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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS MARTIN CUMMINGS,

Defendant and Appellant.

C070432

(Super. Ct. No.
CRF110003631)

Granted probation, defendant Nicholas Martin Cummings appeals his conviction of first degree burglary, contending the evidence was insufficient to establish the house was inhabited at the time of the burglary, and the trial court erred in denying his motion for acquittal on the charge of first degree burglary given the insufficiency of the evidence. Additionally, defendant argues the prosecutor committed prejudicial misconduct in making misstatements of fact and law on the question of whether the house was inhabited.

We agree that the house was not inhabited and thus the evidence does not support a conviction of first degree burglary. Our disposition of the evidentiary issue renders consideration of the prosecutorial misconduct claim unnecessary. We will reduce the offense to second degree burglary and remand the matter to the trial court for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

The critical facts in this case were considered in the appeal of Penny Lynn Burkett, tried with defendant. With appropriate modifications, the summary of facts set forth in our opinion in that case (*People v. Burkett* (2013) 220 Cal.App.4th 572 (*Burkett*)) will suffice for the present opinion as well:

From 2008 to April 2011 Barbara Mattos rented a home located on Michigan Avenue in West Sacramento. Her landlord was Mersa Noor. In March or April 2011 Noor gave Mattos a one-month notice to vacate with the idea she would be out of the home by May 3 or 4. Noor lived with his family on Carmel Bay Road in West Sacramento but was losing his home to foreclosure and needed to move into the Michigan Avenue home. He did not have an exact date by which he had to move out of his Carmel Bay Road home.

Mattos removed all her belongings from the Michigan Avenue home before April 30, 2011. Beginning April 28 and finishing late April 30, Mattos painted and cleaned the home with the help of several people. Mattos last viewed the inside of the home when she removed a vacuum or shampooer on May 1. There was nothing left inside the home. Mattos turned off all the utilities effective May 1. She had all the keys to the residence and attempted to contact Noor to return the keys to him, but she had been unsuccessful. Mattos called Noor about the burglary and returned the keys after that.

Noor testified that he did not have any keys to the Michigan Avenue residence. Noor never testified that he turned the utilities back on. He planned to move his family into the Michigan Avenue residence sometime after May 4. He had not moved anything

into the home. Although he stayed a few nights after the May 2 burglary and used just a blanket, he did not move into the Michigan Avenue home until May 8 or 9.

About 2:00 p.m. on May 2, 2011, Jason Davis and Regena Langhorst, relatives of Mattos, drove by the Michigan Avenue residence on the way to Mattos's new home, located nearby. As they passed the residence, they observed defendant and Penny Lynn Burkett emerge from the backyard through a gate and walk along the driveway toward the street. Davis stopped the car, and they got out and confronted the pair. Defendant, who had a backpack, introduced himself as "Mike." Defendant and Burkett stated that they were there to see "Jamie."

Davis and Langhorst knew Jamie Pokrywka dated Mattos's nephew George Hansborrow. Pokrywka and Hansborrow had often stayed with Mattos when she lived in the Michigan Avenue residence. Pokrywka had helped clean and paint. Langhorst was aware of a serious fight between Pokrywka and Hansborrow and that Pokrywka had been arrested.

Langhorst told defendant and Burkett that "Jamie" was probably with "George," but the pair did not know "George" and stated that they were going to look for "Jamie" at her brother's place on Pecan Street. Davis knew that Pokrywka had a brother but he did not live on Pecan Street. Defendant claimed "Jamie" had another brother. Davis and Langhorst drove away only to be flagged down by defendant and Burkett, who wanted a ride. Davis and Langhorst refused.

About 10 to 30 minutes later, Davis and Langhorst returned to the Michigan Avenue residence and discovered that it had been broken into through a kicked-in door. Finding an assortment of tools on the floor and pipes and other things amiss, they called the police. A furnace had been pulled out and sheetrock had been pulled off the garage wall. Shower handles, pipes under the bathroom sink, and a towel rack were missing. The total damage was greater than \$400.

The police located defendant and Burkett within an hour and not far from the Michigan Avenue residence. Defendant had wrenches, gloves, and other tools in his backpack. He also had a small envelope with snippets of copper-colored wire. Defendant first said he and Burkett rang the doorbell, looking for Burkett's friend "Jamie." Defendant gave the officers other stories but finally admitted entering the residence; he claimed he did not plan to steal anything. Defendant's fingerprints were found on a pipe inside the home. Burkett's fingerprints were found on the inside of the furnace closet door. Burkett often went to a recycling center with scrap metal and did so about 10:00 a.m. on May 2.

Defendant was charged by information with burglary of an inhabited dwelling (Pen. Code, § 459; undesignated section references are to this code), felony vandalism (§ 594, subds. (a), (b)(1)), and possession of burglary tools (§ 466), a misdemeanor. It was also alleged that he had four prior prison terms. (§ 667.5, subd. (b).) Following his plea of not guilty and denial of the prior prison term allegations, evidence was presented to a jury on the charges against him. His motion for acquittal at the end of the prosecution's case was denied. The allegation of four priors was tried by the court alone and found to be true. The jury found the burglary was of an "inhabited house" and found defendant guilty as charged. The trial court imposed a state prison sentence of 10 years, including a term of six years for first degree burglary, a three-year term (stayed) for vandalism, and a one-year term on each of the four prior prison terms, but suspended execution of the sentence, placing defendant on formal probation for four years.

Defendant filed a timely notice of appeal.

DISCUSSION

As we pointed out in *Burkett, supra*, 220 Cal.App.4th 572, California recognizes two degrees of burglary. Section 460 provides that burglary of an "inhabited dwelling house" constitutes first degree burglary. (§ 460, subd. (a).) All other kinds of burglary, including burglary of any other house as well as burglary of a variety of other buildings,

vehicles, and containers, are of the second degree. (§ 460, subd. (b).) Like his codefendant in *Burkett*, defendant here does not challenge the sufficiency of the evidence to support a conviction for burglary but disputes the sufficiency of the evidence to support the jury's finding that the dwelling house that he entered "with intent to commit grand or petit larceny," as prohibited in section 459, was "inhabited," an essential element of first degree burglary.

Obviously, our analysis of the same issue in *Burkett* applies with equal force to defendant's argument here. In *Burkett*, we traced the history of the burglary statutes in California. Though for a time California departed from common law notions of burglary that centered on protection of the home and its inhabitants, the enactment of the language set forth in section 459 returned California's burglary law in some measure to its common law roots. Section 459 provides, in pertinent part, that " 'inhabited' means currently being used for dwelling purposes, whether occupied or not."

Addressing the proper construction of this language, the People argued in *Burkett*, as they do here, that we should apply a multifactor analysis, with the most important factor being the intent of the victim. Quoting *People v. Cardona* (1983) 142 Cal.App.3d 481, 484, the People declare: " 'The dispositive element is whether the person with the possessory right to the house views the house as his dwelling.' " We acknowledge the possessor's intent can be an important factor in determining habitation and may be decisive, as it was in *Cardona* and other cases relied on by the People.

However, "[w]hether a person inhabits a place—whether the person has made a place his or her place of residence—is a question of fact. The prosecution bears the burden of establishing beyond a reasonable doubt that someone inhabited the Michigan Avenue home. In reviewing a challenge to the sufficiency of the evidence, we 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty

beyond a reasonable doubt.’ (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738]; see *People v. Gonzales* (2012) 54 Cal.4th 1234, 1273 [144 Cal.Rptr.3d 757, 281 P.3d 834].) Here, there is no evidence that the burglarized residence was inhabited, that it was currently being used by someone for dwelling purposes. Under established California precedent, it is not enough to show the home was suited for use as a residence and its owner had declared his intent to move in or that it had been recently used or would be imminently used. Nor is there evidence that its owner was merely away temporarily.” (*Burkett, supra*, 220 Cal.App.4th at p. 582.)

Under these circumstances, the evidence does not support the jury’s verdict that the burglary was in the first degree and the finding must be reversed. Reversal of the evidentiary issues raised by defendant renders moot his claim of prosecutorial misconduct.

DISPOSITION

The jury’s finding that the burglary was in the first degree is reversed. The burglary is second degree. The matter is remanded to the trial court for resentencing. The judgment is otherwise affirmed.

RAYE, P. J.

We concur:

NICHOLSON, J.

MURRAY, J.