney here. This case has been pending since April 1st. I'm sending the case [to] Department 100." Defendant then inquired whether he could represent himself. When Judge Rose replied that he could only represent himself if he would be ready to proceed with trial "by next week," defendant stated, "No."[4]

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

[4] The following discussion occurred at the July 21 hearing: "THE COURT: So what we're saying here is that as it stands today, your maximum exposure is 28 years. The People are indicating that they believe that you have a prior violent or serious felony which would add an additional 5 years. So your maximum exposure is 33 years in state prison. The People's offer is 14 years. Did you want a chance to speak to your lawyer [Ms. Aghai] about this?

"THE DEFENDANT: I actually wanted to hire private attorney, Your Honor.

"THE COURT: Well, you have until next week to have your attorney here. This case has been pending since April 1st. I'm sending the case [to] Department 100.

". . . . . .

"THE COURT: Okay. The matter's set in Department 100 on July 26th, 2011 as eight of ten. The defendant's ordered to appear. His bail shall remain as previously set. I'll take his response as a rejection of the offer of 14 years. He rejected 14 years in the past.

". . . . . .

(Fn. continued.)

Following the July 21 hearing, the prosecution sought to amend the information by adding count 2, which alleged the crime of grand theft auto (§ 487, subd. (d)(1)) and a prior strike conviction allegation (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The prosecution sought to dismiss count 1's carjacking and firearm use allegations.

On the July 26 trial date, the parties appeared in Department 100 (Judge Patricia Schnegg) to receive their assignment for jury trial. Dakar Diourbel, a private attorney, appeared before Judge Schnegg and requested to be substituted as defendant's attorney of record. After denying Diourbel's request on the ground that he was not ready to begin trial that day, Judge Schnegg assigned the parties to Department 126 (Judge Clifford Klein) for trial. Before leaving Judge Schnegg's courtroom, defendant stated on the record that he no longer wished to be represented by Ms. Aghai, who had advised him to accept the prosecution's offer of 14 years. Defendant explained that he wanted Diourbel to represent him because the victims' accounts of the crime were inconsistent with the surveillance videotape: "Uhm, I've been here since January. And I have requested copies of my preliminary report and my police report from Ms. Aghai. And also to see if the particular crime occurring — I just got both of those today. Victims — victims stated in the preliminary report contradicts completely what the videotape is showing. Ms. Aghai — Ms. Aghai is asking me to take a deal that shows the victim is a liar. I have

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"THE DEFENDANT: Your Honor, am I still going to be able to see that videotape and also get copies of my preliminary records?

"THE COURT: That's up to your lawyer. You speak to Ms. Aghai when you [*sic*] her.

". . . . . .

"THE DEFENDANT: Do I have a choice of going pro per today also?

"THE COURT: Only if you're going to be ready by next week.

"THE DEFENDANT: Be ready by next week?

"THE COURT: You think about it.

"THE DEFENDANT: No.

"THE COURT: And you can always make your motion in Department 100. But I hear you say 'no' to go pro per today. So I'm sure that Ms. Aghai will speak with you.

"THE DEFENDANT: All right."

a lawyer that I paid for and I would like him to represent me in this case." After considering defendant's statements, Judge Schnegg stood by her previous ruling and stated that Diourbel is "not going to represent you, sir. He's not prepared to go to trial."

Defendant then inquired whether he could represent himself. Judge Schnegg asked, "Are you ready to go to trial today?" Defendant answered, "No, ma'am." Judge Schnegg responded: "Then you're not representing yourself. You know why? This is a ploy. I will tell you that. I just had an attorney in here demanding to represent you. And I was somewhat surprised at that because generally if one comes into this Department regularly, one is aware of the procedures and what happens when you come into 100. And upon further discussing the case with him, he shared with me that he has not done one felony trial and he has not done one misdemeanor trial. So I'm glad that you retained him, but you should ask for your money back because he is not representing you on this case. And you are not going to represent yourself on this case because it is untimely. So you're going to go out to trial today."

The parties went as directed to Judge Klein's courtroom where the matter was called for trial. Judge Klein granted the prosecution's request to amend the original information by adding the grand theft auto charge as count 2 and dismissing count 1's carjacking and firearm allegations. Defendant waived a reading of the amended information and pleaded not guilty.

Before the prospective jurors were brought to Judge Klein's courtroom, defendant referred to his request to be represented by privately retained counsel. Defendant stated, "I just want to put on record that I tried to hire counsel this morning." Judge Klein replied: "I know that you wanted a different lawyer. I know you wanted to represent yourself. I know neither one was ready to proceed; neither yourself or the other one. That was all handled in Department 100. Judge Schnegg, the presiding judge of the criminal court, made her decision, and we're going to proceed, okay?" Defendant responded: "On record, Your Honor, I obtained counsel and I paid him, and he was present in court. He was not allowed to represent me, and I wish to refuse to go on any further with the proceedings on the basis of conflict of interest and lack of preparation

and all . . . . All denials to adhere to any of my request[s] for information pertaining to my case; and, furthermore, I feel like I'm being coerced into admitting a crime I did not commit. I want to request that what I'm saying is on record, and I still wish to be allowed to be represented by counsel, which I have obtained, and be given adequate time to prepare my defense." Judge Klein stated: "Okay. And of course that was already discussed in Department 100 today. Today is 8-of-10 for trial. No one is forcing you to admit anything because you're not admitting anything. You just said you wanted a trial. You're not being forced to admit anything. You are being forced to go to trial. That, I'll concede. But Judge Schnegg made her decision and from what I understand, I agree with it. And so we'll just proceed with the jury trial."

During trial, Diourbel appeared before Judge Klein to provide a statement on the record concerning Judge Schnegg's denial of his request to be substituted as defendant's attorney of record. Diourbel stated on the record that after being retained by defendant on Sunday, he called Ms. Aghai on Monday, the day before trial, and told her he "was coming to pick up the file. Originally she said fine, I'll have my secretary make a copy of it. Then she called me back later and left a message . . . saying . . . we're not going to give you the file. So you can come to court tomorrow and talk to the judge about it. . . . So I came to court the next day and I spoke with Judge Schnegg and tried to become his attorney of record. Judge Schnegg also denied that request. I told her that his constitutional rights are being violated, and she still refused to allow me to substitute in. Now the reason the public defender denied me the file on Monday was so that I would not have time to prepare for the case because the trial was set to start on Tuesday, so they didn't want to give me the opportunity. Therefore the judge — Judge Schnegg's reason for denying me substituting in on this case, well, you're [not] prepared, you're not ready to go to trial right now. I said, Your Honor, I tried to get ready, but they wouldn't let me have the file so that I could be ready."

The jury found defendant guilty of the grand theft auto charge and the court found the prior conviction allegation to be true. The court denied defendant's motion to dismiss

his prior strike under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 and imposed sentence. This timely appeal followed.

DISCUSSION

I. Defendant's Motion to Substitute Counsel

Defendant contends the trial court abused its discretion in denying his request to discharge his appointed counsel and substitute retained counsel. We conclude the contention lacks merit.

"The burden is on appellant to establish an abuse of judicial discretion in the denial of his request for continuance to secure new counsel. (*People v. Kaiser* (1980) 113 Cal.App.3d 754, 761.) The resolution of the issue depends upon the circumstances of each case. (*People v. Byoune* (1966) 65 Cal.2d 345, 347; *People v. Blake* (1980) 105 Cal.App.3d 619, 624.) The right of a defendant to appear and defend with counsel of his own choice is not absolute but must be carefully weighed against other values of substantial importance such as those seeking 'the orderly and expeditious functioning of judicial administration.' (*People v. Kaiser* (1980) 113 Cal.App.3d 754, 760.) A defendant is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory (*People v. Blake* (1980) 105 Cal.App.3d 619, 623) . . . ." (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506.)

On the day of trial, Tuesday, July 26, 2011, the supervising judge (Judge Schnegg) denied as untimely Diourbel's request to be substituted as defendant's attorney of record. The evidence is undisputed that a jury panel was waiting and Diourbel was not prepared to begin trial that day. The issue is whether it was an abuse of discretion to conclude that defendant was "'unjustifiably dilatory' in obtaining counsel." (*People v. Courts* (1985) 37 Cal.3d 784, 790-791.)

In his opening brief, defendant argues for the first time that it was an abuse of discretion for Judge Schnegg to contradict Judge Rose's prior ruling that granted the substitution request. He states that "Judge Schnegg's refusal to allow appellant's

privately retained attorney to substitute in as counsel of record three days after Judge Rose granted appellant's request was arbitrary and unreasonable." He claims that Judge Rose "ruled that appellant would be permitted to make the substitution if he arranged for private counsel to appear at the next trial call date, which was set for Tuesday, July 26, 2011. Appellant selected and retained an attorney over the weekend, and, as directed by Judge Rose, the attorney appeared and attempted to substitute in as counsel by the deadline. It was a patent abuse of discretion for Judge Schnegg to switch course three court days after Judge Rose's ruling and refuse the substitution." (Internal record references omitted.)

We conclude that Judge Rose, who was never presented with a formal request for substitution of counsel, never granted such a request. Because the record fails to reflect that a motion for substitution of counsel was made to Judge Rose, the record necessarily fails to support defendant's assertion that Judge Schnegg "switch[ed] course three court days after Judge Rose's ruling" by refusing the substitution. In addition, the record does not show that Judge Schnegg was informed of the alleged motion or Judge Rose's supposed ruling. If such a ruling exists, defendant had the burden of informing Judge Schnegg of its existence, which he failed to do.

In any event, the record supports Judge Schnegg's finding that defendant was not diligent in seeking retained counsel. Defendant was arrested on January 19, 2011, and arraigned on April 1, but did not mention his desire to obtain privately retained counsel until the July 21 hearing. He did not identify a privately retained attorney until the morning of trial on July 26, after spending seven months in custody. Under these circumstances, Judge Schnegg reasonably concluded that granting defendant's untimely request would cause a significant and unreasonable disruption to both the prospective jurors and the court's administrative processes. (See *People v. Turner* (1992) 7 Cal.App.4th 913, 918-920 [affirming the denial of defendant's motion to discharge counsel on morning of trial].) We find no abuse of discretion.

II. The Evidence Supports the Conviction for Grand Theft Auto

In reviewing a claim of insufficient evidence, we must determine "whether '"a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt."' (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) In making this determination, we '"must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' (*Ibid.*)" (*People v. Rayford* (1994) 9 Cal.4th 1, 23.)

The intent required for grand theft auto, like any theft crime, is the intent to permanently deprive another of property or the intent to keep the property for a sufficient period of time to deprive the owner of a major portion of its value or enjoyment. (*People v. Avery* (2002) 27 Cal.4th 49, 52.) Defendant contends there was no evidence that he intended to keep the tow truck for an extended period of time or that he intended to keep it permanently. He argues the prosecution's evidence merely showed that he took the tow truck "for a very short, five-minute trip to Target" and left "it there under circumstances where it would quickly be recovered by the owners." He argues that because he did not have the key to the tow truck in his possession when he was arrested, it is reasonable to infer he did not intend to use the truck for an extended period of time, but had left it illegally parked in a fire lane at Target, "where it was *certain* to be noticed."

The problem with defendant's contention is that it raises a question of fact for the jury. "The determination of a defendant's intent is a question for the trier of fact." (*People v. Osegueda* (1984) 163 Cal.App.3d Supp. 25, 29.) The fact the key was not in defendant's possession upon his arrest is not dispositive because the key could have been dropped or lost in the Target store or during the half-mile pursuit. On this record, a rational jury could reasonably have found the tow truck was left in the fire lane purely for defendant's convenience and that he would have continued using it for an extended period of time if the police had not arrived.

III. Presentence Custody Credits

The trial court awarded defendant 257 days of actual custody credits and 128 days of conduct credits, for a total of 385 days. Defendant contends on appeal that the correct number of actual custody credits is 258 days, which is the number of days between the date of his arrest on January 19, 2011, and the date of his sentencing hearing on October 3, 2011. The Attorney General agrees with his contention. We conclude that defendant is correct. He is therefore entitled to an additional day of presentence credits, for a total of 386 days.

IV. Fines

The Attorney General argues, and defendant agrees, that the abstract of judgment must be amended to reflect a mandatory $30 court construction fee under Government Code section 70373, subdivision (a) and a mandatory $40 court assessment under section 1465.8, subdivision (a), which the court imposed during its oral pronouncement. We agree and direct that the abstract be corrected to reflect those fines.

DISPOSITION

The judgment is modified to award defendant 258 days of custody credits, for a total of 386 days of presentence credits. The clerk of the superior court is directed to correct the abstract of judgment to reflect the additional day of presentence credits and the mandatory fines of $30 and $40 imposed respectively under Government Code section 70373, subdivision (a) and section 1465.8, subdivision (a). A copy of the

corrected abstract of judgment is to be forwarded to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.