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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. SHONE CHRISTOPHER LACEY, SR., Defendant and Appellant.	C075509 (Super. Ct. No. CRF131665)

Defendant Shone Christopher Lacey, Sr., appeals following a jury trial in which he was found guilty of second degree burglary. He argues that the trial court's failure to instruct the jury sua sponte on trespass created prejudicial error. Specifically, he contends that because the accusatory pleading alleges that he "unlawfully enter[ed]" the building, a jury instruction for trespass should have been given as a lesser included offense. As an alternate theory, he contends that a jury instruction for trespass was required by his constitutional right to present a defense. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On April 25, 2013, at approximately 5:30 in the morning, the pastor of the West Sacramento Community Church received a telephone call that the church's alarm system had been triggered. The pastor asked the alarm company to call the police and he went to the church. When he arrived, eight to ten minutes later, he noticed the gate to the parking lot was open and a board covering a window in a door had been unscrewed and the window removed. The pastor walked to the door and looked inside but did not see anything, so he returned to the front of the church, opened the front door, and turned off the alarm. He turned on a light and as he was walking through the church, he saw defendant wearing a hooded sweatshirt running out the far door of the room.

The pastor pursued defendant, and as he opened the door to follow defendant outside the pastor grabbed a three-foot long piece of baseboard that was lying nearby. When the pastor got outside, he saw defendant leaning over a short brick wall that separated the church parking lot from the neighboring motel placing items over the wall. The pastor yelled to defendant, who turned, and as the pastor approached him, defendant swung his arm at the pastor. The pastor hit defendant in the head with the piece of baseboard, and defendant fell to the ground unconscious. The pastor removed defendant's wallet from his pocket for identification and attempted to pull defendant's pants down to prevent him from running away. As the pastor kept watch over defendant, onlookers helped him call the police. The pastor looked at the items behind a dumpster near the brick wall and confirmed they included various electronics and other items from inside the church. Defendant was also carrying a bag that contained microphone equipment from the church, a box cutter, and a battery-powered drill belonging to the church. Defendant told the pastor he had heard the alarm and saw that no one came, and also that he was there "cleaning up."

Defendant was charged with second degree robbery (Pen. Code, §§ 211 & 212.5, subd. (c); count 1)[1] and second degree burglary (§ 459; count 2). It was further alleged as to both counts that defendant previously had been convicted of a serious felony and had served a prior prison term. A jury found defendant guilty of second degree burglary and, following a bifurcated trial on the enhancements, found true the allegations that defendant had suffered a prior serious felony conviction and a prior prison term.[2] The trial court sentenced defendant to an aggregate term of seven years (the upper term of three years, doubled due to his prior serious felony conviction, plus one year due to his prior prison term).

DISCUSSION

A. *Trespass as a Lesser Included Offense*

Defendant contends the trial court prejudicially erred by not instructing the jury on what he asserts is the lesser included offense of trespass as codified in section 602, subdivision (m). He argues the failure to give the instruction was prejudicial because there was substantial evidence from which the jury could conclude defendant entered the church without intent to commit theft, his intent was a critical issue at trial, and the accusatory pleading alleged defendant entered the church "unlawfully." Contrary to defendant's allegations, we conclude that the accusatory pleading in this case did not include trespass, as codified in section 602, subdivision (m), as a lesser included offense of burglary. Therefore, the trial court did not err in failing to instruct the jury sua sponte on trespass.

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[1] Undesignated statutory references are to the Penal Code at the time of defendant's crimes.

[2] The robbery count was ultimately dismissed following a hung jury in both the original trial and a retrial on that count.

"An appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) "A trial court must instruct the jury sua sponte on an uncharged offense that is less than, and included in, a greater offense with which the defendant is charged 'only if [citation] "there is evidence" ' [citation], specifically, '*substantial evidence*' [citation], ' "which, if accepted . . ., would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citation]." (*Ibid.*) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense [(the elements test)], or the facts actually alleged in the accusatory pleading [(the accusatory pleading test)], include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117 (*Birks*).) Here, defendant relies solely on the accusatory pleading test.[3]

Section 602, subdivision (m), the statute cited by defendant, states that a trespass occurs when a person "[e]nter[s] and occup[ies] real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession." The accusatory pleading alleged defendant "willfully and unlawfully enter[ed] a West Sacramento Community Church with the intent to commit Theft." Defendant argues the use of the term "unlawfully" in the information is equivalent to the statutory element of trespass that a person "enter[s] . . . without consent." Even assuming that is true (which

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[3] Defendant concedes that our Supreme Court has established that trespass is not a lesser necessarily included offense of burglary under the elements test. (*Birks*, *supra*, 19 Cal.4th at p. 118, fn. 8 ["It appears well settled that trespass is not a lesser necessarily included offense of burglary, because burglary, the entry of specified places with intent to steal or commit a felony (§ 459), can be perpetrated without committing any form of criminal trespass (see § 602)"]; accord *People v. Taylor* (2010) 48 Cal.4th 574, 622.)

we do for discussion purposes only), we still conclude trespass, as charged in the accusation in this case, is not a lesser included offense of burglary.

Significant to our analysis, section 602, subdivision (m) is not violated when someone "enter[s] private property without consent *unless such entry is followed by occupation thereof* without consent." (*People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 909-910, italics added; see also CALCRIM No. 2931 [elements of trespass under § 602, subd. (m)].)[4] For purposes of section 602, subdivision (m), "occupy" means "a nontransient, continuous type of possession" resulting in "some degree of dispossession and permanency." (*Id.* at p. 910; see also *id*. at pp. 910-911; accord *In re Y.R.* (2014) 226 Cal.App.4th 1114, 1119 [one hour to several hours spent in the bathroom of a condominium complex not sufficient to constitute occupying].) No occupation of the church is alleged here and, for this reason, the accusatory pleading test cannot be satisfied. We conclude trespass, as codified in section 602, subdivision (m), is not a lesser included offense of burglary when the operative accusatory pleading alleges unlawful entry, but does not allege the requisite possession of the premises. Our Supreme Court came to the same conclusion in dicta in *Birks*, where it held that the burglary allegations in that case (that defendant " 'did willfully and unlawfully enter a commercial building . . . with intent to commit larceny and any felony' ") did not necessarily include criminal trespass. (*Birks*, *supra*, 19 Cal.4th at p. 118, fn. 8.)

B. *Defendant's Right to Present a Defense*

Defendant further argues that even if trespass is not a lesser included offense, the court should have instructed the jury sua sponte on trespass because the absence of that instruction prevented him from presenting his theory of the case, and thereby violated his

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[4] *Wilkinson* interprets then section 602, subdivision (*l*), later renumbered to the current subdivision (m). (Stats. 2003, ch. 805, § 1.3, p. 5490 [renumbering section 602, subdivision (*l*) to subdivision (m)].)

federal due process rights.[5] We disagree. "[A] claim that a court violated a [defendant]'s due process rights by omitting an instruction requires a showing that the error 'so infected the entire trial that the resulting conviction violated due process.' [Citation.]" (*Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1012, 1029.) Here, defendant's theory of the case—that he entered the church for reasons other than to commit theft—was presented to the jury both through defendant's statement to the pastor and defense counsel's closing argument. Further, the jury was instructed not to convict defendant if it found the prosecution had not proved defendant entered with the intent to commit theft beyond a reasonable doubt, and the jury demonstrated its willingness not to convict by rendering no verdict on the robbery count. Therefore, we conclude the trial court's failure to instruct the jury sua sponte on trespass did not deprive defendant of his right to present a defense, did not render the trial unfair, and did not violate defendant's federal due process rights.

DISPOSITION

The judgment is affirmed.

RENNER, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.

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[5] Defendant concedes the same argument cannot be made with regard to state law. (*People v. Schmeck* (2005) 37 Cal.4th 240, 292 ["[A] trial court has no duty to instruct on an uncharged lesser related offense when requested to do so by the defendant [citation] and, therefore, it is clear that the trial court did not err in failing sua sponte to so instruct on [such a] point"].)