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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

CODY EDWARD POHL,

Defendant and Appellant.

C066710

(Super. Ct. No.
72006157)

Among other offenses, defendant Cody Edward Pohl was convicted of second degree burglary (count one) for theft of a guitar from his stepdaughter's bedroom, and first degree burglary (count two) for theft of a television from a vacation home. The trial court found he had a prior strike conviction and a prior serious felony conviction. Defendant was originally sentenced to 13 years 4 months in prison, but the trial court subsequently recalled the sentence and resentenced defendant to 14 years 4 months in prison.

On appeal, defendant contends (1) his second degree burglary conviction for theft of the guitar from his stepdaughter's bedroom must be reversed because defendant cannot be convicted of burglarizing his own home; (2) there was insufficient evidence to support his first degree burglary conviction for theft of the television from the vacation home, because the prosecution did not establish that the vacation home was inhabited at the time of the theft; (3) consequently, the enhancement pursuant to Penal Code section 667, subdivision (a)¹ must be stricken because his first degree burglary conviction on count two must be reduced to second degree burglary, which is not a serious felony; and (4) when the trial court recalled defendant's sentence and resentenced him, it improperly increased his sentence in violation of section 1170, subdivision (d).

We conclude that defendant's first, second and third contentions have merit. We will reverse in part and remand for resentencing. Accordingly, it is not necessary to address his fourth contention.

BACKGROUND

Because this appeal focuses only on defendant's burglary convictions, we limit our discussion to the relevant background.

Defendant married Mirlaine Bennett in 2002 and moved into the four-bedroom condominium in Lake Tahoe that Bennett was

¹ Undesignated statutory references are to the Penal Code.

leasing at the time. Defendant resided there with his wife for seven years.

At some point during the marriage, defendant began spending weeks away from home. In 2009, Bennett's adult daughter Meline was living at home and not paying rent. Meline did not stay at the residence when defendant was there, however, because she did not like him. Meline testified that she would "prohibit" defendant from entering her room. There was no lock on the outside of the door to Meline's room, but sometimes she locked the door from the inside, sometimes the door was closed but unlocked, and sometimes it was open.

Meline's biological father had given her a guitar that she kept in a case behind her closet door. Meline noticed in March 2009 that the guitar was missing from its case. The guitar was eventually recovered from a pawnshop. According to the pawn slip, defendant pawned the guitar on March 5, 2009. Defendant did not deny pawning the guitar but claimed it belonged to him. Bennett filed for divorce and obtained a restraining order prohibiting defendant from entering the home.

In June 2009, Bennett began cleaning two vacation homes, designated unit B (lakeside unit) and unit C (roadside unit), as part of her cleaning business. Bryon Topol owned both vacation rentals. His family sometimes stayed in the lakeside unit, but nobody from his family ever stayed in the roadside unit.

Bennett told defendant about the new cleaning account. She testified that, on one occasion, she entered the roadside unit to clean it and saw that the television was missing.

The vacation rentals were managed by a property management company. When one of Topol's employees discovered that the television was missing from the roadside unit, Topol contacted the management company. The company said it was unaware of the television's disappearance, but that someone had stayed in the unit "within a week or so." According to Topol, the management company verified with their "'cleaning people'" that the television had been there when the unit was cleaned.

The missing television had been pawned by someone named James Polse, and it was recovered from a pawn shop. The television had defendant's fingerprint on it. Defendant knew Polse but denied taking the television. Defendant testified that he did maintenance work for the property management company, including "troubleshooting on TVs," and he had done work in the roadside unit around the time he knew Polse.

Defendant was originally charged with two counts of first degree burglary, among other things, but the trial court reduced the charge for theft of the guitar (count one) from first degree to second degree burglary. Defendant also asked the trial court to reduce the charge for burglary of the vacation rental (count two) to second degree burglary, but the trial court denied that motion.

Following a court trial, the trial court found defendant guilty of numerous offenses, including second degree burglary for theft of the guitar (\$ 459; count one) and first degree burglary for theft of the television (\$ 459; count two). The trial court also found that defendant had a prior strike

conviction (§§ 667, subds. (b)-(i); 1170, subds. (a)-(d)) and a prior serious felony conviction (§ 667, subd. (a)(1)). The trial court struck the prior serious felony conviction for sentencing purposes, denied probation, and sentenced defendant to a term of 13 years 4 months in prison. However, the trial court subsequently recalled the sentence after determining it did not have discretion to strike the prior serious felony enhancement. Defendant was resentenced to a term of 14 years 4 months in prison.

DISCUSSION

I

Defendant contends his second degree burglary conviction for theft of the guitar from his stepdaughter's bedroom must be reversed because defendant cannot be convicted of burglarizing his own home. We agree.

A burglary is "an entry which invades a possessory right in a building" and "must be committed by a person who has no right to be in the building." (*People v. Gauze* (1975) 15 Cal.3d 709, 714.) For example, a legal co-tenant, who has an absolute right to enter his own apartment, cannot "be guilty of burglarizing his own home." (*Ibid.*) This is because such an entry "invade[s] no possessory right of habitation." (*Ibid.*) Although a number of cases have upheld burglary convictions predicated on entry into a residence by a victim's spouse, those cases involved defendants who were separated or living apart from the victims and, consequently, lacked an "unconditional possessory right to enter." (*People v. Davenport* (1990) 219

Cal.App.3d 885, 892; see *People v. Ulloa* (2009) 180 Cal.App.4th 601, 607-610, and cases cited therein.)

Here, however, defendant and his wife were both residing in the condominium as a married couple when the guitar was removed from the home. Although the record reflects that defendant's wife leased the condominium before she married defendant, and only her name was on the lease agreement, defendant and his wife nonetheless lived together in the condominium for seven years. Family Code section 753 provides that, except when protective orders or restraining orders are in effect, a spouse may not be excluded from the other spouse's dwelling. Defendant's wife did not file for divorce and obtain the restraining order until after the guitar was stolen.²

Under these particular circumstances, we are aware of no authority that would allow defendant's wife to exclude defendant from a room of the marital residence, much less allow defendant's stepdaughter to exclude him from a room in the family home. (Cf. *In re Richard M.* (1988) 205 Cal.App.3d 7, 17 [parents have a right of possession in their home superior to the right of children in that home].) Defendant had an unconditional possessory right to enter the home.

² See also Family Code sections 910, subdivision (a) [community estate is liable for a debt incurred by either spouse before or during marriage], and 914, subdivision (a)(1) [a married person is personally liable for a debt incurred for necessities of life of the person's spouse while the spouses are living together].

The trial court recognized that defendant's conduct did not comport with the purpose of the residential burglary statute to protect against unauthorized entry by intruders. (See *People v. Richardson* (2004) 117 Cal.App.4th 570, 574.) Primarily because defendant "was not an intruder or a stranger" and there was a lack of evidence that he was "dangerous" when he stole the guitar, the trial court reduced the charge in count one to second degree burglary. The Attorney General suggests the trial court's reduction of the charge from first degree to second degree burglary was a "windfall" to defendant caused by the trial court's confusion, because the burglary of "an inhabited dwelling house" constitutes burglary in the first degree (§ 460, subd. (a)) and there is no dispute the family condominium was inhabited. However, because defendant had an unconditional possessory right to enter the home when the guitar was stolen, we conclude there was no burglary at all. Accordingly, defendant's conviction on count one must be reversed.

II

Defendant also contends there was insufficient evidence to support his first degree burglary conviction for theft of the television from the vacation home, because the prosecution did not establish that the vacation home was inhabited at the time of the theft. Again, we agree.

"When reviewing a claim of insufficient evidence, we examine the entire record in the light most favorable to the prosecution to determine whether it contains reasonable, credible and solid evidence from which the jury could find the

defendant guilty beyond a reasonable doubt." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.) "'The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Farnam* (2002) 28 Cal.4th 107, 143.) When "findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings" (*People v. Earp* (1999) 20 Cal.4th 826, 887-888.)

A burglary is committed when entry is made into a variety of structures with the intent to commit a theft or any felony. (§ 459.) As we have explained, only the burglary of "an inhabited dwelling house" constitutes burglary in the first degree. (§ 460, subd. (a); *People v. DeRouen* (1995) 38 Cal.App.4th 86, 91, overruled on another ground in *People v. Allen* (1999) 21 Cal.4th 846, 866.) "A structure is a dwelling if it is ordinarily used for residential purposes. It is 'inhabited' if it is currently being used for residential purposes, even if it is temporarily unoccupied, i.e., no person is currently present." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 320, italics omitted.) A dwelling need not be the regular residence of its owners to be considered inhabited. Vacation homes and second homes are considered inhabited even if they are used only sporadically by their owners. (*People v. DeRouen, supra*, 38 Cal.App.4th at pp. 91-92.)

Temporary abodes, such as hospital and hotel rooms, can also qualify as inhabited dwellings. (*People v. Long* (2010) 189 Cal.App.4th 826, 835; *People v. Villalobos, supra*, 145

Cal.App.4th at p. 321.) This is so because, even if only for one night, “[p]eople have an expectation of freedom from unwarranted intrusions into a room in which they intend to store their personal belongings, sleep, dress, bathe and engage in other intimate, personal activities.” (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 318.) However, such dwellings must remain “‘inhabited’” by the occupant for an entry to constitute first degree burglary. (*Id.* at p. 317.)

“A structure that was once used for dwelling purposes is no longer inhabited when its occupants permanently cease using it as living quarters, and no other person is using it as living quarters.” (*People v. Meredith* (2009) 174 Cal.App.4th 1257, 1266.) In other words, formerly inhabited dwellings become uninhabited when the occupants have moved out permanently and do not intend to return to resume using the structure as a dwelling. (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 320.)

Thus, rental dwellings generally have been found to be uninhabited where the current tenants have left without intending to continue living there. (See *People v. Cardona* (1983) 142 Cal.App.3d 481, 482-484; *People v. Valdez* (1962) 203 Cal.App.2d 559, 561-563; see also *People v. Hughes* (2002) 27 Cal.4th 287, 354 [“Other cases reinforce the proposition that when a tenant moves out of an apartment without intending to return and continue living there, the premises become ‘uninhabited’ for purposes of the relevant statutes, even if the tenant leaves some property behind with the intent of retrieving

it later"].) In *People v. Valdez, supra*, 203 Cal.App.2d 559, the fact the landlord had signed a new lease with another tenant who had not moved in was found to be insufficient to establish the dwelling was inhabited. (*Id.* at pp. 562-563.) The dwelling remains unoccupied at least until the new occupants actually begin to move in. (See generally *People v. Hernandez* (1992) 9 Cal.App.4th 438, 441-442.) Accordingly, mere ownership of a dwelling for rental purposes does not establish that the dwelling is inhabited if there are no current tenants living there.

Here, the trial court found the evidence sufficient to establish first degree burglary, stating that the proper focus was on "the character of the use of the building," i.e., "whether the nature of the structure's composition is such that a reasonable person would expect some protection from unauthorized intrusion." The trial court concluded: "Even if no people were actually occupying [the roadside unit] at the time, it still had all the trappings of a home" and "the composition of the structure [wa]s such that it would render it a[n] inhabited dwelling."

But the foregoing authorities establish a distinction between (1) a vacation home occasionally used by the owner, and (2) a vacation rental unit occasionally used by renters but not by the owner. The authorities indicate that a vacation home occasionally used by the owner remains inhabited even when the owner is not using the home, but a vacation rental unit occasionally used by renters but not the owner is inhabited only

when the renters are using the unit. Although the California Supreme Court noted in *People v. Hughes, supra*, 27 Cal.4th 287 that the question “”turns not on the immediate presence or absence of some person but rather on the character of the use of the building’” (id. at p. 355), the apartment renter in *Hughes* had not completely moved out of the apartment yet and thus still inhabited the apartment.

In the present matter, however, the owner of the roadside unit testified that he and his family always stayed in the lakefront unit and had never stayed in the roadside unit. On this record, there is no evidence that the owner “inhabited” the roadside unit.

The People disagree, arguing that the testimony was unclear as to whether the owner’s extended family had stayed in the roadside unit, even if his immediate family had not. But although the owner initially testified that his family used “them” (i.e., the vacation rentals) on occasion, he subsequently clarified more than once that no one from his family had stayed in the roadside unit. Regardless of whether the owner “considered them to be available for use as vacation homes,” as asserted by the People, there is no evidence Topol’s family had ever stayed in the roadside unit.

Likewise, there is insufficient evidence to establish that the roadside unit was being used by renters at the time the television was stolen. Renters may have reported that the televisions were not working, but there is no evidence that any renter reported a television missing. Instead, there is

evidence that the television was discovered missing when the owner's employee entered the house "a week or so" after renters had stayed there. Bennett said she saw that the television was missing when she went to clean the roadside unit, but there is also evidence that the television was there when the unit was cleaned. In any event, the record is devoid of any "reasonable, credible and solid evidence" upon which to base a finding that the unit was inhabited when the television was stolen.

Accordingly, the evidence supports only a second degree burglary conviction.

III

Pursuant to section 667, subdivision (a), defendant received a five-year enhancement because he was convicted of a serious felony and had a prior serious felony conviction. He contends that because his first degree burglary conviction on count two must be reduced to second degree burglary, which is not a serious felony, and because none of his other convictions in this case are serious felonies, the enhancement must be stricken.

Defendant's analysis is correct. This issue can be addressed by the trial court upon remand for resentencing.

IV

Defendant's final contention is that when the trial court recalled his sentence and resentenced him, it improperly increased his sentence in violation of section 1170, subdivision (d). It is not necessary to address this contention, however,

because we will remand this matter to the trial court for resentencing.

DISPOSITION

Defendant's conviction for second degree burglary (count one) is reversed. His conviction for first degree burglary (count two) is modified to reflect a conviction of second degree burglary. The true finding on the special allegation pursuant to section 667, subdivision (a)(1), is reversed. The matter is remanded to the trial court for resentencing. The judgment is otherwise affirmed.

MAURO, J.

We concur:

HULL, Acting P. J.

BUTZ, J.