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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **DINO L. SMITH,** **Defendant and Appellant.**	**A112647** **(San Francisco County Super. Ct. No. 2187358)**

Defendant Dino L. Smith (appellant) was charged in an information filed on March 8, 2005, with four counts of second degree robbery (Pen. Code, § 212.5, subd. (c))[1] against Richard Frey, Erin Beeghly, Miranda Gonsalves and Suzanne Martinez (counts 1, 2, 3 and 4); two counts of kidnapping to commit robbery (§ 209, subd. (b)) against Frey and Gonsalves (counts 5 and 6); four counts of false imprisonment (§ 236) against Frey, Beeghly, Gonsalves and Martinez (counts 7, 8, 9 and 10); second degree burglary (§ 459) against Lang's Antique and Estate Jewelry (Lang's) (count 11); being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1)) (count 12); conspiracy to commit robbery (§ 182, subd. (a)(1)) with Devin L. Smith (also known as Troy Smith)[2] and George L. Turner (count 13),[3] and second degree burglary of a

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1 All undesignated section references are to the Penal Code.

2 Hereafter Devin Smith is referred to as "Troy."

commercial building at One Tillman Place (count 14). The information alleged that appellant used a firearm in committing the robbery, kidnapping, false imprisonment and burglary of Lang's (§§ 12022.5, 12022.53, subd. (b)), and as to the robbery charges, alleged an excessive taking of funds (§ 12022.6, subd. (a)(4)). It also alleged three prior strike convictions (§§ 667, subds. (a), (d), (e); 1170.12, subd. (c)).

Appellant appeals his conviction by jury trial of three counts of second degree robbery (counts 1, 2 and 3), three counts of false imprisonment (counts 7, 8 and 9), second degree burglary (count 11), and conspiracy to commit robbery (count 13). The jury found true the excessive taking allegations (§ 12022.6, subd. (a)(4)) in counts 1, 2 and 3.[4] Following a bifurcated trial on the prior conviction allegations, the jury found that appellant suffered three prior robbery strike convictions. In a special verdict regarding aggravating factors, the jury found that the taking involved in the instant offenses was "at least $1.5 million over $2.5 million."[5] Thereafter the court struck two prior strike conviction allegations and sentenced appellant to 23 years in state prison.

Appellant raises claims of evidentiary and sentencing error. He also contends the evidence was insufficient to sustain his convictions, and the court erred in responding to jury questions and denying his request for self-representation.

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[3] The information alleged 14 overt acts committed by one or more of the conspirators. The alleged overt acts included: entering One Tillman Place without permission and cutting through the wall leading from One Tillman Place to Lang's; bringing duct tape, plastic handcuffs and garbage bags into Lang's; taking jewelry away from Lang's; using walkie talkies to communicate with a female; ordering the Lang employees to open the safes containing jewelry; and binding the Lang's employees.

[4] The jury found appellant not guilty of robbery of Martinez (count 4), false imprisonment of Martinez (count 10), and burglary of One Tillman Place (count 14), and found not true the personal firearm use allegations. The kidnapping charges (counts 5 and 6) were dismissed on appellant's motion, and the ex-felon in possession of a firearm charge (count 12) was dismissed on the prosecution's motion.

[5] The jury found not true allegations that: the offense involved great violence or cruelty, appellant induced others to participate in the crime, the offense involved planning and sophistication, and appellant's prior performance on parole was unsatisfactory.

BACKGROUND

On April 7, 2003, Beeghly was working as a staff gemologist for Lang's, located at 323 Sutter Street in San Francisco. Just before 9:30 a.m., Beeghly and fellow employee Frye arrived at Lang's to open the store. As Beeghly entered a back bathroom to change her clothes, two men armed with handguns jumped out of the bathroom, located near the store's safes. While one of the men held a gun to Beeghly's head, the other went upstairs to get Frye. Frye identified appellant as the man who pointed a gun at him, then held a gun at Frye's back and ordered him into the back room. The other man then ordered Frye to open the safes, and Frye opened two of the three safes. Once inside the room with the safes, Frye complied with the order not to look at appellant.

The store's doorbell rang, and Beeghly was held at gunpoint while Frye was ordered to answer the door for Gonsalves, Lang's bookkeeper. As Gonsalves proceeded upstairs to her office, a man in a ski mask and armed with a handgun ordered her into the back room where Frye was attempting to open the safes. Thereafter, store manager Martinez rang the store's doorbell, Frye let her in and she and Frye entered the back room. Martinez complied with the robbers' orders to open the third safe.

While Gonsalves was in the back room with the two robbers, she noticed a shadow moving around inside the hole cut in the back wall, "like there might have been another person back there." She could not tell whether the person was male or female, or their race.

The robbers took approximately $4,472,000 in jewelry from the store's safes. However, they left behind jewelry items that the store's customers had brought to the store to be repaired. After securing the store employees' hands, feet and mouths with duct tape and plastic ties, the robbers left the store through a hole cut in the wall of the back room which adjoined a vacant restaurant at One Tillman Place.

The day after the robbery, Frey was shown pictures by police and identified a photo of appellant as the person who robbed him. Frey told police the person had certain facial features similar to those of Jerry Rice. At trial Frey was "very certain" that the person in the picture was the person who robbed him. In February 2003, the defense

investigator showed Frey a series of photographs. Frey initialed a photo of Jerry Rice, which had features similar to those of Frey's robber. However, Frey refused to sign the admonition form because he felt he was being tricked by being shown a photo of Jerry Rice. Frey denied writing on the admonition form for the photo, "number 14 is the guy I saw on the stairs."

Several victims told police they heard the two robbers talking on a walkie talkie while inside the store to a female "dispatcher" located outside. The female appeared to be reminding them of the time and "calling time." A security video from a nearby clothing store taken at 9:48 a.m. on the morning in question depicted four men coming out of the back side of Lang's, one of whom was carrying a large bag. Police discovered fingerprints belonging to Troy (appellant's brother) and Turner on newspaper and posterboard found at the crime scene. In June 2003, Turner was arrested in a San Francisco motel in possession of approximately $650,000 in jewelry taken from Lang's.

In June 2004, police arrested appellant outside a New York City subway station. At first appellant claimed to be "Brandal Platt" and had identification in that name. Subsequently, appellant told police he had not been involved in the Lang's robbery but had "given advice and helped to plan the robbery." He then told police that Lang's owner, Mark Zimmelman, approached him in late 2002 and asked him if he and his brother Troy wanted to earn $1.0 to $2.0 million dollars. Appellant said he and Zimmelman planned the Lang's robbery over a five-month period. Appellant also told police he was afraid of Zimmelman "because of the people [Zimmelman] knew" who could hurt him. Appellant admitted to police that two parking tickets issued to his car in January 2003 within a block of Lang's occurred while he was meeting with Zimmelman. Appellant told police he knew there was an arrest warrant for him in California.

Beginning in August 2003, Brian Boucher shared a New York City apartment with appellant, who identified himself to Boucher as "John Williams." In June 2004, appellant left the apartment without notice. Thereafter, in appellant's room, Boucher found a laptop computer which contained the sign-in name "Dino Smith." After discovering that appellant was connected to a San Francisco "burglary," Boucher contacted San Francisco

police. A forensics examination of the laptop revealed internet searches between April 8 and 13, 2003, for crimes in San Francisco in the profile of "Dino Smith." In addition, a letter on the computer stated, "Why did I even give MZ the fucking time of day. I know, the money, right?" A document found in a folder retrieved from a search of appellant's bedroom in the New York City apartment dated a month before the robbery stated "meet" "with" "MZ again [????]" Also in the folder was an article from the April 19, 2003 San Francisco Chronicle headlined, "*Three Men Sought as Suspects in $10 Million SF Heist.*"

DISCUSSION

I. *Appellant's Motion to Suppress His Statements Was Properly Denied*

Appellant contends the trial court erroneously denied his pretrial in limine motion to exclude statements he allegedly made to San Francisco police officers following his June 2004 arrest in New York. Appellant's in limine motion asserted that no notes existed regarding his interrogation by police and suggested that his alleged statement was never made. He also argued that any statement by him was taken in violation of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436).

The following evidence was adduced at the hearing on appellant's in limine motion:

San Francisco Police Lieutenant Leydon testified that at about 6:10 p.m. on June 3, 2004, he arrested appellant in New York on an arrest warrant and brought him to the New York City Police Department. San Francisco Police Inspector Gardner was present in the interview room with Leydon and appellant. Prior to interviewing appellant, Leydon read appellant the requisite *Miranda* admonitions, and appellant said he understood them and agreed to talk with police. However, appellant said he "would not be taped and he would not write or sign anything." Thereafter Leydon conducted a 45-minute interview of appellant during which appellant did not ask to speak to an attorney or refuse to talk with police. Appellant asked if it would be possible to see his children before being booked. During the interview appellant said he had given people advice as to how the Lang's robbery could be committed. When Gardner wrote "Mark Zimmelman" on a piece of paper appellant sighed heavily and slumped forward, putting

his arms on his knees. Appellant then said that Zimmelman approached him and told him he and Troy could each make $1.0 to $2.0 million by being involved in a job worth "millions." Appellant said he believed Zimmelman felt he "owed" appellant because appellant was previously convicted and served time in prison for a crime involving Zimmelman. Appellant said he was not involved in or at the robbery scene. Leydon said neither he nor Gardner took notes during the interview, but later Leydon wrote a chronological investigation report.

On cross-examination, Leydon said the interview of appellant started shortly after 9:00 p.m. Appellant appeared "very distraught," sighed a lot and talked about his children. Leydon said that in his experience, taking notes during an interview often makes a person stop talking. Leydon said appellant refused to tell him the whereabouts of his brother Troy.

Gardner also testified that appellant did not at any time indicate he wanted to remain silent, but said he would not be taped or sign anything. On cross-examination Gardner said that at one point during the interview appellant began crying, but then regained his composure.

The defense presented no evidence at the in limine hearing.

In denying the motion, the court stated it accepted the officers' undisputed sworn testimony that appellant did not invoke his *Miranda* rights. The court found that appellant refused to be taped and refused to sign anything, but did not refuse to talk with police. The court stated that without contrary evidence, it was unwilling to assume the police who testified were lying, so it accepted their testimony. The court also stated that a suspect who imposes conditions on the interrogation, such as no tape recording, does not automatically invoke his right to remain silent.

"The law is well settled. When reviewing a trial court's decision on a motion that a statement was collected in violation of the defendant's rights under *Miranda* [citation], we defer to the trial court's resolution of disputed facts, including the credibility of witnesses, if that resolution is supported by substantial evidence. [Citation.] Considering those facts, as found, together with the undisputed facts, we independently determine

whether the challenged statement was obtained in violation of *Miranda*'s rules [citation], that is, whether (assuming the defendant was in custody) the statement was preceded by the now-famous admonition of *Miranda* rights: the defendant has the right to remain silent, any statement he might make can be used against him, he has the right to the presence of an attorney, and an attorney will be provided at state expense if he cannot afford one. [Citation.] [¶] If a custodial defendant requests counsel, all questioning must cease. [Citation.] Statements made by a custodial defendant in the absence of *Miranda* warnings are inadmissible in the prosecution's case-in-chief. [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 918.)

Appellant contends the court abused its discretion in denying his *Miranda* claim. He states the court had discretion to disbelieve the officers' version of the facts regarding their interview with him, and abused its discretion when it stated it was "not willing" to do so. He argues that the court's unwillingness to question the credibility of the officers' testimony was unreasonable because the officers took no notes during the interview, the interview was unrecorded, there was no one except Leydon and Gardner in the interview room and there was no signed statement. He contends the trial court's ruling violated his rights to due process. He also argues that Leydon's admission that the details of his statements were already known to Leydon at the time of the interview suggests Leydon could have fabricated appellant's alleged statements from Leydon's case files.

Although appellant's opening brief asserts he "unambiguously requested counsel on a number of occasions" during the interview, the record before us does not support the assertion. The defense presented no evidence at the in limine hearing, and the court could reasonably accept the credibility of the officers. Leydon reasonably explained his practice regarding the taking of notes during suspect interviews. Moreover, the assertion that Leydon fabricated appellant's statements based on case files is merely speculation, unworthy of consideration. Appellant has failed to demonstrate any abuse of discretion or due process error in admitting his statements to police.

II. *Substantial Evidence Supports Appellant's Convictions*

Next, appellant contends the evidence was insufficient to support his convictions.

A judgment of conviction must be reversed if the record does not contain substantial evidence to support it. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) Pursuant to this standard, the court reviews the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Id.* at pp. 260-261.) In reviewing the record for substantial evidence, "an appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

We begin with a general overview of California law regarding who is a party to a crime. "The parties to crime are principals and accessories." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, p. 122; Pen. Code, § 30.)[6] Section 31 defines principals as, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." (See also § 971.) As such, aiders and abettors are subject to the same range of punishment as direct perpetrators. (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1371.) "[A]t common law, one who is found guilty of the same offense on a theory of aiding and abetting while present at the scene of the crime, or conspiring with the perpetrator beforehand or instigating, encouraging, or advising commission of the crime, is subject to the same

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6 An accessory is one who "after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof." (§ 32.)

punishment as the one who with the requisite criminal intent commits the crime by his or her own acts." (*People v. Beeman* (1984) 35 Cal.3d 547, 555, fn. 2.) Because we conclude there was substantial evidence that appellant was an aider and abettor, as well as a coconspirator who planned the crimes, we need not address whether he directly committed them.

A. *Aiding and Abetting*

"[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman, supra,* 35 Cal.3d at p. 561.) As the jury was instructed in this case, a person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime. (CALJIC No. 3.01.)

There is ample evidence in the record to support appellant's conviction as an aider and abettor. First, after his arrest, appellant admitted to police that he had "given advice and helped plan the [Lang's] robbery," and that he and Zimmelman planned the robbery over a five-month period. Second, appellant admitted that two parking tickets were issued to his car in January 2003, while it was parked within a block of Lang's, and he was meeting with Zimmelman. The jury could reasonably believe that appellant's presence near Lang's during January 2003 was for the purpose of planning the robbery. Third, Gonsalves testified that while she was in the back room with the two robbers, she saw a shadow moving around inside the hole in the back wall suggesting another person might have been back there. The jury could have concluded that it was appellant's shadow that Gonsalves saw. Fourth, the security video from a nearby store taken at 9:48 a.m. on the morning of the robbery, showed four men coming out the back side of Lang's. The jury could have concluded that appellant was one of the four men exiting the store at the time of the robbery. Finally, a San Francisco newspaper article found in appellant's New York bedroom noting that three men were being sought in a $10 million

San Francisco robbery supports the inferences that appellant was involved in the robbery and he remained concerned about the robbery two weeks after its commission.

Based on this evidence, we reject appellant's speculative and unfounded contention that "[t]he only evidence presented was that [he] advised [Zimmelman] on how to stage a fake robbery at his business with knowledge of those who would be present," for purposes of committing insurance fraud. The jury was entitled to accept that part of appellant's statement in which he admitted he helped with the crime, but reject his description of the planned offense as "insurance fraud" involving "cooperative victims" of a "fake robbery." The evidence supports the jury's apparent conclusion that appellant provided help to the actual perpetrators of the crime, knowing that it involved the robbery of innocent victims.

B. *Conspiracy*

Conspiracy, like aiding and abetting, is an alternate, vicarious means to being convicted as a principal. Pursuant to section 182, criminal conspiracy is a separate offense. In this case, appellant was convicted of conspiracy to commit robbery (count 13) and conspiracy was also one of the vicarious theories of liability for the substantive offenses argued by the prosecution.

"Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy. [Citations.] A conspiracy requires: (1) the intent to agree, and (2) the intent to commit the underlying substantive offense. [Citation.] These elements may be established through circumstantial evidence. [Citation.] 'They may . . . " 'be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.' " ' [Citation.]" (*People v. Bogan* (2007) 152 Cal.App.4th 1070, 1074.) Criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy. (*People v. Lee* (2006) 136 Cal.App.4th 522, 529.) Thus, a defendant may be convicted of conspiracy even though the substantive offense was committed without the defendant's participation. (*Id.* at p. 529-530.) In addition, so long as a unanimous jury concludes that a conspirator

committed some overt act in furtherance of the conspiracy, it need not agree as to who the coconspirators were, who did an overt act or exactly what the act was. (*People v. Prieto* (2003) 30 Cal.4th 226, 251.)

Appellant contends no substantial evidence was presented that he entered into an agreement to commit robbery or intended to commit a robbery. Instead, he argues the evidence presented showed only that he agreed to advise Zimmelman "how to pull off a fake robbery." Once again, we reject appellant's contention. Appellant admitted that he and Zimmelman planned the Lang's robbery over a five-month period prior to the robbery. Contrary to appellant's assertion, the jury could reasonably have concluded that appellant conspired to plan the actual robbery with the actual participants, rather than a "fake" robbery with Zimmelman.

III. *Court's Responses to Jury Questions Were Not Erroneous*

Appellant contends the court erred in its responses to questions from the jury during deliberations.[7]

The first jury question asked: "If the jury determines that Zimmelman gave the defendant permission to enter and take away property from 323 Sutter, can the defendant still be guilty of count 11 (burglary of 323 Sutter)?" The court gave the following written response:

"(1) Yes, if you find that one or more of the alleged victims did not consent to give defendant permission to enter and take property from 323 Sutter.

"(2) No, if you find that Zimmelman and all the alleged victims gave and or consented to give defendant permission to enter and take property from 323 Sutter."

The second jury question asked: "If the defendant believed all alleged victims (employees) were party to the crime at the time of providing aid to commit the crime, could the defendant still be guilty of aiding and abetting in the crime of robbery?" The

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[7] For the first time in his reply brief, appellant refers to an additional question raised by the jury regarding CALJIC Nos. 3.00 and 3.01. Since no claim related to this instruction was raised in appellant's opening brief, any claim of error related to this instruction is waived. (*People v. Senior* (1995) 33 Cal.App.4th 531, 537.)

court responded in writing: "See instruction 4.35A as modified." Instruction "4.35A Modified" stated, "Robbery/Conspiracy [¶] Ignorance or Mistake of Fact [¶] An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if he commits an act or omits to act under an actual belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful. [¶] However, if under such assumed state of facts, defendant's actions would still have been unlawful, this defense does not apply."

The following day the jury asked, "As a follow up to our question yesterday, [¶] (1) If the defendant believed at the time of providing aid that all the alleged victims were part of the crime, would the defendant be guilty of aiding and abetting false imprisonment and [¶] (2) would the defendant be guilty of conspiracy of robbery if he believed the agreement included the plan to have all alleged victims to be part of the conspiracy." The court responded in writing: "(1) See instruction 4.35B as modified. [¶] See instruction 4.35A as modified." Instruction 4.35B as modified is entitled "False Imprisonment [¶] Ignorance or Mistake of Fact." It is identical to instruction 4.35A as modified, except for the second sentence which reads, "Thus a person is not guilty of a crime if he commits an act or omits to act under an actual *and reasonable* belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful." (Italics added.)

Following the jury's verdict, appellant unsuccessfully moved for new trial pursuant to section 1181(5) on the ground that the trial court "misdirected the jury in a matter of law" in its responses to the aforementioned jury's questions.

Appellant concedes that the instructions given by the court were correct statements of the law regarding mistake of fact.[8] (See Use Note to CALJIC No. 4.35 (Spring 2007

[8] CALJIC No. 4.35 states: "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he] [she] commits an act or omits to act under an actual

ed.), p. 166 ["In specific intent or mental state crimes, delete the bracketed phrase 'and reasonable.' Mistakes of fact, however, must be reasonable to negate general criminal intent."].) However, he argues that the court's responses to the jury's questions "failed to correctly respond to the jury's question relating to appellant's belief as it affected his specific intent in the conspiracy and aider and abettor contexts." The thrust of appellant's argument appears to be that if part of the conspiracy plan was that all the persons present inside Lang's at the time of the robbery would be part of the conspiracy, then he could not have the specific intent to commit robbery and could not be convicted of conspiracy or any of the substantive counts underlying the conspiracy. Thus, he argues the court's mistake of fact instruction was "improper as it related to a vicarious liability theory of guilt."

In reviewing a claim of error in jury instructions in a criminal case, we first consider the jury instructions as a whole to determine whether error has been committed. We must view a challenged instruction in the context of the charge and the entire trial record. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1330-1331.) A judgment will be set aside on the basis of instructional error only if, after an examination of the entire record, the appellate court concludes that the error has resulted in a miscarriage of justice. That is, when it is reasonably probable that the jury would have reached a result more favorable to the appellant absent the error. (*Id.* at p. 1331; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The trial court has the primary duty to help the jury understand the legal principles in the case. Section 1138 imposes on the trial court a mandatory " 'duty to clear up any instructional confusion expressed by the jury,' " but does not require trial court elaboration on the standard instructions in every instance. (*People v. Moore, supra,* 44 Cal.App.4th at p. 1331, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) When the original instructions are full and complete, the court has discretion to determine

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[and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful."

what additional explanations are necessary to satisfy the jury's request for information. "The urgency to respond with alacrity must be weighed against the need for precision in drafting replies that are accurate, responsive, and balanced. When a question shows the jury has focused on a particular issue, or is leaning in a certain direction, the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination. Although comments diverging from the standard should be embarked on with care, a trial court must do more than figuratively throw up its hands and tell the jury it cannot help. It must consider how it can best aid the jury and decide whether further explanation is desirable, or whether the reiteration of previously given instructions will suffice." (*Moore*, at p. 1331.)

As noted by the People, defense counsel agreed with the court's answers to the jury's questions, including its reference to specific instructions. Moreover, we conclude the court's references to instructions 4.35A and 4.35B were sufficient responses to the jury's questions. The questions focused on whether appellant could be convicted of aiding and abetting and/or conspiracy if he believed that all of the employees inside the store at the time of the robbery were actually aiders and abettors or coconspirators, rather than innocent victims. The court's instructions adequately informed the jury that as to the specific intent offenses of which appellant was charged, appellant would not be guilty if he was acting under a mistake of fact, which if true would make his act lawful; but would be guilty if despite such mistake of fact, his act would still be unlawful. The instruction similarly informed the jury as to the general intent offenses of which appellant was charged. We fail to see how the court's responses to the jury's questions were improper as they related to vicarious liability. No instructional error is shown.

IV. *The Court Properly Denied Appellant's Motion to Argue a Portion of the Case Himself*

Appellant next contends the trial court abused its discretion in denying his *Faretta* request (*Faretta v. California* (1975) 422 U.S. 806, 833-834) for self-representation.

At the conclusion of the prosecutor's closing argument, defense counsel requested a sidebar conference, which was unreported. Thereafter, for the record, the following colloquy occurred:

"[Defense Counsel]: [Appellant] requests that he be allowed to argue this portion of the case to the jury, himself.

"[THE COURT]: All right, and I have denied that request. I think it's either [defense counsel] is the attorney, or he isn't. [Appellant] can't pick and choose. [¶] In any event, I'm denying the request."

Thereafter, defense counsel gave his closing argument.

A criminal defendant has a federal constitutional right to represent himself at trial. (*Faretta v. California, supra,* 422 U.S. at p. 807.) However, in order to invoke the right to self-representation, the defendant's request must be timely and unequivocal. (*People v. Clark* (1992) 3 Cal.4th 41, 98.) In order to be considered timely, the request must be asserted within a reasonable time before commencement of trial. (*People v. Marshall* (1996) 13 Cal.4th 799, 827; *People v. Windham* (1977) 19 Cal.3d 121, 128.) Where the defendant's request comes during trial, it is untimely and therefore, the request is a matter within the trial court's discretion. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048.)

"*Windham* [*supra,* 19 Cal.3d at p. 128] instructs the trial court faced with an untimely request under *Faretta* to consider such factors as 'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. [Citations.]" (*People v. Rivers, supra,* 20 Cal.App.4th at p. 1048.) Error in denying an untimely *Faretta* motion is subject to harmless error review under *People v. Watson, supra,* 46 Cal.2d at page 836. (*Rivers, supra,* 20 Cal.App.4th at p. 1050.)

As the People correctly assert, the record before us does not establish that appellant's request was an *unequivocal* request for self-representation. Instead, appellant requested only that he be permitted to "argue this portion of the case to the jury, himself." Moreover, after the court denied appellant's request, and through the remainder of the

case, appellant at no time indicated that he wished to either discharge his counsel or represent himself. Based on the record before us, the court could reasonably conclude in making his request, appellant was seeking to deliver his closing argument to the jury himself, but was to be represented by counsel for the remainder of the trial proceedings. Since appellant's request was not a *Faretta* request for self-representation, its denial by the court was not an abuse of discretion.

V. *The Court Properly Imposed the Upper Term*

At the November 10, 2005 sentencing hearing, the court stated it was imposing the upper term on count 1 based on "various aggravating factors, including the fact that the crime was committed with great planning and sophistication; the taking was excessive and constituted a considerable sum of money; [appellant's] extensive prior prison record; [and] the fact that [he had] served previous terms in State Prison." It imposed the upper term on count 13 for the same reasons, and noted that count 13 would be stayed pursuant to section 654.

A. *Blakely/Cunningham*

On appeal, appellant contends the court violated *Blakely v. Washington* (2004) 542 U.S. 296, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and section 654 in imposing the upper five-year term on counts 1 and 13. He argues the court improperly relied on the planning and sophistication and extensive prior prison record factors, because these factors were not found true by a jury.

In *Apprendi,* the United States Supreme Court applied the Sixth Amendment and held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra,* 530 U.S. at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. When a sentencing court's authority to impose an enhanced sentence depends upon additional fact finding, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington*, *supra,* 542 U.S. at pp. 301-305.) In *Cunningham v. California*

(2007) 549 U.S. ___ [127 S.Ct. 856], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham*, at p. 860, overruling on this point *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), vacated in *Black v. California* (2007) 549 U.S. ___ [127 S.Ct.1210].) Subsequently, in *People v. Black* (2007) 41 Cal.4th 799, 813 (*Black II*), the California Supreme Court held that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial."

Appellant contends the court erroneously relied on his "extensive prior prison record" as an aggravating factor because there is no evidence that he had an extensive prison record and the jury did not make such a finding. He argues the jury decided only that the allegation that his prior parole performance was unsatisfactory was not true.

The court correctly imposed the upper term based on appellant's criminal history. The right to a jury trial does not apply to the fact of a prior conviction. Recidivism is a traditional ground for a sentencing court's imposition of the aggravated term. (*Black II, supra,* 41 Cal.4th at p. 818.) The jury found that appellant suffered three prior robbery strike convictions. In addition, the record reveals appellant has a long and extensive criminal history dating from 1980. The parties stipulated to the following prior convictions by appellant, for which he received prison terms: burglary in 1980; false imprisonment in 1983; receiving stolen property in 1984; and robbery and false imprisonment in 1996. Appellant was in custody between March 1990 and August 1998.[9] This single aggravating factor is legally sufficient to render appellant eligible for the upper term. (*Id.* at p. 813; *People v. Osband* (1996) 13 Cal.4th 622, 728.) Because

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9 The 1996 convictions arose from offenses committed in 1988.

this factor was properly relied on by the trial court in imposing the upper term, no *Blakely/Cunningham* error is demonstrated.

B. *Dual Use*

Finally, appellant contends the court erroneously relied on the jury's finding of excessive taking to support imposition of the upper term because it also imposed a four-year consecutive excessive taking enhancement under section 12022.6, subdivision (a)(4).

According to section 1170, subdivision (b), the trial court "may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (See also Cal. Rules of Court, rule 4.420(c); *People v. Williams* (1986) 180 Cal.App.3d 57, 63.) Assuming the fact of appellant's excessive taking was improperly used to both enhance and aggravate his sentence, the error is harmless under *People* v. *Watson, supra*, 46 Cal.2d at page 836. It is not reasonably probable that absent reliance on the excessive taking factor, a more favorable sentence would have resulted, given appellant's extensive prior prison record. (*People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1783.)

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.