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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONON JAMES ALSTON,

Defendant and Appellant.

C070453

(Super. Ct. No. 11F04074)

A jury convicted defendant Leonon James Alston of first degree burglary. (Pen. Code, § 459.)¹ He now contends (1) the trial court erred in failing to instruct sua sponte on the lesser included offense of attempted burglary, and (2) the trial court also should have instructed sua sponte on trespass, because that was a lesser included offense in this case under the accusatory pleading test.

¹ Undesignated statutory references are to the Penal Code.

We conclude (1) the trial court did not err in omitting an instruction on attempted burglary, because there is no evidence on which the jury could have found defendant guilty of attempted burglary but not burglary; and (2) on this record, trespass is not a lesser included offense of burglary under the accusatory pleading test.

We will affirm the judgment.

BACKGROUND

In the evening of June 6, 2011, Sandra Ortiz was in her living room when her two small dogs began barking. She looked out her window and saw defendant. Ortiz had seen defendant in the neighborhood a number of times and near the house twice before. Defendant was on a bicycle, stopped near her car, and was using a cell phone. He appeared to be looking in the window of her car and stayed there for a long time. As she watched, defendant approached the house next door. That house had been vacant for over a year, and frequently attracted transients. Ortiz changed vantage points and watched defendant from the bathroom window. She heard a loud noise and saw defendant scaling the fence into her yard.

Ortiz called 9-1-1. She watched defendant enter her backyard, approach a parked motorcycle in the yard, and go to her back door. She heard the doorknob turning, but the door did not open. She heard defendant forcibly remove the screen covering the bathroom window. She saw defendant put his fingers inside the window to push it open. The window had previously been nailed, so it could not be opened fully. After defendant opened the window a few inches, he put his whole arm inside to try to remove the nail and his face pressed up against the glass of the bathroom window. Ortiz reported to the 9-1-1 operator "He's coming in my house." Defendant did not get inside the house.

Police officers arrived at the scene approximately six minutes after receiving the 9-1-1 dispatch. They saw defendant standing in the backyard of Ortiz's home and ordered him not to move. Ortiz identified defendant as the prowler. She pointed out the screen that had been removed from the window. Ortiz told officers defendant had tried to

stick his head through the window, but could not get into the house. She also indicated defendant had put both hands inside the window trying to feel around and push the window open further. Both on the night of the incident and a few months later, she told officers that defendant had ripped the screen off the bedroom window, but had not entered the home because the window was nailed shut. Ortiz maintained she told the officers defendant removed the screen from the bathroom window, not the bedroom window.

Ortiz told a defense investigator defendant did not put his head through the window. He had tried to put his head through, but could not because the window did not open fully. She also told the defense investigator defendant's hands were the only thing that crossed the threshold of the window and defendant never entered the house. Ortiz clarified that when she said defendant had not entered the house, she meant his whole body did not physically come all the way inside the house.

The information charging defendant with first degree burglary (§ 459) alleged “defendant did unlawfully enter an inhabited dwelling house occupied by SANDY ORTIZ, with the intent to commit larceny and any felony.”

The jury was instructed with CALCRIM No. 1700 that “[t]he defendant is charged in Count 1 with burglary in violation of Penal Code section 459. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant entered a building; [¶] AND [¶] 2. When he entered a building, he intended to commit theft.” The jury was also instructed that “[t]he People do not have to prove that the defendant actually committed theft. Under the law of burglary, a person enters a building if some part of his or her body penetrates the area inside the building's outer boundary. A building's outer boundary includes the area inside a window screen.”

The jury found defendant guilty as charged. In bifurcated proceedings, the trial court found three prior conviction allegations true. The trial court sentenced defendant to

an aggregate term of 19 years in prison, imposed various fines and fees, and awarded 303 days of presentence custody credit.

DISCUSSION

I

Defendant contends the trial court erred in failing to instruct sua sponte on the lesser included offense of attempted burglary.

A trial court has a sua sponte obligation to instruct on lesser included offenses “ ‘if the evidence “raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.” ’ [Citation.]” (*People v. Moon* (2005) 37 Cal.4th 1, 25.)

“An 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.) “In any criminal prosecution, ‘The jury . . . may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.’ (§ 1159.) Thus, where there is evidence that would absolve the defendant from guilt of the charged offense but would support a finding of guilt of attempt to commit the charged offense, an instruction on attempt is mandatory. [Citation.]” (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1454.)

Defendant argues the trial court should have instructed on attempted burglary because there was a “factual inconsistency as to the element of ‘entry’ The jury could have reasonably found that [defendant] intended to enter the residence and commit the burglary, but was not successful in entering the window.”

But to prove burglary, “it has long been settled that ‘[a]ny kind of entry, complete or partial, . . . will’ suffice. [Citations.] All that is needed is entry ‘inside the premises’ [citation], not entry inside some inner part of the premises.” (*People v. Valencia* (2002) 28 Cal.4th 1, 13, italics omitted (*Valencia*), disapproved of on a different point by *People v. Yarbrough* (2012) 54 Cal.4th 889, 894.) “It is settled that a sufficient entry is made to

warrant a conviction of burglary when any part of the body of the intruder is inside the premises.” (*People v. Failla* (1966) 64 Cal.2d 560, 569.) Putting a hand or fingers in an open window constitutes an entry for purposes of burglary. (*People v. Massey* (1961) 196 Cal.App.2d 230, 236.) Furthermore, “penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute even when the window itself is closed and is not penetrated,” because it violates both the occupant’s possessory interest in the building and her personal interest in freedom from violence that might ensue from an unauthorized intrusion. (*Valencia, supra*, 28 Cal.4th at p. 13, fn. omitted.)

Defendant’s argument is based upon asserted inconsistencies in the statements made by Ortiz. Defendant says Ortiz (1) told officers defendant did not “enter” the home, but ripped the screen off the bedroom window; (2) told the defense investigator only defendant’s hands crossed the threshold of the window; (3) later told officers she saw defendant feeling around the window trying to push it in and to, unsuccessfully, stick his head in the window; and (4) testified at trial that defendant removed the screen from the bathroom window, put his whole arm inside the window and then on cross-examination testified he only put his fingers through the window, not his whole hand.

Even if Ortiz’s testimony had some inconsistencies, they do not provide a basis on which defendant could be absolved of burglary. Even under defendant’s version of Ortiz’s statements, she described an actual entry into her home, not an attempt. In each statement, Ortiz indicated that either defendant’s hands, fingers or arm entered through the window and in each statement she maintained he removed a window screen. There was no basis for the jury to find defendant did not successfully enter the home.

II

Defendant also contends the trial court should have instructed sua sponte on trespass. He admits trespass is not a lesser included offense under the elements test, but

he argues the allegations in the information rendered trespass a lesser included offense under the accusatory pleading test.

Under the accusatory pleading test, we look to “whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime. [Citation.]” (*People v. Moon, supra*, 37 Cal.4th at pp. 25-26.) We do not consider the evidence adduced at trial. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369-371.)

Residential burglary is the entry of a dwelling house with the intent to commit a felony. (§§ 459 & 460, subd (a).) Criminal trespass, also known as “unauthorized entry,” is the entry of a residence without the owner’s consent. (§ 602.5, subd. (a).) It is settled that trespass is not a lesser included offense of burglary under the elements test, because burglary may be committed by a person who has permission to enter a dwelling. (*People v. Lohbauer, supra*, 29 Cal.3d at p. 369.) Nonetheless, defendant contends the accusatory pleadings test is satisfied. He points to the language of the information, which alleged defendant “unlawfully” entered Ortiz’s home. He says the nonconsensual entry required for trespass is necessarily included in the allegation that defendant committed an unlawful entry.

In a burglary, however, the entry is unlawful because it is committed with the intent to commit a felony. Here, the information alleged defendant “unlawfully” entered Ortiz’s home “with the intent to commit larceny and any felony.” It did not allege that defendant “unlawfully” entered Ortiz’s home “without the owner’s consent.” The information alleges it was defendant’s intent to steal that made his entry unlawful, not the owner’s lack of consent. Accordingly, the information did not allege a trespass under the

accusatory pleading test, and the trial court did not have a sua sponte duty to instruct on trespass.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

BLEASE, Acting P. J.

HULL, J.