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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

KRAYTON LEE BODNER,

Defendant and Appellant.

C076704

(Super. Ct. Nos. 13F1565,
13F5809)

A jury convicted defendant Krayton Lee Bodner of receiving stolen property. The trial court also found that defendant violated the terms of his probation. The trial court sentenced him to eight years eight months in state prison.

Defendant now contends (1) his conviction for receiving stolen property must be reversed because the trial court failed in its sua sponte duty to instruct on innocent intent;

and (2) the trial court's failure to instruct on innocent intent also undermines defendant's probation violation, because the violation was based on his conviction for receiving stolen property.

We conclude the trial court did not have a sua sponte duty to instruct on innocent intent. Defendant has not established instructional error and he has not shown that his conviction or his probation violation should be reversed. We will affirm the judgment.

BACKGROUND

A

Charlene D. lived with her son and three daughters in June 2013. She met defendant through her sister Christina and others. Defendant visited Charlene's home a number of times and Charlene told him he was welcome there anytime. Charlene knew defendant was close with Christina's daughter N., who often stayed with Charlene.

Charlene left her home and went to work on June 28, 2013. Her daughter C.D. was with Charlene's mother Debbie. Later that day, C.D. and her friend A. went to an aquatic center and then A.'s mother dropped the two girls off at Charlene's house. Because no one was home and C.D. did not have her house key, A. climbed through the doggie door, unlocked the door, and let C.D. into the house. A. played with C.D.'s Nabi -- a child's tablet computer -- and left it on Charlene's bed. The girls then went outside and swam in the swimming pool for about two hours, leaving the door unlocked.

At some point, C.D. saw a dark-colored SUV driven by defendant pull up to the house and park. C.D. had met defendant before and knew his name. Defendant knocked on one of the doors to the house and tried to open it without success. He knocked on another door (the one the girls used to get into the house), opened it, and went inside. C.D. told A. they "were in danger" and the two girls jumped out of the pool and ran to the landlord, a husband and wife who lived in the house next door. The couple contacted their daughter, Karen Bullert, a retired sheriff's deputy who lived nearby.

Bullert drove to Charlene's house to check things out. C.D. and A. walked back to the house. By the time they reached the house, Bullert was there talking with C.D.'s grandmother Debbie, who had just arrived. Debbie pounded on the door and said, "Open the door." Defendant came out. Debbie knew defendant as the friend of her daughter Christina. Neither Debbie nor Bullert saw anything in defendant's hands. Debbie yelled at him and asked him what he was doing in Charlene's house. Bullert asked defendant to leave and told him she was going to call the police, which she did. About that time, Debbie's grandson arrived and parked behind defendant's SUV.

Eventually, defendant got into his SUV. Debbie noticed he had some difficulty starting it. At Debbie's instruction, her grandson moved his car out of the way. Defendant backed out, stopped, got out and talked to Debbie again, then got back in his SUV and drove away, only to turn around and drive by slowly back and forth while revving his engine before finally leaving. Bullert took photographs of the SUV and the license plate and provided those to police.

Shasta County Sheriff's Deputies Marcus Miyasato and Greg Walker subsequently arrived at Charlene's house. Debbie spoke with Deputy Miyasato and explained what had just transpired. C.D. went into the house and discovered that the Nabi was missing from Charlene's bed.

Deputy Miyasato remained at Charlene's house while Deputy Walker went to find the SUV. Deputy Walker found the vehicle unattended and partially blocking the road "as if it had just died and stopped in the roadway." Deputy Walker looked inside the SUV and found indicia of defendant's ownership of the vehicle. He also found a device that was later confirmed to be C.D.'s missing Nabi.

Charlene had not given anyone permission to take any property from her home. She later told law enforcement officers that although she knew defendant, he was not allowed to be at her home on June 28, 2013, nor did he have permission to go inside her

house when “[n]obody was home.” But after the June 28, 2013, incident, defendant again stayed at Charlene’s home.

B

In case No. 13F5809, the People charged defendant with first degree residential burglary (Pen. Code, § 459 -- count 1)¹ and receiving stolen property (§ 496, subd. (a) -- count 2). The amended information alleged that, as to count 1, defendant had a prior serious felony conviction (§ 667, subd. (a)(1)), and as to counts 1 and 2, defendant had a prior strike conviction (§ 1170.12) and served two prior prison terms (§ 667.5, subd. (b)).

Christina testified at trial for the defense, saying defendant was a good friend and he had a close relationship with her daughter N. Christina testified she was with defendant earlier in the day on June 28, 2013, and had spoken with him “about visiting [N.] at Charlene’s house.” Christina added that within weeks after the incident, defendant gave her a notebook computer to give to C.D. when he learned the girls had broken the Nabi after it was returned to them.

The jury found defendant not guilty of burglary, but guilty of receiving stolen property. (§ 496, subd. (a).) In a bifurcated proceeding, the trial court found all of the special allegations true.

At the time of the June 28 incident, defendant had been on probation after pleading no contest in case No. 13F1565 to possession of a firearm by a felon and admitting a prior prison term. The People filed a petition for revocation of probation based on the evidence presented in case No. 13F5809. Defense counsel stipulated that the trial court could make findings based on the jury verdict. The trial court found the allegations true based on the verdict and sustained the petition. Thereafter, the trial court

¹ Undesignated statutory references are to the Penal Code.

denied probation and sentenced defendant to an aggregate term of eight years eight months in state prison.

DISCUSSION

I

Defendant contends his conviction for receiving stolen property must be reversed because the trial court failed in its sua sponte duty to instruct on innocent intent.

When a person receives stolen property intending to restore it to the owner or to turn it over to law enforcement, such innocent intent is a complete defense. (*People v. Osborne* (1978) 77 Cal.App.3d 472, 476.) However, the intent to turn over the property must exist at the moment of receipt. (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 (*Wielograf*)). The defense may be negated by the defendant's words or conduct; thus, when he has an opportunity to assist in the return of the property but does not do so, the innocent intent defense is not available. (*Id.* at p. 495.)

Defendant did not request an instruction on innocent intent.² The trial court did not have a sua sponte duty to instruct on such a defense unless it appeared that the

² CALCRIM No. 1751, the instruction on innocent intent, reads as follows: “The defendant is not guilty of receiving (stolen/extorted) property if (he/she) intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) the property.

“If you have a reasonable doubt about whether the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) the property, you must find (him/her) not guilty of receiving (stolen/extorted) property.

“[This defense does not apply if the defendant decided to (return the property to its owner/ [or] deliver the property to law enforcement) only after (he/she) wrongfully (bought/received/concealed/withheld) the property.] [The defense [also] does not apply if the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) it, but later decided to (sell/conceal/withhold) the property.]”

defendant was relying on such a defense or there was substantial evidence supportive of such a defense and the defense was not inconsistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

Defendant claims there is substantial evidence to support an inference that he intended to return the Nabi to C.D. According to defendant, he was friendly with Charlene and was allowed to stay in her home; he was close friends with Christine and her young daughter N., who often stayed at Charlene's home; Christine obtained Charlene's permission for defendant to visit N. at Charlene's house on the day of the incident; the Nabi was designed for a young child like N., whom defendant was going to visit with that day; and nothing else was missing from Charlene's house.

Christine testified that she was with defendant earlier in the day on June 28, 2013, and spoke with him "about visiting [N.] at Charlene's house," and that "[Charlene] gave [defendant] permission because I called and asked her." But Christine did not testify that there was an arrangement to meet at Charlene's house that particular day, or that defendant had permission to be in the house alone, or that he should take C.D.'s Nabi out of her home and deliver it to N. In any event, removing the Nabi was inconsistent with the purported plan for defendant to meet N. at Charlene's home. Moreover, defendant does not cite any evidence that he told Debbie or Bullert he was bringing the Nabi to N., or any evidence that he tried to deliver the Nabi to N. And defendant concedes it would not support innocent intent if he stole the Nabi from C.D. merely to share it with N.

Nonetheless, defendant claims there was evidence of innocent intent with respect to C.D. He points to Christina's testimony that within weeks after the incident, defendant gave Christina a notebook computer to give to C.D. As we have explained, however, innocent intent must be present at the time the property is received. (*Wielograf, supra*, 101 Cal.App.3d at p. 494.) It is no defense that defendant subsequently intended to return or replace the stolen property. (*Ibid.*) Here, any defense of innocent intent was negated by the evidence of defendant's conduct around the time of the incident, because

he had opportunities to return the property and did not do so. (*Id.* at p. 495.) When Debbie and Bullert confronted defendant, he did not mention or produce the Nabi. Defendant backed out in his SUV, stopped, got out and talked to Debbie again, then got back in his SUV and drove away, only to turn around and drive by slowly back and forth while revving his engine before finally leaving. He does not cite evidence that he mentioned or produced the Nabi. Deputy Walker found the Nabi in defendant's abandoned SUV.

Defendant notes that nothing else was missing from Charlene's home. But that does not evidence innocent intent given that defendant's time in Charlene's house was interrupted by Debbie and Bullert.

Defendant claims the prosecution's choice not to charge him with theft undermines any assertion he did not have an innocent intent at the time he came into possession of the Nabi. Discretionary charging decisions are not evidence of intent, however, and we have already described the evidence that negates defendant's assertion of innocent intent.

The trial court did not have a sua sponte duty to instruct on innocent intent. Defendant has not established instructional error requiring reversal of his conviction for receipt of stolen property.

II

Defendant further contends that the trial court's failure to instruct on innocent intent also undermines defendant's probation violation, because the violation was based on his conviction for receiving stolen property. As we have already explained, the trial court did not have a sua sponte duty to instruct on innocent intent and defendant has not established instructional error. Accordingly, his second contention, like his first, lacks merit.

DISPOSITION

The judgment is affirmed.

_____ MAURO _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ ROBIE _____, J.