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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY MARCUS MERRITT,

Defendant and Appellant.

C063941

(Super. Ct. No. 09F04235)

Defendant Gregory Marcus Merritt, a sex offender who was required to register any change in his residence address with a local law enforcement agency within five working days of making the change (Pen. Code, § 290, subd. (b)),¹ was convicted by a jury of failure to so register (§§ 290.013, subd. (a), 290.018, subd. (b)). He was sentenced to five years in state prison.²

¹ References to undesignated sections are to the Penal Code.

² The court found defendant had a prior strike conviction (§ 667, subds. (b)-(i)) and had served a prior prison term (§ 667.5, subd. (b)).

On appeal, defendant contends the trial court erred when it (1) denied his request for a mistake of fact instruction, the mistake being that his moving from the residence for which he had last registered into an automobile in a parking lot across an alley from that residence was not a change of address; and (2) failed to instruct the jury with the definition of “residence” as provided in section 290.011, subdivision (g). We conclude that under the circumstances of this case defendant was not entitled to a mistake of fact defense, and that any error in instructing the jury on the definition of residence was harmless.

FACTS

Defendant is a convicted sex offender who is required to register the address of his residence with a local police agency. Defendant last registered his address on August 20, 2008, as 477 1/2 El Camino Avenue, Sacramento (hereafter the El Camino residence). The El Camino residence is located on Sacramento County Assessors parcel No. 32. Parcel No. 32 is a rectangular piece of land, fronting on El Camino Ave and extending back to an alley. Parcel No. 32 has two structures on it -- the primary structure which fronts on El Camino Avenue and contains spaces for small businesses, each bearing a separate address, and the El Camino residence that backs up to an alley, across from which is a parking lot. The parking lot is on parcel No. 1.

On May 28, 2009, Detective Kevin Patton went to the El Camino residence to determine if defendant was living there. He was not, instead the El Camino residence was now occupied by Placido Martinez and his family.

Placido Martinez, a security supervisor, testified that he and his family moved into the El Camino residence on May 1, 2009. Martinez’s only contact with defendant was when he saw and spoke to him at a nearby Kentucky Fried Chicken restaurant. Martinez had never seen defendant around Martinez’s residence or sleeping in a vehicle in the parking lot.

Phu Nguyen testified that starting in August 2008, he was working six days a week, from 8:30 a.m. to 7:00 p.m., at a barbershop located on parcel No. 32. Nguyen was acquainted with defendant and knew he had lived at the El Camino residence. Nguyen also knew defendant had moved from that residence on April 9, 2009. In early May 2009, Nguyen saw defendant picking up mail from defendant's mailbox, which was located on front of the main building on parcel No. 32. Nguyen never saw defendant sleeping in an automobile in the parking lot across the alley.

Defendant's girlfriend, Karen Smith, testified she and defendant moved into the El Camino residence in July 2006 and were evicted therefrom in April 2009. While Smith and defendant were living at the El Camino residence, the owner of the property asked them to keep the parking lot clear of debris that people would dump there. The request, with which Smith and defendant complied, led them to believe the parking lot was owned by the same person who owned the El Camino residence.

After Smith and defendant were evicted they were unsuccessful in their search for new accommodations and began sleeping in Smith's automobile, a small white older Toyota which "barely" ran, in the parking lot across the alley from the El Camino residence. Although Smith and defendant were not always together and she slept in other locations, when she wanted to find defendant she would look for him at the parking lot because that was "where he knew to be" and "that was his address."

Defendant did not testify.

DISCUSSION

I

Defendant requested the trial court to instruct the jury on the defense of mistake of fact as provided by CALCRIM No. 3406.³ The purported mistake being that defendant

³ "The defendant is not guilty of <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not

believed his moving from the El Camino residence and into Smith's automobile in the parking lot across the alley from that residence was not a change in residence address. The court denied the request because it determined there was insufficient evidence of defendant's mental state from which the jury could infer that he actually believed the move was not a change in address. We agree with the trial court.

CALCRIM No. 3406 states in part: "The defendant is not guilty of [insert crime] if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact." Thus, at the very least, for a defendant to be entitled to a mistake of fact defense instruction he or she must have actually believed the fact that would negate the mental intent required.

Defendant makes the following argument in support of his position that the record contains substantial evidence that he mistakenly believed his move did not require him to reregister his location: "For purposes of . . . section 290.018, subdivision (b), offense, a person can maintain a residence address by living in their vehicle 'located by a street address.' ([] § 290.011, subd. (g).) In this case, there was substantial evidence [defendant] moved from living in a house at a registered address to living in his vehicle behind the house and continued receiving mail at that address and that the registration

know a fact or [reasonably and] mistakenly believed a fact.

"If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit <insert crime[s]>.

"If you find that the defendant believed that <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for <insert crime[s]>

"If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for <insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes)." (CALCRIM No. 3406.)

form given to [defendant] -- which repeatedly referenced ‘residence *address*’ -- did not inform [defendant] that he had to register that move as a change of address. Thus, there was substantial evidence that [defendant] suffered from a mistake of fact and did not act willfully to violate the law and, if there was a failure to reregister, it was without actual knowledge the move to his car required reregistration as a change of residence address.” (Original italics.)

While these asserted facts are evidence that defendant was actually living in Smith’s automobile in the parking lot behind the El Camino residence, a fact strongly contested at trial, they are not evidence of what defendant actually believed his legal position was with regard to the move. Of course, defendant may have held the belief he now asserts as the basis for his purported mistake of fact. The problem is that without evidence of defendant’s mental state, any conclusion on what he believed is only speculation. And speculation is clearly not substantial evidence. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767 [substantial evidence is “evidence which is reasonable, credible, and of solid value”].) Consequently, the trial court did not err in refusing to give a mistake of fact defense instruction.

II

Defendant contends the trial court prejudicially erred when it instructed the jury that “[a] *residence* is any factual place of abode of some permanency” instead of instructing the jury per section 290.011, subdivision (g), which provides: “ ‘Residence’ means one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.” (Original italics.)

According to defendant, the prejudice caused by the definition given by the court was that it “failed to adequately advise the jury of an element of the crime and reduced

the prosecution's burden in proving that element that [defendant] had changed residences or become a transient and willfully failed to reregister.”

In the circumstances of this case, any difference in the definitions of residence was harmless beyond a reasonable doubt because, even if the jury believed defendant had moved from the El Camino residence into Smith's automobile, the jury would have found, as shown by the following undisputed evidence, the move was a change of address, the change being from having an address to having no address. Defendant had been evicted from the El Camino residence, meaning he had no further attachment to the residence, including its 477 1/2 address. Smith's automobile was parked not just behind the El Camino residence, but it was in a parking lot located on a different parcel of land (parcel No. 1) from that of the El Camino residence (parcel No. 32). The parking lot was located across an alley from the El Camino residence, and it was used by visitors to the businesses on parcel No. 32.

Given this record, we can confidently say beyond a reasonable doubt that if the jury had been instructed on the definition of residence contained in section 290.011, subdivision (g), it would have concluded the move was a change in address.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

HOCH, J.