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

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC WAYNE BROWN et al.,

Defendants and Appellants.

C076011

(Super. Ct. No. 13F06461)

A jury acquitted codefendants Eric Wayne Brown and Melissa Monique Linithicumn of residential burglary but convicted them of receiving stolen property. Sentenced each to double the two-year midterm or four years in state prison due to each having a strike prior, defendants appeal.

Defendants contend the trial court erred prejudicially by refusing a defense request to instruct the jury on mistake of fact. We find the trial court did not commit prejudicial error. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

During the evening of October 4, 2013, defendants entered a home they believed had been foreclosed upon, apparently to spend the night. Defendants learned about the home from another homeless person. When they arrived at the home, it appeared abandoned. The lawn was overgrown and the back door was wide open when they entered. When the police responded to a neighbor's 911 call, defendants exited the home with personal belongings of the home's owner in their pockets.¹

The home, in fact, had not been foreclosed. The homeowner, Peggy Davis, was a 94-year-old woman residing temporarily in a rehabilitation facility following an injury. While Davis was recovering from her injury, her home apparently had become a shelter for the local homeless and had been ransacked. Furniture had been destroyed, pictures had been taken off the walls, and it appeared everything had been searched for valuables. Davis's personal belongings had been strewn throughout the house, and defendants apparently found them in plain sight.

An information charged defendants with two counts: first degree residential burglary (Pen. Code, § 459—count one)² and receiving stolen property (§ 496, subd. (a)—count two). In addition, it was alleged that each defendant had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and that defendant Linithicumn had a prison prior (§ 667.5, subd. (b)). As noted, the jury acquitted defendants of the burglary but convicted them on count two. At sentencing, the court struck Linithicumn's one-year prior prison term enhancement. Each defendant admitted a strike prior. In February 2014, the trial court sentenced each defendant to four years in prison, consisting of the midterm of two years, doubled for the strike prior.

¹ The belongings found on defendants included jewelry, collectible coins, and silverware.

² Undesignated statutory references are to the Penal Code.

DISCUSSION

I. The Trial Court Erred by Refusing the Defense Request to Instruct on Mistake of Fact Regarding the Receiving Stolen Property Charge

Defendants contend the trial court erroneously refused defendant Linithicumn's request to instruct the jury on mistake of fact on the receiving stolen property charge.³ We agree. Specifically, defendant Linithicumn requested the following instruction:

“The prosecution has the burden of proof beyond a reasonable doubt as to the element of intent. When a mistake of fact disproves any criminal intent which is a requisite element of any crime, the mistake is a defense to the crime.

“When a person commits an act based on a mistake of fact, his or her guilt or innocence is determined as if the facts were as he or she perceived them.

“Thus, a person is not guilty of a crime if he or she commits an act under an honest belief in the existence of certain facts and circumstances which, if true, would make such act lawful. The person must actually hold the belief even if unreasonable.

“Thus, if you find that a defendant had an honest mistake of fact with regard to entering abandoned property, and that such mistake of fact negated the required intent under my instructions, you must find him or her not guilty of any allegation where such intent has been negated.”

As for the legal principles that apply to this instruction request issue, “In determining whether the evidence is sufficient to warrant a [requested] instruction [on a defense], the trial court does not determine the credibility of the defense evidence, but only whether ‘there was evidence which, if believed by [a reasonable] jury, was sufficient

³ In denying this defense request, the trial court noted that a mistake of fact—concerning the nature of the building entered—is not a defense to a charge of residential (first degree) burglary; defense counsel, however, also requested the mistake of fact instruction on the charge of receiving stolen property.

to raise a reasonable doubt [pursuant to the defense].’ ” (*People v. Salas* (2006) 37 Cal.4th 967, 982; see *People v. Hanna* (2013) 218 Cal.App.4th 455, 462 (*Hanna*).) Furthermore, to convict a defendant of receiving stolen property, the defendant must “know” the property was stolen; and since receiving stolen property is a specific intent crime with regard to this knowledge element, a particular defendant’s actual belief in the mistake of fact suffices for the mistake of fact defense to apply, even if that belief is not a reasonable one. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425-1426 (*Russell*).)

The record contains sufficient evidence that defendants believed the house was abandoned, in light of its unkempt yard, ransacked condition, wide-open back door, and allegedly foreclosed status. Further, defendant Linithicum testified she understood that when a house is foreclosed upon, the owners “have to pack up” and things get left. A reasonable jury could conclude from this evidence that defendants actually believed the personal property (comprising the charge of receiving stolen property) had been abandoned and did not belong to anyone. Consequently, the trial court erred in denying the requested instruction.

II. The Trial Court’s Error in Refusing the Request for Instruction on Mistake of Fact Was Harmless

“ ‘Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.] [Citation.] Under this standard, a conviction ‘may be reversed . . . only if, “after an examination of the entire cause, including the evidence” [citation], it appears “reasonably probable” the defendant would have obtained a more favorable outcome had the error not occurred [citation].’ ” (*Hanna, supra*, 218 Cal.App.4th at pp. 462-463.)

For three reasons, we find the error here harmless.

First and foremost, the trial court properly instructed the jury that to convict defendants of receiving stolen property, defendants had to *know* that the property was

stolen. (CALCRIM No. 1750; § 496.) Thus, the essence of the defense requested instruction on mistake of fact regarding the charge of receiving stolen property was covered in this instruction on knowledge. The guilty verdict on this count indicates the jury found that defendants knew the property was stolen rather than abandoned.

Second, at trial, defendant Linithicumn also admitted so freely that the personal property at issue did not belong to her that she triggered an “asked and answered” objection which was sustained, and she further admitted she had lied to the responding police officers when she told them some of the items were hers. Defendant Brown did not testify at all.

Third and last, the present case is not akin to *Russell*, as defendants contend, where a failure to give a mistake of fact instruction was found prejudicial on a conviction for receiving a stolen motor vehicle.

In *Russell*, the defendant came across a motorcycle near trash cans behind a motorcycle repair shop. (*Russell, supra*, 144 Cal.App.4th at p. 1421.) The *Russell* defendant took several affirmative steps to try to identify the owner, including inquiring within the motorcycle shop and going to the last recorded owner’s address to have the motorcycle signed over to him. (*Id.* at p. 1422.) Furthermore, the motorcycle was not registered and, when the defendant was issued a traffic citation, the officer ran the plates and told the defendant it had not been reported stolen. (*Ibid.*) The court in *Russell* found that had the jury been instructed on mistake of fact—specifically, that an actual belief that the property was abandoned was enough to defeat the charge—it was reasonably probable that the defendant would have obtained a more favorable result. (*Id.* at p. 1433.)

In *Russell*, the evidence that defendant believed the motorcycle had been abandoned was “relatively strong.” (*Russell, supra*, 144 Cal.App.4th at p. 1433.) Although the evidence of abandonment here was sufficient to trigger the requested instruction, that evidence did not rise to *Russell*’s feat of strength. It is not reasonably

probable that the erroneously refused instruction would have resulted in a decision more favorable to defendants. Accordingly, we do not find this error prejudicial.

DISPOSITION

The judgment is affirmed.

_____ **BUTZ** _____, J.

We concur:

_____ **NICHOLSON** _____, Acting P. J.

_____ **HOCH** _____, J.