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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. FABIAN ANDY SANCHEZ, Defendant and Appellant.	C066742 (Super. Ct. No. CRF101266)

Defendant Fabian Andy Sanchez appeals his conviction for first degree burglary. (Pen. Code, § 459.)[1] On appeal, he contends the trial court violated his due process rights and the right to effective assistance of counsel by allowing "supplemental closing argument on the prosecutor's revised theory of intent after the jury twice announced it was deadlocked on the burglary charge." We requested supplemental briefing on whether defense counsel provided ineffective assistance of counsel based on a misunderstanding of the requisite intent for burglary.

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[1] Undesignated statutory references are to the Penal Code.

Based on defense counsel's misunderstanding of the elements of the offense with which defendant was charged, and the resulting effective concession of defendant's guilt in closing argument based on that misunderstanding, we conclude defendant was provided ineffective assistance of counsel and was prejudiced by defense counsel's deficient performance.[2] Accordingly, we reverse the burglary conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after the Neithercutt family arrived home on the evening of March 8, 2010, defendant walked through some bushes and into their yard. He walked into their driveway, opened the unlocked door of their truck and began rummaging through the truck. He yanked the GPS/DVD video screen off its mount, exited the truck and walked down the driveway. A few moments later, he came back up the driveway towards the garage, briefly looked in the truck then walked away from the truck again. Less than a minute later, defendant walked back up the driveway with his jacket covering his head and stepped into the garage. The garage door was open. After about 15-20 seconds, defendant exited the garage. He waved his hands at the security cameras and light. The light went off and he returned to the truck with his head still covered. Defendant looked through the truck again and took a white NETGEAR eight port router. As he left and shut the truck door, he wiped the door handle with his

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[2] Our resolution of this issue obviates the need for us to discuss further the issues raised by defendant.

sleeve. His jacket remained covering his head. The Neithercutt family remained in the home, unaware of defendant's unauthorized presence.

Jeff Neithercutt discovered the theft the next morning. He had installed a security system that included cameras and motion detection lights, so he reviewed the video surveillance and saw the "whole event" had been recorded. The video showed a young Hispanic man, with a widow's peak and mustache. He was wearing a "letterman" jacket with dark colors and blue jeans. The jacket did not appear to have any identifying patches or insignias. Neithercutt reported the theft to the police and turned over the surveillance video. The truck was also processed for fingerprints. Although a latent fingerprint was found on property inside the truck, it could not be matched to either defendant or the Neithercutts.

A few nights later, the Neithercutts went out to eat dinner. They saw a young man sitting on a bicycle and immediately recognized defendant. They called the police and followed him until police arrived. Jeff then identified defendant as the man who had burglarized his truck and defendant was arrested. Defendant's home was searched incident to arrest. None of the property taken from the Nethercutts was found in defendant's home.

Defendant was charged with first degree burglary, with a special allegation that the dwelling was occupied during the commission of the burglary. (§ 667.5, subd. (c)(21).) It was

also alleged defendant had previously been convicted of a serious felony. (§§ 667, subds. (a)(1), (c), (e)(1), 667.5, subd. (c), 1192.7, subd. (b); Welf. & Inst. Code, § 707, subd. (b).) He was also charged separately with a violation of probation.

Prior to the preliminary hearing, defendant was offered a plea deal to resolve both the burglary and probation violation cases. Defendant would plead to the burglary and admit the occupied dwelling and prior serious felony conviction enhancements. The People would dismiss the prior strike allegation. Defendant would be sentenced to an aggregate term of eight years and four months, consisting of a low term of two years on the burglary conviction, plus five years for the prior serious felony enhancement and 16 months on the separate probation violation. The offer was to remain open until the preliminary hearing. Defendant rejected the plea. During the preliminary hearing, defense counsel argued defendant should not be held to answer on the burglary charge, because even though the surveillance video showed him briefly entering the garage it could not be inferred he intended to steal from the garage, only that he intended to commit theft from the vehicle.

In closing argument at trial, the prosecution distinguished between the theft offense and the burglary, arguing defendant had to have the intent to steal when he entered the garage and describing the circumstances demonstrating that intent, including the fact that defendant was trying to conceal his

identity throughout the video. After arguing extensively about defendant's intent to steal, the prosecutor concluded the argument about intent saying, "The defendant's sole purpose and intent on being on the victim's property that night was to steal, was to commit theft, and what [*sic*] that did not suddenly change when he entered the garage. [¶] The other thing to concentrate on in this particular count is that he doesn't need to actually steal anything from the garage in order for it to be considered burglary. It's just the intent that he intended to go inside to steal. [¶] So the fact that he didn't take anything from the garage is really irrelevant as to the burglary count because really what we're looking at is the intent, what was his intent when he entered."

The prosecutor also specifically argued it was defendant who committed the crimes. The prosecutor pointed out the surveillance video, defendant's matching physical characteristics and clothing, and the Neithercutts' identifications of defendant as the perpetrator both on the street and in court.

In turn, based on the video surveillance, defense counsel conceded it was defendant who committed the offenses and conceded defendant had committed the petty theft from the truck and the prowling offense. He focused his closing argument on the burglary charge, and specifically on the issue of defendant's intent in entering the garage. Defense counsel argued defendant was only in the garage for a few seconds, and

that although there were valuable items in the garage, he did not take anything from it. He argued defendant always had an intent to steal from the truck, but there was no evidence he had any intent to steal from within the residence. In fact, counsel argued, the defendant went into the garage to hide his identity. "When you line up the facts, he has the intent to steal something from the [truck]. . . . His next intent, other than to steal, is not to be seen. [¶]. . . [¶] But there's a problem. He notices that there's a floodlight or a security camera or both . . . the suspect goes and tries to figure out a way to deactivate that. [¶] . . . [¶] [S]o he's not in the garage to steal. It's clear he's trying to get the light to go off. Why? To further the intent I just talked about, the intent not to be seen. [¶] We know he has an intent not to be seen because he still maintains the jacket over his head. [¶] . . . Once the light goes off, he resumes the theft of the vehicle."

The jury began deliberations on October 21, 2010. After a few votes, the jury indicated it was deadlocked and further argument on the issue of intent on the burglary count would be helpful. Following a bench conference, the court granted each attorney five minutes to present additional argument on the issue of intent as related to the burglary charge.

The prosecution argued the jury could look at any evidence surrounding the theft from the truck to determine defendant's intent when he entered the garage, including defendant's act of stealing items, concealing his identity, and that there was no

other purpose for him being on the property. Over objection, the prosecution also argued, “I must prove that the defendant entered and that when he entered, he intended to commit theft. [¶] Where that theft occurs does not have to be in the garage. His intent to steal can be the intent to steal from the truck as long as the entry was made to facilitate that crime. [¶] . . . [¶] The law does not require that the defendant intends to steal from the garage. It only requires that he enters with the intent to steal. . . . [¶] . . . [¶] Even if the defendant intended to steal from the truck, as long as he entered that garage in a manner that would facilitate that theft from the truck, that’s enough to prove . . . burglary. [¶] . . . [A]s long as the entry is made, is considered closely connected and made in order to facilitate . . . the intended crime, that’s enough.”

Defense counsel objected that the prosecution was instructing the jury with language that was not in the jury instructions. The trial court overruled the objection and indicated the prosecution was arguing the law and defense counsel would have the opportunity to do the same.

The prosecution concluded, “So even if you believe that the defendant entered that garage to make sure that his identity was concealed or that he was testing the security system and the motion sensor, if he was doing that to facilitate his theft to [*sic*] the truck, that is enough intent to prove first degree residential burglary.”

Defense counsel then argued that “first-degree burglary is the intent to steal when you enter the dwelling *something inside the dwelling* [*sic*].” (Italics added.) The prosecution objected to this statement as a misstatement of the law and the court clarified, “The law says that to -- the intent is the intent to commit theft. That’s the intent.” Defense counsel went on to argue defendant’s intent in entering the garage was to conceal himself, “[p]utting the jacket over his head was not good enough. He saw the light. That’s why he approached the sensor light. That’s why he tried to affect it and coincidentally he did. [¶] When the light turned off, as on the video, he resumed the theft.”

The jury found defendant guilty of all counts and found the special allegation attached to the burglary count true. In bifurcated proceedings, the court found the prior conviction allegations true. Defendant was sentenced to an aggregate term on both cases of 14 years and four months in prison. The sentence consisted of the midterm of four years for first degree burglary, doubled because of the strike, plus five years for the prior serious felony conviction. Defendant was sentenced to two years for petty theft with a prior, doubled due to the prior strike. This term was stayed under section 654. Defendant was also sentenced on the separate probation violation matter to 16 months, to run consecutively.

Defendant appealed the burglary conviction claiming, in allowing reargument the court had allowed the prosecution to

give the jury a pinpoint instruction on intent for burglary and essentially sanctioned that instruction, denying him his right to effective assistance of counsel.

Following our review of the record, we requested supplemental briefing from the parties on whether defense counsel rendered ineffective assistance because he did not understand the elements of the offense of burglary, specifically that defendant did not have to enter the garage with the intent to steal something from within the garage to be guilty of burglary. Both parties agree that defense counsel at trial rendered ineffective assistance. The parties disagree on whether defendant was prejudiced by defense counsel's deficient performance.

DISCUSSION

Burglary is an unlawful entry into a building "accompanied by the 'intent to commit grand or petit larceny or any felony.'" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041; § 459.) Section 459 does not require that a burglar intend to commit the target theft or felony within the premises entered. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749.) Rather, it is sufficient if the "entry is 'closely connected' with and is made in order to facilitate the intended crime." (*Id.* at p. 749.) Since as early as 1945, California courts "have rejected the invitation to read into the burglary statutes a requirement that a defendant enter premises with the intent to commit a crime 'therein.'" (*People v. Guthrie* (1983) 144 Cal.App.3d 832, 845-

846; see *People v. Shields* (1945) 70 Cal.App.2d 628, 637; *People v. Wright* (1962) 206 Cal.App.2d 184; *People v. Nance* (1972) 25 Cal.App.3d 925, 931–932; *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–696; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1246–1248.)

Counsel's most fundamental duty is "to conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order [to] make informed decisions on [defendant's] behalf, both at the pleading stage [citations], and at trial. [Citations.]" (*People v. Corona* (1978) 80 Cal.App.3d 684, 705-706, italics omitted; see also *People v. Ledesma* (1987) 43 Cal.3d 171, 222.) The record here establishes that from the earliest stages of the proceedings and throughout, defense counsel was operating under a misapprehension of the intent required for burglary. Specifically, counsel wrongly believed defendant had to have intended to enter the garage with the intent to commit a theft or felony within the garage. Counsel rested his defense on this erroneous view of the law. As a result, his defense counsel effectively argued defendant was guilty of burglary. Counsel's misunderstanding of the intent required for burglary demonstrates he failed in his most basic duty to adequately research the law.

The Attorney General properly concedes that "counsel plainly misunderstood the requisite intent for burglary" and that this misunderstanding constituted deficient performance

falling below the reasonable standard of competence. But, focusing on the state of the evidence, the Attorney General contends the error was not prejudicial as "it is not reasonably probable that but for counsel's error the result of the proceeding would have been different. Counsel's error was not 'so serious as to deprive . . . [defendant] of a fair trial, a trial whose result is reliable." We cannot agree.

To obtain a reversal, defendant must still establish prejudice flowing from counsel's deficient performance. "'"Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]'" (*People v. Avena* (1996) 13 Cal.4th 394, 418; fn. omitted.) Importantly, "the test for 'prejudice' is not solely one of outcome determination. Instead, the pertinent inquiry is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.' [Citation.] 'Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.' [Citation.]" (*In re Avena* (1996) 12 Cal.4th 694, 721-722.) "'"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

produced a just result." [Citation.]' [Citation.]" (*In re Cudjo* (1999) 20 Cal.4th 673, 687; quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686 [80 L.Ed.2d 674].)

Here, as a direct result of counsel's misunderstanding of the law, he argued a legal theory that was unsupported by the law on the intent required for burglary. He also failed to argue an identity defense, a defense that could be supported by the evidence. Where "counsel fails to argue in support of evidence showing a lawful defense, and instead argues a theory not recognized as a lawful defense, and upon which the jury will receive no instructions, counsel has incompetently deprived his client of a potentially meritorious defense." (*People v. Diggs* (1986) 177 Cal.App.3d 958, 970.) A potentially meritorious defense "is not necessarily one which, if presented, 'would result inexorably in a defendant's acquittal.' [Citations.]" (*People v. Pope* (1979) 23 Cal.3d 412, 425, fn. 15, disapproved on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10; *People v. Corona, supra*, 80 Cal.App.3d at p. 723.) Rather, it is a defense that is crucial. (*People v. Diggs, supra,* 177 Cal.App.3d at p. 970.) The failure to obtain an appropriate adjudication of a crucial defense deprives the defendant of constitutionally adequate assistance and renders the trial fundamentally unfair. (*Ibid.*; *People v. Corona, supra,* 80 Cal.App.3d at p. 723; *People v. Rodriguez* (1977) 73 Cal.App.3d 1023, 1028.)

The prosecution's case rested heavily on the surveillance video and the Neithercutts' identifications of defendant as the person in the video. The video shows a man with a widow's peak and moustache wearing an oversized "letterman" jacket and jeans. A few days after the burglary, the victims saw a person on the street wearing the "exact same clothing" as the burglar and identified him as the culprit. No physical evidence tied defendant to the burglary. One latent print was found in the truck, but it could not be matched to defendant. A search of defendant's home did not reveal any property directly linked to the burglary.

The prosecution specifically addressed the issue of identity in its closing argument. Defense counsel, on the other hand, did not challenge the quality of the surveillance images, the reliability of the Neithercutts' identifications both on the street three nights after the burglary or in court, and did not challenge the credibility of eyewitness identifications in general. Nor was there argument about the commonality of defendant's physical characteristics and clothing. Instead, defense counsel conceded defendant was the person shown on the surveillance video and relied on a legal theory without legal support to effectively argue defendant was guilty of burglary. Counsel's failure to obtain an appropriate adjudication of a crucial defense rendered the trial fundamentally unfair. (*People v. Diggs, supra,* 177 Cal.App.3d at p. 970.)

"'The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted —- even if defense counsel may have made demonstrable errors —- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.'" (*In re Avena, supra,* 12 Cal.4th at p. 727.) On the facts of this case, we cannot conclude that a true adversarial criminal trial was conducted.

Defendant was entitled to advice from an attorney who properly understood the elements of the crime with which defendant was charged and the facts the prosecution would have to prove to establish the criminal elements. Instead, defendant had an attorney who misunderstood the elements of the charged offense, and relied on that misunderstanding to provide defendant's defense. The error at issue here is not a trial error that we can assess in light of the evidence received at trial. (See *People v. McDowell* (1968) 69 Cal.2d 737, 750-751.) This is not a case where the evidence adduced at trial is reflective of informed tactical decisions and strategy. Defense counsel's strategic and tactical decisions were not informed, they were misinformed. The adversarial process is seriously undermined when defense counsel does not know the intent required for the offense with which defendant is charged and

does not research the relevant law. When that misunderstanding leads counsel to forego a potentially meritorious defense and effectively argue defendant is guilty, we cannot have faith in the results of the trial as being reflective of a fair adversarial process. (See *Ibid.*; see also *People v. Shells* (1971) 4 Cal.3d 626, 630-631.) Accordingly, we must reverse the burglary conviction.

DISPOSITION

The burglary conviction is reversed and the matter remanded for further proceedings.

HOCH, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.