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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK WILLIAM MULLEN, JR.,

Defendant and Appellant.

A143196

(Lake County  
Super. Ct. No. CR935457-B)

**INTRODUCTION**

Although the evidence at trial proved a completed burglary, defendant was only convicted of attempted burglary, a lesser included offense. On appeal, defendant argues his conviction violates the corpus delecti rule, and the evidence was insufficient to support a conviction for attempted burglary. Defendant also challenges the imposition of the five-year enhancement for a prior serious felony conviction. We find no violation of the corpus delecti rule or insufficient evidence. We do find due process requires the striking of the five-year enhancement imposed pursuant to Penal Code<sup>1</sup> section 667, subdivision (a) for lack of adequate notice in the information. The judgment is otherwise affirmed.

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<sup>1</sup> Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

## **STATEMENT OF THE CASE**

The Lake County District Attorney filed an amended information charging defendant and codefendant Randy Hopper with burglary of an inhabited dwelling house on February 16, 2014 (count 1) and receiving stolen property from February 1 to March 1, 2014 (count 2). (§§ 459, 462, subd. (a) [probation prohibited], 496, subdivision (a).) The information alleged the charged burglary was a serious and violent felony within the meaning of sections 1192.7, subdivision (c) and 667.5, subdivision (c). The information included a special allegation as to both counts that defendant had suffered a prior serious and violent felony conviction for violation of “PC459/1st degree” on March 3, 2000, in Lake County, within the meaning of section 667, subdivisions (b)–(i).

Codefendant Hopper’s case was severed and defendant proceeded to jury trial. The jury found defendant not guilty of burglary, but guilty of attempted burglary and receiving stolen property. At a bifurcated court trial, defendant’s prior conviction was found true by the judge. Defendant was subsequently sentenced to an aggregate sentence of 11 years in state prison consisting of concurrent three-year terms, doubled pursuant to section 667, subdivisions (b)–(i); and imposition of a five-year enhancement pursuant to section 667, subdivision (a).

Defendant timely appeals.

## **STATEMENT OF THE FACTS**

Naomi Richmond left her home on Big Bear Road in Lower Lake at 9:30 p.m. on February 16, 2014. She locked the door when she left. When she returned home at 11:30 p.m. her front door was wide open and there were pieces of wood on the floor in the entryway. Her husband’s laptop was missing from the living room and a backpack containing a couple of guns and a knife was missing from her bedroom. Also missing were six drawers of a jewelry chest on a dresser and all the jewelry in them, including a diamond tennis bracelet and an antique ring worth \$8,000, among other pieces. A Kindle

and a Samsung tablet were missing from the nightstand next to the bed. Also, a pillowcase had been taken from the bed.

Lake County Sheriff Deputy Kreutzer responded to the burglary at 12:15 a.m. on February 17. He confirmed the door had been forced open and there were several pieces of splintered doorjamb inside the door. Additionally, the strikeplate had been “knocked clear of the door jam[b].” Attempts to find latent fingerprints proved fruitless.

On February 18, 2014, defendant sold a bracelet with a broken clasp stolen from the Richmond house to a pawn shop in Lower Lake. Records of each transaction are kept and reported to law enforcement.

On March 18, 2014, a search warrant for stolen property from the Richmond burglary was served on defendant at his residence on Mill Road in Lower Lake. At that time, Detective Dahmen asked if defendant knew anything about “the burglary”; he said “no.” He did acknowledge knowing two people named Randy: one who lived up on the hill (Randy Morton), and “little Randy” (Randy Hopper), who lived “at the end of [unintelligible].” He “went over to visit Randy on the hill.” He knew about the burglary on February 17. He was “aware of what was going on but I chickened out.” “[Y]ou might have seen two people . . . walk across an intersection but no I chickened out.” “I didn’t go into the house. . . . I went up the street and that was it.” Older Randy (Morton) told him the door was already open.

Detective Dahmen interviewed defendant again on April 2. He showed defendant the pawn ticket. Defendant acknowledged he “scrapped” a broken bracelet. He got the bracelet from little Randy (Hopper) at a park. Hopper was driving by and offered defendant a ride. Defendant said, “No[,] I’m just gonna get a cup of coffee,” but asked Randy, “Hey[,] where’s my money?” Randy owed him \$40 for dope. Randy said he did not have the money right then, but offered him the bracelet. Defendant asked him why he did not take it himself and Randy explained, “I don’t have I.D.” This could have happened the next day [after the burglary] or the day after that.

Defendant volunteered somebody told him about a pillowcase. He also volunteered that when little Randy got back to older Randy's house, defendant saw the tablets, the laptop and the backpack.<sup>2</sup>

## DISCUSSION

### *Defendant's Conviction Does Not Violate the Corpus Delicti Rule.*

Defendant concedes the evidence "irrefutably" establishes a burglary, and that the offense was committed with the specific intent to steal. He also acknowledges that "[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a; *People v. Toledo* (2001) 26 Cal.4th 221, 229.) However, defendant argues his conviction for attempted burglary cannot be sustained on appeal because the corpus delicti rule prevents reliance on his out-of-court statements to Detective Dahmen to prove *he* took a direct step towards commission of the burglary (i.e., walked from Hopper's house to the Richmond's house, with the requisite intent) before he "chickened out" (i.e., rendered the direct step ineffectual).

Defendant's argument misconstrues the corpus delicti rule. " 'In any criminal prosecution, the corpus delicti must be established by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant. [Citations.] The elements of the corpus delicti are (1) the injury, loss or harm, and (2) the criminal agency that has caused the injury, loss or harm. [Citation.] Proof of the corpus delicti need not

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<sup>2</sup> "DEFENDANT: I hear about the tablets, right? Actually[,] I've visualized the tablets, I've seen 'em. Okay? And the uh laptop.

"DETECTIVE: (Clears throat.)

"DEFENDANT: That's all I've seen. I didn't see—

"DETECTIVE: When did you see 'em?

"DEFENDANT: When he came back. Fuckin when he came back fuckin after I told him, now I'm cool, he came up to Randy's. Fuckin with a backpack."

be beyond a reasonable doubt; a slight or prima facie showing is sufficient. [Citation.]’ [Citation.] The identity of the perpetrator is not an element of the corpus delicti.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1057; accord, *People v. Valencia* (2008) 43 Cal.4th 268, 296.) “The corpus delicti ‘rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened.’ ” (*People v. Valencia*, at p. 296; see *People v. Jones* (1998) 17 Cal.4th 279, 301.)

Just as attempted burglary is a necessarily included offense of burglary (*People v. Aguilar* (1989) 214 Cal.App.3d 1434, 1436), the corpus delicti of a completed burglary necessarily includes the corpus delicti of an attempt—the commission of at least one unequivocal overt act towards its completion. Here, independent proof amply established a crime did happen: the Richmond family suffered a harm caused by some criminal agency. Reliance on defendant’s inculpatory statements, which merely provided proof of *his identity* as one of the perpetrators who took at least one unequivocal overt step towards the infliction of that harm, does not run afoul of the corpus delicti rule.

***Substantial Evidence Supports Defendant’s Conviction for Attempted Burglary.***

Defendant argues there is insufficient evidence he went “beyond the planning stage” and took a direct (but ineffectual) step towards burglarizing the Richmond residence. He argues that, at most, the evidence shows (1) he agreed to participate in the burglary, knowing the door to the Richmond’s residence was open; (2) he thereafter accompanied the actual perpetrator or perpetrators of this crime en route to the Richmond’s residence for this purpose; (3) he “chickened out” and walked away sometime before the crime was actually committed; and (4) he sold a bracelet which was stolen in this burglary to a pawn shop the following day. We disagree.

“ “On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” ’ [Citation.] The same

rule applies to the review of circumstantial evidence. ‘The court must consider the evidence and all logical inferences from that evidence in light of the legal definition of [attempt]. [Citation.] But it is the jury, not the appellate court, which must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] Therefore, 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.’ ” (*People v. Poindexter* (2006) 144 Cal.App.4th 572, 577.)

“Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.” (*People v. Murray* (1859) 14 Cal. 159, quoted in *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.) “As simple as it is to state the terminology for the law of attempt, it is not always clear in practice how to apply it. As other courts have observed, ‘ “[m]uch ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparation ends and attempt begins.” [Citation.] . . . .’ [¶] . . . [¶] Although a definitive test has proved elusive, we have long recognized that ‘[w]henver the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.’ ” (*People v. Superior Court (Decker)*, at p. 8.)

Defendant discusses a number of cases in which appellate courts have either upheld or reversed convictions for attempted crimes on the basis of greater or lesser participation, or number of steps, toward completion of the crime. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1255–1258 [convictions for attempted burglaries affirmed]; *People v. Luna* (2009) 170 Cal.App.4th 535, 541, 543 [reversal of conviction for attempted manufacture of a controlled substance].) However, those cases are of limited utility, given that each case turns on its own facts. Based on the evidence

adduced below, we have no trouble finding the evidence sufficient to establish defendant committed an attempted burglary.

A reasonable jury could infer that defendant took a number of substantial steps towards commission of a burglary before he “chickened out.” Based on his statements to the detective, a reasonable jury could find that while at Randy Morton’s house, defendant and the two Randys conspired to burglarize the Richmond residence, which was “in the area” somewhere near Morton’s house. Defendant allowed as how “two people” could have been seen crossing an intersection to get to the Richmond house. The jury could reasonably infer the two people were him and Hopper, because even though he maintained he did not go inside the house, he did admit he “went up the street and that was it.” Although defendant may well have gotten cold feet about going inside the house, he was already in too far. Like a batter’s checked swing that results in a called strike, defendant’s attempted withdrawal from the burglary came too late. “ ‘[A]fter the intent has been formed and such intent has been coupled with an overt act toward the commission of the contemplated offense, the abandonment of the criminal purpose will not constitute a defense to a charge of attempting to commit a crime.’ ” (*People v. Crary* (1968) 265 Cal.App.2d 534, 540.) The evidence is sufficient to support a conviction for attempted burglary.

***The Trial Court Erroneously Imposed a Five-Year Enhancement.***

Defendant contends the trial court erred by imposing a five-year enhancement under section 667, subdivision (a). Defendant acknowledges the amended information adequately informed him his sentence would be doubled pursuant to sections 667, subdivisions (b)–(i) on account of his prior serious felony conviction for first degree burglary, but maintains as a matter of due process he was not provided adequate notice that the same prior conviction would also be relied upon at sentencing to impose an additional five years. He objected in the trial court on due process grounds. The court, not finding any case specifically on point, imposed the enhancement.

The record supports defendant's claim that a section 667, subdivision (a), enhancement was not alleged. Neither the language of the allegations, nor the citation to the applicable statute, gave defendant any notice that he would be subjected to a five-year enhancement.

We accept the Attorney General's concession that the enhancement must be stricken in this case. "All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." (§ 1170.1, subd. (e).) "[I]n addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747; see *People v. Arias* (2010) 182 Cal.App.4th 1009, 1017.)

The prior serious and violent felony allegations here specifically referenced only the three-strikes sentencing scheme. There was no advisement, anywhere in the pleading, that the People would use the "factual allegations" again, to impose five-year enhancements for each of the strike priors. Although the use of the same conviction twice, once for the purpose of each statutory provision, does not violate any "dual use" principles, a defendant must receive notice in some fashion that the prosecution intends to subject him or her to such dual use of one conviction. Defendant received no such notice here. Accordingly, the enhancement must be stricken.

### **DISPOSITION**

The matter is remanded to the trial court with directions to strike the consecutive five-year enhancement imposed under Penal Code section 667, subdivision (a), and to amend the abstract of judgment accordingly. The court is directed to prepare and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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DONDERO, J.

We concur:

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HUMES, P.J.

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MARGULIES, J.